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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT  
OF  
SOUTH CAROLINA

VOLUME XVII

CONTAINING CASES OF NOVEMBER TERM, 1881, AND APRIL TERM, 1882

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.

FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS

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# JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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## JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

## CIRCUIT JUDGES.

FIRST CIRCUIT,	HON. BENJAMIN C. PRESSLEY.
SECOND	" " ALFRED P. ALDRICH.
THIRD	" " THOMAS B. FRASER.
FOURTH	" " JOSHUA H. HUDSON.
FIFTH	" " JOSEPH B. KERSHAW.
SIXTH	" " ISAAC D. WITHERSPOON. <sup>1</sup>
SEVENTH	" " WILLIAM H. WALLACE.
EIGHTH	" " JAMES S. COTHRAN

ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

SOLICITORS.

1st Circuit—W. ST. J. JERVEY.

5th Circuit—R. G. BONHAM.

2d Circuit—F. H. GANTT.

6th Circuit—T. C. GASTON.

3d Circuit—J. J. DARGAN.

7th Circuit—D. R. DUNCAN.

4th Circuit—G. W. DARGAN.

8th Circuit—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

<sup>1</sup> Elected by the General Assembly in December, 1881, and qualified February 15, 1882, as successor to Hon. Thomas J. Mackey, whose term had expired.

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# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED  
IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.  
HON. HENRY McIVER, ASSOCIATE JUSTICE.  
HON. SAMUEL MCGOWAN, " "

### 17 S. C. \*1

#### \*TINSLEY v. KIRBY.

(November Term, 1881.)

#### [1. *Principal and Surety* ¶59.]

A surety is a favorite of the law, and has a right to stand on the strict terms of his obligation.

[Ed. Note.—Cited in *Pelzer, Rodgers & Co. v. Steadman*, 22 S. C. 288; *Kennedy v. Adickes*, 37 S. C. 181, 15 S. E. 922; *Sloan v. Latimer*, 41 S. C. 219, 19 S. E. 491, 691.

For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. ¶59.]

#### [2. *Sheriffs and Constables* ¶157.]

Quære: Under the terms of a lawful constable's bond, requiring him well and truly to perform the duties of his office, would his sureties be liable for a penalty imposed upon him for collecting excessive fees?

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. ¶354-371; Dec. Dig. ¶157.]

#### [3. *Sheriffs and Constables* ¶157.]

Beyond the irregularities of the constable's bond here sued on—the requirements of law as to oaths, number of sureties, the clerk's approval and certificate, not being complied with—it was utterly void, as there is not and cannot be a regularly commissioned constable in this State, the legislature not having directed the manner by which they shall be chosen. Const., Art. IV, § 21.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 354; Dec. Dig. ¶157.]

#### [4. *Estoppel* ¶22.]

A surety is not estopped from denying his liability as such on a constable's bond, where the bond itself alleges that the constable had been appointed to office by a trial justice.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 47; Dec. Dig. ¶22.]

#### [5. *Principal and Surety* ¶83.]

The rule that prohibits sureties from denying facts stated in obligations signed by them

applies only to facts recited in obligations legal in themselves.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 129, 130; Dec. Dig. ¶83.]

### \*2

#### [6. *Officers* ¶126.]

\*A surety on an official bond is certainly not estopped from denying his liability because that the bond recites an erroneous conclusion based upon a mistake of law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 220-222; Dec. Dig. ¶126.]

#### [7. *Officers* ¶123.]

That a voluntary bond of a public officer is binding upon him and his sureties is a principal applicable only where the office was authorized by law, and no obstacle existed in the way of its being filled.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 217; Dec. Dig. ¶123.]

#### [8. *Officers* ¶125.]

It does not apply to one as an officer de facto, if the office itself does not legally exist.

[Ed. Note.—Cited in *State v. Messervy*, 86 S. C. 508, 68 S. E. 768.

For other cases, see *Officers*, Cent. Dig. § 219; Dec. Dig. ¶125.]

[This case is also cited in *Cavender v. Ward*, 28 S. C. 474, 475, 6 S. E. 302, and distinguished therefrom.]

Before Thomson, J., Spartanburg, October, 1879.

Action by T. A. Tinsley against Marcus Kirby and A. H. Kirby, commenced March 4, 1878. The opinion makes a full statement of the case.

Messrs. Bobo & Carlisle, for appellant, cited Const. Art. IV, § 21; Genl. Stat. (1872) 205, §§ 1, 2, 3; Brandt Sur., §§ 11, 12, 451; 22 Ind. 207; 4 La. Ann. 372; 60 N. Y. 421.

Mr. J. S. R. Thomson, contra.

The appellants are estopped from denying the recitals of the bond sued upon. Brandt Sur., §§ 29-31, 444; Big. Estop. § 272; 17 How. 442; 2 Pars. Cont. 789; 7 Rob. Prac. 389. A common law or voluntary bond of a public officer is valid and binding upon said officer and his sureties. 1 Bail. 211; 2 McC. 107; 7 Rich. 232; 38 N. J. 324; 2 Brock. 96; High Inj., § 961; Brandt Sur., §§ 12, 13, 445; 10 Wall. 395; 1 Chit. Cont. 7. Under the terms of the bond in this case, both the defendants are responsible for the wrongdoing of M. Kirby. 8 S. C. 114; 1 Hill, 227; 15 Stat. 608, § 11.

March 18, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action on what purported to be the official bond of a constable as follows:

"Know all men by these presents, that we, Marcus Kirby and A. H. Kirby, are held and firmly bound unto the State of South Carolina in the penal sum of five hundred dollars, to the payment of which well and truly to be made we bind ourselves and each and

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every of us, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 16th day of December, 1873. Whereas, the above bound Marcus Kirby has been appointed to the office of Constable by J. B. Tollison, Trial Justice, now the condition of the above obligation is such that if the above-bound Marcus Kirby shall well and truly perform the duties of the said office, as now or hereafter required by law, during the whole period he may continue in said office, then the above obligation to be void and of none effect, else to remain in full force and virtue."

(Signed) "M. Kirby. [L. S.]  
"A. H. Kirby." [L. S.]

This bond was filed in the office of the clerk of the county, on December 16, 1873. Attached to it was a paper addressed to the clerk as follows: "Capt F. M. Trimmier: I hereby appoint Marcus Kirby my constable by his compliance with the law. Dec. 15, 1873. (Signed) J. B. Tollison, Trial Justice." At the time the bond was filed Marcus Kirby took and subscribed the constitutional oath, Section 30, Article II., and entered upon the duties of the office.

While acting as constable under this appointment, he was employed in that capacity by Trial Justice B. H. Steadman, in a case before him against one T. A. Tinsley, for assault and battery. Tinsley was convicted and fined five dollars and costs. Marcus rendered his bill of costs, which were taxed, and Steadman gave him a special appointment in writing to collect the money, fine and costs, which he did. Tinsley sued Marcus for extortion and oppression in office for

charging and collecting improper fees. In that case it appeared that he had taxed and collected \$10.96 in excess of his lawful fees, and Tinsley had a judgment for ten times the amount under the act upon the subject, which judgment was affirmed by this court. 8 S. C. 114.

The execution against Marcus was returned nulla bona, and now the plaintiff Tinsley sues the surety A. H. Kirby on the bond for the amount recovered against Marcus. The presiding judge charged the jury

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that the bond sued on was sufficient to sustain an action against Marcus for misconduct in office, and also against A. H. Kirby as surety; that Marcus having assumed to act, was a constable de facto, and responsible for acts done in that character, and A. H. Kirby as surety was liable for the amount of the recovery against Marcus for official misconduct. The jury found for the plaintiff \$273.09, the amount of the recovery against Marcus and the costs therein. A. H. Kirby appeals to this court and asks that the judgment be reversed on the ground of error in the charge of the judge.

The recovery against Marcus Kirby was not on the bond, but under the statute which declares that "if a constable shall charge any other fees or for any other service than herein allowed, such constable shall be liable to forfeit to the party injured ten times the amount of excess of fees so improperly charged, to be recovered by suit in the Court of Common Pleas." Gen. Stat. 208. The execution on the judgment recovered being returned nulla bona the plaintiff now sues the surety, A. H. Kirby, on the bond to make him liable for the penalty recovered against Marcus, upon the ground that such illegal charging on the part of Marcus was a breach of his official bond, and the penalty imposed by law on him must be the measure of damages against the surety.

A rule never to be lost sight of in determining the liability of a surety is that he is a favorite of the law, and has the right to stand on the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the court, and is applicable to every variety of circumstances.

If this bond were free from objection as to its validity, there would be at least a question whether the surety should be made liable upon it for penalties imposed upon his principal for malfeasance in office. The words of the bond are, "That if the above-bound Marcus Kirby shall well and truly perform the duties of said office as now or hereafter required by law, during the whole period he may continue in said office, that the above obligation to be void and of none effect; else to remain in full force and virtue." To remain in full force and virtue for what purpose? Might not the answer



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be to pay all \*damages that may result from the failure of the principal "well and truly to perform," but not the penalties which may be imposed on him for a quasi-criminal violation of his duty?

Does not this consideration touch at least the quantum of damages? Before the act of 1846 (11 Stat. 358) the sureties of a sheriff were held not to be liable for the penalties imposed by acts of the legislature for not returning execution and not paying over money within ten days after demand. *Treasurers v. Hilliard*, 8 Rich. 412. In that case Judge O'Neill pertinently says: "The undertaking of the securities is, that the sheriff shall discharge the duties of his office; his failure to pay over money collected by him or to return the execution in his office according to law are violations of his duty, and consequently breaches of the covenant contained in the condition of the official bond; and the securities became thereby liable to respond in damages to the parties interested. But penalties imposed on the sheriff for a violation of his duties are not damages sustained by the parties affected by his default. They are punishments inflicted by the law on the sheriff himself for a quasi-criminal neglect of duty. If the penalties were in the nature of liquidated damages, it is possible the sureties might be liable, but there is nothing in the acts which authorizes us so to regard them."

But it is unnecessary to make any ruling on this point. There can be no doubt that as a statutory obligation this bond was utterly void. It was not executed as the law directs, the requisite oaths were not taken, and the required number of sureties were not given. The clerk did not approve the bond in writing or issue a certificate of appointment.

But beyond all these irregularities, it is a remarkable fact that there is not and cannot be a regularly commissioned constable in the state. What the office was intended to be, its duties and fees, are laid down in detail; but the law fails to afford the means by which the office can be obtained. "Constables shall be chosen in each county by the qualified voters thereof in such manner as the general assembly shall direct, for the term of two years." Const., Art. IV., § 21. The legislature has not directed the manner

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in which a constable may be chosen by the qualified electors, and the result is, that there can be no regular constable in the state. There is an authority for making a temporary special appointment in the proviso of the second section of the constables act, which declares, "nor shall any person not so qualified exercise the powers of constable. Provided, that nothing herein contained shall prevent a presiding judge or a trial justice from appointing a constable to act by virtue

of such appointment, only on a particular occasion to be specified in writing." As was said in the case of *the State, Ex Rel. McCall, v. Cohen*, 13 S. C. 201: "The court is bound to take judicial cognizance of the fact that there is no such office in the state as a regular constable, inasmuch as the constitution provides that such officer shall be chosen in each county by the qualified voters thereof in such manner as the general assembly shall direct, and the statute-book fails to show that any such direction has ever been given."

It is said, however, that the bond recites that Marcus Kirby was constable, and the parties who signed the bond are estopped from denying it. We suppose where recitals are referred to, all the recitals must be taken into consideration. While this bond does recite that Marcus Kirby had been appointed to the office of constable, it also recites that the appointment was made "by J. B. Tollison, Trial Justice," which was impossible and illegal, making the alleged appointment simply a nullity. The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false; having once solemnly alleged the existence of the facts, they cannot afterwards be heard to deny them. But as we understand it, this rule applies to facts in connection with bonds possible and legal in themselves. If such bond could not be legal, we cannot see how a false assertion could dispense with the law and make it valid. A surety is not in all cases estopped to deny the facts recited in the obligation signed by him. Thus, a court had appointed a guardian for a minor, and while such appointment was unrevoked, appointed another, who gave bond with a surety, reciting that he had been appointed guardian. In a suit on this bond against the surety, it was held that the appointment

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of the last \*guardian was absolutely void, and that the surety might show the fact. *Thomas v. Burrus*, 23 Miss. 550. The court said: "It is certainly true that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation he will be estopped from denying the truth of such recital. But this doctrine presupposes a valid legal obligation, and we do not know any authority, and reason is certainly against the proposition, that the party is estopped by any recital contained in an instrument from showing that the instrument is absolutely null and void."

Again, a defendant was taken under a bail writ, and the sheriff by mistake took a bond for the prison bounds, which recited the defendant's imprisonment to have been under a ca. sa. Held, the bond was void, and that the surety was not estopped to show that there was no ca. sa. *Miller v. Bagwell*, 3 McC. 429. The ground of the decision is stated as follows: "It is a general rule of

law, and a correct one too, that a man cannot aver against his own deed; but that is where he has alleged some particular fact within his own knowledge, and which forms a part of the consideration for his undertaking, and that is the whole extent to which the cases relied on go. But the principle cannot be extended to an allegation coming from the other party, and which can be necessarily known only to him, although contained in the recital of a deed made by the defendant. The person supposed to be estopped is the very person imposed on.\*

The case before us is even stronger than that; for here, probably, both the clerk who furnished the bond and the parties who signed it were mistaken upon a question of law. No falsehood in fact was recited, but an erroneous conclusion of law that J. B. Tollison could appoint Marcus Kirby a regular constable.

But it is urged that at common law a voluntary bond of a public officer is valid and binding upon him and his sureties. It is true that a bond, whether required or not, is good at common law, if entered into voluntarily, for a valid consideration, and if it is not repugnant to the letter and policy of the law; and the surety on such bond is

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bound thereby. This \*is upon the just principle, that parties shall not be allowed to take advantage of their own wrong, and, after enjoying the benefits which the bond secured, then deny their liability. But in all the cases in which the principle has been applied, the office, the performance of whose duties was secured by the bond, was authorized by law, and no obstacle existed in the way of its being filled.

We have been referred to no case in which the surety was held liable on a bond, purporting to be official, where there could be no such office as that claimed. In reference to the office of constable, the statute declares: "Nor shall any person not so qualified (by election, etc.) exercise the powers of constable." This is a positive prohibition, which could not be set aside by the agreement of the parties to disregard it. The alleged appointment of Trial Justice Tollison was against both the letter and policy of the law: "Thus a statute provided that express companies should not do business in the state, without recording, in every county in which they did business, a statement showing the stockholders' names, residences, etc. An express company, without complying with the law, appointed an agent, who gave bond for the faithful performance of his duties. The agent collected money for packages sent, and failed to pay it over, and it was held that the surety was not bound. The bond being given for the performance of an illegal act, viz., sending packages by express, was void." *Brandt on Suretyship*, § 11; *Daniels v. Barney*, 22 Ind. 217.

In the case of *Cross v. Gabeau and Hunt*, 1 Bail. 211, there was a legally appointed collector of fines in the regiment, the difficulty being that no bond was required by law.

In the case of *Stevens ads. Treasurers*, 2 McC. 107, the legal office of sheriff existed, and the only difficulty was in respect to irregularities in the execution of the bond required by statute. And so in reference to the *State v. Toomer*, 7 Rich. 232, Mr. Laurens had been elected to the office of master in equity. And so in all the other cases cited.

It is true that under some circumstances the sureties of an officer de facto will be held liable just as if he were an officer de jure. But the surety will not be held liable in such

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case, \*unless the office in reference to which the transaction takes place actually exists. A party who volunteers to perform the duties of an office which does not exist, and which, in the manner assumed, is in fact prohibited by law, can not, in any just sense of the term, be called an officer de facto, but a mere usurper. "A state treasurer was re-elected, and accepted a new commission and took a new oath, and continued to discharge the duties of the office, but failed to file a new bond within the time prescribed by law, which failure by law worked a forfeiture of the office. Held, that this was not a holding over of the old term: but the treasurer was an officer de facto, holding as of a new term; and that sureties on a new bond, afterwards filed by the treasurer, which recited his election as treasurer, were estopped to deny that he was holding as of the new term de jure. The court said it would have been otherwise if he had been a mere usurper, and not an officer de facto."—*Brandt Sur.*, § 445.

The judgment of this court is that the judgment of the Circuit Court be reversed.†

†Except where otherwise stated, the opinion and judgment of the court are unanimous.

## 17 S. C. 9

### BRADLEY v. RODELSPERGER.

(November Term, 1881.)

[1. *Pleading* ⚡220.]

The decision of an issue raised by a demurrer to the complaint does no more than adjudge the point of law involved.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. ⚡220.]

[2. *Homestead* ⚡141.]

That a childless widow is entitled as against her deceased husband's debts to the homestead allowed to the head of a family by the constitution and laws of this state, was the only point decided in *Bradley v. Rodelsperger*, 3 S. C. 227.

[Ed. Note.—Cited in *Yoe v. Hanvey*, 25 S. C. 97; *Jeffries v. Allen*, 29 S. C. 508, 7 S. E. 828; *Broughton v. Broughton*, 93 S. C. 28, 75 S. E. 1027.

For other cases, see *Homestead*, Cent. Dig. ⚡261-270; Dec. Dig. ⚡141.]



[3. *Homestead* ¶51.]

All proceedings in the Court of Probate, whether pending or completed, for the assignment of a homestead as against debts contracted prior to 1863, are without the jurisdiction of the court, and therefore void ab initio, and hence in such proceeding there can be no adjudication binding upon any person.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 69, 74, 75; Dec. Dig. ¶51.]

[4. *Judgment* ¶660½.]

Long silence and acquiescence, induced by ignorance of the law in regard to the right of homestead, do not operate as an estoppel upon creditors.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1171, 1284; Dec. Dig. ¶660½.]

## \*10

\*Before Kershaw, J., Newberry, November, 1880.

The opinion fully states the case.

Messrs. Suber & Caldwell, for appellant.  
Mr. L. J. Jones, contra.

March 18, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. Richard L. Bradley died prior to 1868, leaving a widow, Emeline A. Bradley, as his executrix and sole legatee. His estate was insolvent, and on Nov. 15, 1869, the widow Emeline filed her petition in the Probate Court of Newberry county for homestead in the real estate of her late husband. Peter Rodelsperger, a specialty creditor of her husband, demurred to the petition on the ground that, as it appeared on its face that the petitioner was childless, she was not the "head of a family" and entitled to homestead. The judge of Probate sustained the demurrer. She appealed to the Circuit Court, which sustained the judgment of the Probate Court, and she then appealed to this court, which, at the November Term, 1871, decided that a widow without children might be entitled to homestead, reversed the judgment below, and remanded the case to the Probate Court "for further consideration," saying that "the facts on which the decree was based not having been fully brought before us, we cannot finally adjudicate the right of the claimant to a homestead exemption." 3 S. C. 226.

The case went back, and on September 30, 1872, the Probate judge issued a writ directing commissioners to set off homestead for the applicant. To this writ the commissioners made return on the same day that they had set apart for such homestead a lot in the town of Newberry, being the lot on which the deceased husband had resided at the time of his death, and on which the applicant then resided. This return was filed in the Court of Probate November 28, 1872, and thus the case stood without exception being either filed or served to the return, and without order of the court confirming the return, until April

## \*11

24, 1876, when exceptions were \*filed on the

grounds that petitioner was not entitled to homestead, and if she was, that the quantity set off was excessive. On March 30, 1878, other creditors of the husband, who had not been made parties, filed a petition *In Re*, asking to be allowed to come in and defend. The judge of Probate allowed them to be made parties, and upon their motion set aside the return of the commissioners and dismissed the petition. From this order of the Probate Court Mrs. Bradley appealed to the Circuit Court, and Judge Kershaw dismissed the appeal. From this order she appeals to this court upon the following exceptions:

1. Because the petitioner's claim of homestead has been heretofore adjudicated in her favor by competent courts of the said State.

2. Because the creditors of Richard L. Bradley, the petitioner's husband, acquiesced in and consented to her claim of homestead in such manner as to estop them from further contesting the same.

3. Because under the laws of the state and the facts of the case the said petitioner is entitled to the homestead exemption claimed by her in this proceeding.

As to the claim that the matter has been adjudged. The decision of an issue raised by a demurrer to the complaint does no more than decide the point of law involved. If there are facts in the case other than those stated in the complaint the decision does not touch them, but they are referred to the proper tribunal for hearing and determination. The only question in the case which went to the Supreme Court was the question of law whether a childless widow as against her deceased husband's debts is entitled to the homestead allowed to "the head of a family" by the constitution and laws of this state. That question was decided and cannot be again mooted, but nothing more was decided. The case was referred back "for further consideration." Accordingly the case went back, and the judge of Probate, accepting the point decided, that the applicant was not excluded from homestead only for the reason that she had no children, proceeded with the case and issued a writ to set off homestead, which was returned executed.

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\*The return lay in the Probate Office without being excepted to or confirmed until 1876, when exceptions were filed. This was after the publication of the decision in the case of *Cochran v. Darcy*, 5 S. C. 125, which, following *Gunn v. Barry* in the Supreme Court of the United States (15 Wall. 610 [21 L. Ed. 212]), held that so much of our constitution and laws as purports to allow a homestead against a debt older than the constitution was in violation of the Constitution of the United States and void. We have no doubt that the new light thrown upon the subject by that decision led the creditors of Bradley in 1876 to file exceptions and contest the

claim of the applicant for homestead in her husband's lands.

In the view which the court takes it is not material to inquire what was the stage or condition of the proceedings in the Probate Court at the time the creditors filed exceptions—whether the proceeding had been completed or was still pending. The deceased debtor died before the adoption of the constitution in 1868 allowing homestead, and it is therefore clear that all his debts had been contracted before that time, and as against said debts, any and all proceedings instituted by the widow for homestead, whether such proceeding was still pending or in form concluded, were absolutely void. There can be no binding adjudication of any kind against any person in a proceeding void ab initio, which may be set aside in any manner direct or collateral, wherever and whenever encountered. "The plea of *res judicata* cannot prevail for several reasons, but it is only necessary to state that the whole proceedings were without jurisdiction and void." *Douglass v. Craig*, 13 S. C. 374.

The question of estoppel from long silence and acquiescence, on account of ignorance of what the law was in these homestead cases, was a question of some difficulty; but it has been fully considered by this court, and we suppose it can hardly be necessary to do more than to refer to the repeated decisions upon the subject. It has been held that there was no estoppel even in the case of a judgment creditor under whose judgment the homestead was assigned, and who received his pro rata of the proceeds of sale outside of the

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homestead assigned in ignorance of the real state of the law. *Douglass v. Craig*, 13 S. C. 371; *Bull v. Rowe*, *Id.* 355.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

### 17 S. C. 13

WATKINS v. LANG.

(November Term, 1881.)

[1. *Bonds* ⚭63; *Interest* ⚭60.]

A bond payable "in three equal annual instalments from this date, with interest payable annually until the whole be paid,—that is, one third Nov. 10, 1866; one other third with the like interest Nov. 10, 1867; and the other third with the interest Nov. 10, 1868,"—draws annual interest on the several instalments after maturity as well as before.

[Ed. Note.—Cited in *Baum v. Raley*, 53 S. C. 40, 30 S. E. 713.]

For other cases, see *Bonds*, Cent. Dig. § 66; Dec. Dig. ⚭63; *Interest*, Cent. Dig. § 136; Dec. Dig. ⚭60.]

2. *Wright v. Eaves*, 10 Rich. Eq., 582, recognized and followed.

[3. *Bonds* ⚭65.]

The interpretation given by the circuit judge to a very obscure credit endorsed upon a bond, sustained.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 52; Dec. Dig. ⚭66.]

[4. *Reference* ⚭101.]

This court will not ordinarily interfere with the discretion of the circuit judge in recommitting a report to a referee, in whole or in part, for further investigation. The judge may confirm the report as to some of its findings of fact, and as to others recommit it for further testimony and report.

[Ed. Note.—Cited in *Lowndes v. Miller*, 25 S. C. 122; *Halk v. Stoddard*, 62 S. C. 571, 40 S. E. 957.]

For other cases, see *Reference*, Cent. Dig. §§ 169, 170; Dec. Dig. ⚭101.]

[5. *Evidence* ⚭355.]

A trustee cannot introduce the book entries of her deceased attorney to prove that rents were not received from the trust property during certain years.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1491; Dec. Dig. ⚭355.]

[6. *Taxation* ⚭529.]

Where a lady trustee produced the tax receipts for all the years of her trust save one, and there was no proof that the taxes for that one year were not paid, and the attorney who had attended to all her business being dead, the circuit judge committed no error in presuming payment by her of the taxes for that year.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 982; Dec. Dig. ⚭529.]

[7. *Interest* ⚭56.]

[Cited in *Wilson v. Kelly*, 19 S. C. 168, to the point that the mode of computing interest depends upon the intention deduced from the terms of the instrument on which the question arises.]

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 90, 129; Dec. Dig. ⚭56.]

[This case is also cited in *Wilson v. Kelly*, 19 S. C. 169, and distinguished therefrom.]

Before Pressley, J., Kershaw, June, 1881.

The case is fully stated in the opinion of this court.

Messrs. W. H. Lyles and J. T. Barron, for plaintiff.

Messrs. Chesnut & Workman, contra.

March 18, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. B. F. Watkins in his lifetime (1858) sold a tract of land known as "Rock Hill" to Mrs. Esther A. Cunningham for \$12,000, taking her bond for the pur-

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chase—money, payable in instalments, with John Brown and Anthony M. Kennedy as sureties, who, to indemnify themselves as such sureties, on the same day took a bond and mortgage from Mrs. Cunningham on the said tract of land. Sundry payments from time to time were made by Mrs. Cunningham on the bond for the purchase, but not sufficient to satisfy the bond. In the mean time Mrs. Cunningham contracted to sell "Rock Hill" to John D. Kennedy, and let him into possession on condition that he would pay off the balance of the debt to Watkins, but executed to him no deed of conveyance. While so in possession, John D. Kennedy, having made several payments to Watkins, mortgaged the said "Rock Hill"



plantation in November, 1865, together with a tract of land adjoining the same, known as the "Doby Place," of which he was the owner in fee, to Misses Susan M. Lang and Murray Lang, to secure a bond for \$3,000, payable in gold. On November 16, 1869, Mrs. Cunningham, B. F. Watkins, and John D. Kennedy entered into a tripartite agreement, by which Mrs. Cunningham bound herself to execute title for Rock Hill to John D. Kennedy in trust to pay the bond of Watkins, recognizing, however, the mortgage of the Misses Lang as the first lien upon Rock Hill after the Doby Place was exhausted, and directing that the same should be first paid. The title to John D. Kennedy was executed in accordance with this agreement.

Affairs stood in this condition until 1872, when John D. Kennedy was adjudged a bankrupt, and all his interest in both tracts of land were ordered to be sold in bankruptcy. In the mean time John Brown and Anthony M. Kennedy had become insolvent and Murray Lang had died, leaving Susan M. Lang her sole heir and distributee. She administered upon the estate of her deceased sister, and having fully administered the same, retained the bond of John D. Kennedy as her own property in severalty. At the sale of the property of John D. Kennedy, ordered by the bankrupt court, Susan M. Lang purchased all his interest in the aforesaid tracts of land. The rent of Rock Hill for the year 1872 was assigned by J. D. Kennedy to William M. Shannon, Esq., for Watkins and Miss Lang.

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\*B. F. Watkins died, and his executrix, Elizabeth C. Watkins instituted these proceedings, asking to be subrogated as creditor to the rights of the sureties John Brown and Anthony M. Kennedy in the bond and mortgage of Mrs. Cunningham to them, and for foreclosure of the said mortgage. Judge Hudson heard the case, and held that Mrs. Watkins as executrix was not entitled to be subrogated to the rights of John Brown and Anthony M. Kennedy; that Miss Lang purchased the two tracts of land at the bankrupt sale in trust, first to pay her own debt of \$3,000 and then to pay the balance due upon the bond of Mrs. Cunningham to Watkins, and referred it to the master to ascertain the amounts due on the bond of Esther A. Cunningham to B. F. Watkins, and also on that of John D. Kennedy to Miss Lang; and also, as agreed by the parties, to take an account of Susan M. Lang, as trustee, for the rents, issues, and profits arising from the "Rock Hill" and "Doby" plantations.

Under this decree the master, John M. De Saussure, Esq., took much testimony and made his report. Both parties excepted, and the case came up on the report and exceptions before Judge Pressley, who made a decree, simply sustaining some of the exceptions as numbered and overruling others.

From his order both parties appeal upon the following exceptions:

Plaintiff's Exceptions.—"1. For that his Honor overruled plaintiff's exceptions to so much of the Master's report as allowed interest with annual rests on the bond of J. D. Kennedy to the Misses Lang after the maturity thereof.

"2. For that his Honor did not construe the receipt endorsed on said bond of April 17, 1871, so as to allow a credit thereon of two hundred and fifty dollars in addition to all interest on said bond up to date.

"3. For that his Honor sustained defendant's exceptions to so much of the master's report as refused to allow her credit for the taxes claimed to have been paid in 1876 for the year 1875.

"4. For that his Honor allowed the de-

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fendant a further \*opportunity to introduce evidence as to the diligence used by her to collect the rents of the 'Rock Hill' and 'Doby' places for the years 1877 and 1878, and refused to allow plaintiff to introduce further testimony as to the value of the 'Doby' place."

Defendant Lang's Exceptions (omitting one abandoned).—"1. For that his Honor confined the privilege of the defendant to prove due diligence in collecting the rents, issues, and profits of Rock Hill and Doby places and failed, through no fault of hers, to the years 1872 and 1873.

"2. For that his Honor overruled the defendant's fifth exception to the master's report and denied to the defendant the right of showing by the books of Wm. M. Shannon, deceased, the agent and attorney of the defendant, who attended to the renting, of these places—Rock Hill and Doby—and the collection of the rents, the actual amount received by him therefor, and the amounts actually paid out by him therefrom during the time he acted as her attorney and agent in the business, and as casts upon the defendant the burden of showing what amounts of rent cotton she failed to receive and why she so failed, and that the same was not for want of due diligence on her part."

The Circuit decree decides the numerous exceptions to the referee's report simply by confirming, overruling, or recommitting them by number without any explanation of the subject considered, and, therefore, in order to prevent confusion and make the rulings intelligible, we will not consider the exceptions *seriatim*, but endeavor to classify them according to subject-matter:

First, as to the mode of computing interest on the bond of J. D. Kennedy to Miss Lang. There is no copy of the bond in "the Case," but we find in the report of the master, John M. De Saussure, Esq., that the condition is in these words: "Three thousand dollars in American gold coin in three equal annual instalments from this date, with interest payable annually until the whole be

paid; that is to say, one third with interest on the whole November 10, 1866; one

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other third with \*the like interest on November 10, 1867; and the other third with the interest November 10, 1868, without fraud, etc.

The bond was executed on November 10, 1865, which was before the Act of 1866 (Gen. Stat. 318), allowing parties to agree upon any specific rate of interest, but there is no question of usury in the case. No point is made as to the rate of interest, nor as to the manner in which it should be calculated, up to the time the last instalment fell due, November 10, 1868, but simply as to whether after that time the interest should be calculated with annual rests as before. The question is purely one of construction. What was the intention of the parties as shown by the bond itself? Most of the cases relied on refer to the rate of interest and not the manner of counting it, but the questions are analogous and the rules of construction the same. The referee in the case counted the interest with annual rests and the Circuit judge confirmed it. Was that error? The proposition of the appellant is that there is in the bond no contract, express or implied, for the payment of any interest after November 10, 1868, and consequently the legal rate, as well as the manner of counting the interest, without compounding, attached at that time.

One of the first rules of construction is that every word of a written contract should, if possible, have its proper meaning. The bond here contains the words "with interest payable annually," and if the debt were payable at twelve months, or at a shorter time than twelve months, in order that the word "annually" could have some meaning, it would be necessary to construe the contract as extending beyond the time when the money fell due. *O'Neill v. Bookman*, 9 Rich. 80; *Sharpe v. Lee*, 14 S. C. 341; *Mobley v. Davega*, 16 S. C. 75 [42 Am. Rep. 632]. In the case last cited it was said that the word 'annually' conveys a distinct idea that the matter might not stop at the end of one year, but go into years beyond. It is defined as follows: 'Yearly,' 'returning every year,' 'year by year,' etc. The instalments of the bond before us were not all due within a year, but in one, two, and three years, and the word "annually" might have some meaning within the period of the stipulated credit, being three years, and therefore, if there was nothing

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\*else in the bond, this word "annually" alone would not be conclusive of the intent of the parties that the contract was to extend beyond the maturity of the bond. *O'Neill v. Sims*, 1 Strob. 115; *DeBruhl v. Neuffer*, Ib. 426.

But there may be other words in the bond or note which show that it was the intention of the parties to extend the contract beyond maturity. It is not usual for bonds to be paid

the very day they fall due, and is it probable that while the parties were stipulating about interest they would omit entirely to make provision for the time the money might remain unpaid after due? Every case must be decided upon its own facts and circumstances. No two cases are in all respects precisely alike. The purpose is to ascertain the intention in each case as it arises, and, in order to do this, it is proper to consider the whole instrument in the light of surrounding circumstances.

There is no such inflexible, settled rule of construction as would authorize us to say that the decision was erroneous in the case of *Wright v. Eaves*, 10 Rich. Eq. 582, which held that "on a bond conditioned to pay the principal sum in three equal annual instalments, with interest from date, payable annually as it becomes due, the interest annually accruing after the last instalment fell due as well as that then and before due bears interest." So in the case before us there is more than the phrase "with interest payable annually" in the superadded words "until the whole be paid." This declaration would seem to be conclusive as to the intention of the parties.

But it is ingeniously argued that these words are qualified by those which immediately follow: "that is to say, one third with interest on the whole November 10, 1866; one third with like interest," etc. If this were the proper view, and it had been the intention that the interest should stop upon the falling due of the instalments respectively, the expression would probably have been "until the whole becomes due," instead of "until the whole be paid." The videlicet, "that is to say," manifestly had reference to and was intended to particularize the words going before—"three equal annual instalments." Some seeming confusion may be avoided and the intention made plain if we consider the

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parts of the condition transposed, \*and, taking the paragraph about interest out from the context where it stands, read it last, "with interest payable annually until the whole be paid." We agree with the referee and Circuit judge that such was the intention of the parties.

Second, in regard to the receipt on the bond of J. D. Kennedy to Miss Lang, April 17, 1871. Wm. M. Shannon, Esq., a lawyer of Camden, was the attorney of Miss Lang in renting the lands held in trust and collecting money due her. He had possession of her Kennedy bond, and at various times, as he received money, entered credits on it. One of these credits is very obscure, and the question made was as to its proper construction. A photograph of the receipt is in the case, and is in these words: "April 17 1871 Recd of J D K one hundred and ninety-two dollars (\$192) in currency on this bond, on account of last years interest. Greenbacks at 10 per cent loose receipt." Signed, W. M. Shannon.



The receipt appears to have been written over pencil marks previously made, and opposite the signature in small writing, as if added afterwards, are these words: "and balance of int and int on Chesnut's bond in full paid 1 Feby 70 by 250 cash." The master allowed a credit of only \$250 in currency. The plaintiff excepted for that he did not allow, in addition thereto, the sum of \$192, and all the interest thereon up to November 10, 1870, and also a payment of \$33.33 January 8, 1873. The judge sustained the exception so far as to construe the receipt to be a payment in full of all interest then due on the bond to date of receipt, April 17, 1871, and allowed the \$33.33. The plaintiff again excepts, claiming two hundred and fifty dollars in addition to all interest up to date of receipt.

The receipts endorsed on the bond show that the obligor made payments at different times to keep down the annual interest; that these payments were made up of various items, cash, currency, due bills, etc., but never exceeded the interest due. These payments thus made had been credited and the interest discharged up to November 20, 1869, and from that time until April 17, 1871, the date of the receipt,—one year and five months,—the interest and interest on interest was due, which, calculated as the receipts

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show the parties had done it \*before, amounted to about as much as the aggregate of both sums indicated in the receipt. The memoranda were short, not intended to be full entries, but merely to recall the transactions to the mind of Mr. Shannon, and it is greatly to be regretted that he is not here to explain them. After inspection of the original bond and the credits on it, we see no better solution of the matter than that given by the judge, that all the payments went in liquidation of the interest up to that date. We cannot say that his decision in this particular was error, and it is affirmed.

Third, in reference to the account against Miss Lang as trustee of the two tracts of land, Rock Hill and Doby. In charging the trustee the master did not take proof of the rents and profits actually received, but charged her with the annual rental value, according to the proof of witnesses, being eleven bales of cotton each year from 1873 to 1878, inclusive. To this the defendant excepted, claiming that without fault on her part certain rents were not received, particularly in the years 1877 and 1878, when one McLeod was her tenant, and that the master erred in excluding as evidence the professional books of Wm. M. Shannon, Esq., her attorney in law and fact, which would have shown that there were rents in each year not received. Judge Pressley sustained the master as to the incompetency of the books as evidence for Miss Lang, but sustained the exceptions so far as to allow the defendant to prove due diligence in her efforts to collect the rents for

the years 1877 and 1878, the burden of proof being on her. From this ruling both parties appealed to this court: the defendant, because the opportunity to exonerate herself from liability in not collecting the rents in all the years was not allowed, and the books of Shannon were excluded; and the plaintiff, because such opportunity was allowed as to the years 1877 and 1878.

The defendant, Miss Lang, was declared to be a trustee as to the two tracts of land in question, and she was liable to account according to the principles which apply to the accountability of trustees generally. One of the most important of them is, that the trustee must make such faithful endeavors to do his duty as a prudent man would exert in

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respect to his own \*property; but if, notwithstanding such endeavors, there is loss without fault upon his part, he is not liable. As we understand it, Judge Pressley did not disregard this principle, but on the contrary in his rulings recognized it.

Miss Lang prima facie was chargeable with the value of the rents. The testimony was taken on the subject on both sides, and the master reported a fixed amount for each year. The judge recommitted the report so far as it related to the years 1877 and 1878, giving the defendant an opportunity to show that after due diligence she had failed to collect the rents of those particular years, but as to the other years in which she had possession, it seems that he thought the showing was not sufficient to justify him in having the subject re-examined, and he confirmed the report. The question was substantially as to the propriety of recommitting the report in whole or in part after the case had been heard before the master, and upon that subject the Circuit judge must have a large discretion, with which this court will not ordinarily interfere.

There was no legal right to have the report recommitted on account of error on the part of the master in refusing to admit in evidence the office account-books of Mr. Shannon, the agent and attorney. His account-book was not competent evidence in this case in behalf of his principal, Miss Lang, for the purpose of proving that rents due her had not been collected. Upon the point ruled adversely to the defendant there was concurrence between the master and Circuit judge.

The plaintiff also excepted because the judge refused to open the report and recommit for further testimony the question as to the value of the Doby place. The same rule applies here. The question had been fairly considered. No testimony offered had been improperly excluded. There was no claim of accident or surprise. It is important that litigation should have an end. The master had considered all the testimony offered and made his report. The judge thought that no injustice had been done, and that there

was no necessity for having the matter re-examined, and we cannot say that he erred in declining to open up the question a second time.

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\*In the accounting against Miss Lang for rents she was allowed credits for taxes paid on the lands, but as she was unable to produce the receipts for the taxes of the year 1875 (\$145.12), the master refused to allow her credit for the same. The defendant excepted and the judge sustained the exception, but making it incumbent on her to show by proper evidence the amounts assessed upon said tracts of land for that year.

Being in possession it was the duty of the trustee to pay the taxes, which were a charge on the land. Taxes are said to be very certain, and there is no claim that either some one else paid these taxes or that they have not been paid. The land has never been forfeited for non-payment. Having paid the taxes every other year, both before and after 1875, it would seem that she had no motive to refuse payment for that year. As a lady; unaccustomed to business, she did not attend to the matter herself, and her trusted friend and agent, who was employed to do it, is dead. The judge held that the circumstances authorized the presumption of payment by Miss Lang, and we cannot say that such ruling was error.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 17 S. C. 22

Ex parte OSTENDORFF.

(November Term, 1881.)

[1. *Executors and Administrators* ¶17.]

In a contest between two creditors of the deceased for administration on his estate the judge of probate properly issued letters to the greater creditor, although the appointment of the other petitioner was requested by the widow and by other creditors representing more than half of the indebtedness of the deceased.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 43; Dec. Dig. ¶17.]

[2. *Executors and Administrators* ¶17.]

Where none of the persons having a preference under the statute applies for administration, the judge of Probate may consider their wishes in selecting an appointee, but he is not controlled by their suggestions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 57; Dec. Dig. ¶17.]

[3. *Executors and Administrators* ¶17.]

The administrator of one to whom the deceased was indebted is a creditor of the deceased within the meaning of Chapter LXXXVIII., § 1, Subd. 6, of the General Statutes of 1872.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 54; Dec. Dig. ¶17.]

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\*Before Mackey, J., Charleston, February, 1881.

The case is fully stated in the opinion of this court.

Messrs. Lord & Inglesby, for appellant.  
Messrs. Campbell & Whaley, contra.

March 20, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Mrs. Emma R. Moses on the 8th day of July, A. D. 1880, applied by petition to the Probate Court for Charleston county for letters of administration upon the estate of C. C. Bowen, late of said county deceased. Before action by the Probate Court, the appellant, G. W. Dingle, filed a caveat, and subsequently, to wit, on 22d January, 1881, petitioned to be appointed himself, on the ground that he was a large creditor.

At the same time respondent, John H. Ostendorff, made application for the appointment. The petition of Ostendorff was recommended by a large number of the creditors, with claims amounting in the aggregate to \$17,769.67; besides, Ostendorff claimed to be a creditor to the amount of \$4202.54 in his own right. The appointment of Ostendorff was also requested by the widow. Mrs. Moses, it seems, had withdrawn her application.

Upon the hearing in the Probate Court evidence was introduced that Dingle, as the administrator of Wm. B. Dingle, represented a judgment for some \$6000; also a simple contract debt for about \$4000. The Probate judge granted letters to Dingle, stating in his order of appointment "that he was the largest judgment creditor; was a gentleman who would bring to the work of administrator an intimate knowledge of the duties of his office and of the status of the estate;" and that the best interests of the estate would be subserved by his appointment.

Ostendorff appealed to the Circuit Court, Judge Mackey presiding, who reversed the decree of the Probate judge, and ordered letters to issue from the Probate Court to Os-

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tendorff \*upon his entering into good and sufficient bond as prescribed by law.

This decree of Judge Mackey was founded upon the facts that Ostendorff was a large creditor of the deceased, that he was the choice of the widow and a majority of the creditors, and also because Dingle was the administrator of a creditor, and not a creditor in his own right.

Under an act of the general assembly the Probate judge of the county where the intestate resided is invested with the power of granting letters of administration, and the validity of his decree and judgments thereunder must be determined by the requirements of this act. The act upon this



subject is found incorporated in Gen. Stat., p. 451. It provides that administration shall be granted in a certain order. In Subdivision 6 of Section 1 it is enacted: That in default of the previous classes the greatest creditor or creditors shall receive the appointment. Here there was default of all the previous classes, and the contest was between two parties, each claiming to be a creditor. According to the terms of the act in such case, it was the duty of the Probate judge to ascertain which of the two was the greater creditor. That being determined, the act became imperative.

But it is said that Ostendorff represented a majority of the creditors and also the widow. This, no doubt, was true, and if the act had given the widow the authority to nominate or a majority of the creditors to recommend, then the Probate judge would have been bound to yield to these suggestions. This, however, would have delegated to the widow and the creditors the power of appointment instead of to the Probate judge, which has not been done. On the contrary, this authority is expressly conferred upon the Probate Court without qualification or limitation, except that the appointment shall be made in a certain order.

The cases of Thompson v. Hucket, 2 Hill, 348, and *McBeth v. Hunt*, 2 Strob. 338, are not in conflict with this position; on the contrary, they support and confirm it. In the first the contest was between two strangers. The court held that in the absence of kindred and creditors it was discretionary with

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the \*Ordinary, under the act of 1789, as well as at common law, to whom he should grant the letters. In the latter the contest was again between two strangers. This was under the act of 1839. The Ordinary had appointed the nominee of the widow under a mistake of the law, which he supposed required him to make the appointment in accordance with the request. The court, while sustaining the appointment, distinctly declared that the widow's request or nomination carried no legal force whatever with it. The court said "that it was true the law gave to the widow the right to administer and it cannot be denied her. But it by no means follows from this that she may transfer her right to a stranger." This the court said would be giving her not only the right to administer, but also the power of appointment, thus substituting her discretion for that of the Ordinary.

When no one applies in the order prescribed by the act, it would not be improper for the Probate judge, in reaching a conclusion as to a suitable appointee, to listen to the suggestions of those who, if they applied, would be entitled; but such suggestions are not controlling. They would be simply advisory, and if rejected would give no ground

for an appeal. This applies to the recommendations of creditors as well as to the widow and other kindred. *McBeth v. Hunt*, supra. This disposes of the first ground upon which the Circuit judge reversed the decree of the Probate judge.

The judge held, secondly, that Dingle was not a creditor in the sense of the act, but that Ostendorff was, and therefore by the terms of the act he should have been appointed. It seems that the amount represented by Dingle was admitted to be much the largest of any other single creditor, and that, as we have seen, the recommendation of the other creditors had no legal force; so that unless the position that Dingle, being only the administrator of a creditor, was not such a creditor as is contemplated by the act be correct, it would seem to follow that the judge was in error in reversing the Probate judge's decree on that ground.

Administration vests the legal title of the personal effects of the intestate in the administrator. It is true the administrator,

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\*as to such assets, occupies somewhat the position of a trustee but he is none the less the legal owner thereof, and becomes as much entitled to exercise all the rights of ownership as if he were in possession of it as his individual property.

We see nothing in the terms of the act, or in its purpose and spirit, which limits the term creditor to one who only claims in his individual capacity and excludes one claiming in a representative right. Nor does there appear to be any inconsistency in the two positions. Dingle was in fact as much a creditor of the estate as Ostendorff, and, being the largest creditor, was entitled under the law to the administration.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded to be determined in accordance with the principles herein adjudged.

## 17 S. C. 26

FERGUSON & MILLER v. GILBERT & CO.

(November Term, 1881.)

[1. Attachment  $\hookrightarrow$ 293.]

A void judgment (as where the absent debtor, whose property was attached, was never served personally or by publication) may be vacated by a junior attaching creditor; and a motion to vacate is a proper mode of proceeding in such case.

[Ed. Note.—Cited in *Crocker v. Allen*, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see Attachment, Cent. Dig. § 1034; Dec. Dig.  $\hookrightarrow$ 293.]

[2. Motions  $\hookrightarrow$ 23.]

Notice of motion to vacate a judgment was served upon the attorney of record and not upon the judgment creditor, and the motion was resisted on its merits in the Circuit Court by such attorney. Held, that it was too late to

raise the objection in this court that service on the attorney was insufficient.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 20; Dec. Dig. ¶23.]

Before Kershaw, J., Greenville, April, 1881.

This was a motion made by P. W. Dalton & Co., judgment creditors of H. D. Gilbert & Co., to vacate a judgment of Ferguson & Miller v. H. D. Gilbert & Co. The notice of the motion was served upon the attorneys of record for the plaintiffs in the judgment sought to be vacated. The motion was based upon an affidavit in words following:

Personally appears before me Julius H. Heyward, who upon being duly sworn says, that he is the Attorney for P. W. Dalton & Co.; that on the 24th day of January, 1881,

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the \*said P. W. Dalton & Co. obtained in the Trial Justice Court a judgment against H. D. Gilbert and J. W. Walker, partners doing business under the firm name of H. D. Gilbert & Co., for the sum of sixty-eight 07-100 dollars, with interest from the 13th day of September, 1880, and costs; that on the 15th day of February, 1881, a transcript of said judgment was filed in the office of the clerk of the Court of Common Pleas for Greenville County, and duly docketed therein; that on the same day execution was issued and lodged in the office of P. D. Gilreath, sheriff of said county, with instructions to levy forthwith and satisfy the same out of the property of the defendants; that at the time of issuing the summons in said action an attachment was issued and levied by the said sheriff upon certain goods, the property of the defendants, then in the hands of the sheriff; that subsequent to said levy the said sheriff proceeded to sell said goods, and now refuses to apply the proceeds thereof to the satisfaction of said judgment, for the alleged reason that the same are claimed by Messrs. Ferguson & Miller, the plaintiffs in a certain action entitled Ferguson & Miller v. H. D. Gilbert & Co.; that the summons and complaint in said action of Ferguson & Miller v. H. D. Gilbert & Co. have never been served upon either of said defendants as required by law.

The ground upon which the plaintiffs, Ferguson & Miller, obtained their warrant of attachment is thus stated in their affidavit: "That the said defendants cannot after due diligence be found within this state; that this deponent believes that the defendants have departed from this state, with intent to defraud their creditors, the grounds of his belief being that they have sold most all of their goods and have gone to North Carolina to remain, as this deponent is informed and believes, and not return to this state."

The presiding judge simply "ordered that the motion be dismissed, with five dollars costs against P. W. Dalton & Co." Dalton & Co. appealed upon the following exceptions:

1. Because it is respectfully submitted that his Honor erred in declining to consider the questions of law presented on said motion.

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\*2. Because it is respectfully submitted that his Honor erred in refusing to allow a junior attaching creditor to attack, on motion, an illegal and void attachment claiming priority.

3. Because it is respectfully submitted that his Honor erred in declining to declare void the lien of the supposed attachment of Ferguson & Miller.

4. Because it is respectfully submitted that his Honor erred in declining to declare void the supposed judgment of Ferguson & Miller. Other facts are stated in the opinion.

Mr. Julius H. Heyward, for appellants.

Proceeding by motion is the proper mode, and according to the established practice in this state. 1 McC. 116; 3 Id. 345; Harp. 219; 1 Strob. 239; 4 Id. 290; 1 Rich. 438; 4 Id. 561; 4 Abb. Prac. 393. The judgment here assailed is void for want of legal service. Code, § 250; 1 Wait, Prac. 539, 501, 502; 26 Wisc. 558; 16 Md. 171; 60 Ill. 328; 29 Mich. 526. Service by copy left under the amendment to Section 157 of the code (15 Stat. 869) is not sufficient in proceedings by attachment under Section 250. Besides, the defendants were not temporarily absent. Defendants being absent, jurisdiction of their persons cannot be taken, but only of the property attached. 1 Bail. 245; 4 Rich. 561; 33 N. H. 228; 60 Barb. 107; 11 How. (U. S.) 437. See too Rule 38 of the Circuit courts.

Mr. M. F. Ansel, contra.

March 22, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is a contest between two attaching creditors over a fund in the hands of the sheriff of Greenville county, arising from the sale of certain property of an absent debtor. The respondent's attachment was issued on October 11, 1880, and levied upon the goods of the absent debtor. The summons was served on the

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same day by leaving \*a copy with the wife of one of the defendants. There was no publication. The appellant's attachment was issued by a trial justice on November 19, 1880, and levied upon the same goods, the summons being regularly served by publication.†

†This is the statement of the brief. It does not appear, however, by whom the order for publication was granted. There is no power in courts to reach by its process non-resident defendants, except through property within its jurisdiction, and only so far as that property is affected. There is also no power by which a court can make an absent defendant a party to a cause by a publication of summons, unless expressly authorized by statute to do so. Bailey v. Whaley, 14 Rich. Eq. 81; Galpin v. Page, 18 Walt. 367 [21 L. Ed. 959]; Pennoyer v. Neff,



Both respondents and appellants obtained judgments, the former in the Court of Common Pleas for \$353.91, on November 19, 1880, and the latter in the Trial Justice Court for \$69.67, a transcript of which latter was filed in the clerk's office on February 15, 1881. At the April Term of the court, 1881, appellants moved the court to vacate and set

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aside the judgment and attachments of the respondents, upon the ground that they were void for want of legal service of the summons. The judge dismissed the motion on the ground, as is stated in the brief, that a rule upon the sheriff was the proper remedy, and not motion. The only question on the appeal is whether the appellants could be heard on motion.

If it had been the purpose of the appellants to assail the proceedings of the respondents on account of irregularity merely, they could not have been heard under any form of procedure, because it has often been decided in this state that no one but the absent debtor himself could complain of errors consisting in irregularities simply. *Foster v. Jones*, 1 McC. 116; *Chambers & Sadler v. McKee*, 1 Hill, 229; *Camberford v. Hall*, 3 McC. 345; *Kincaid v. Neall*, 3 McC. 201.

But there is a wide distinction between irregular and void process, between voidable and such as are absolutely void. This distinction has been frequently recognized in our courts, and while it has been often held, as stated above, in attachment proceedings, that no one but the debtor himself can take advantage of the first, yet in cases vulnerable for the latter cause, junior attaching or judgment creditors may assail such judgments in a prompt and summary manner, and the practice to have them vacated has been by motion. Thus in *Lindau v. Arnold*, 4 Strob. 290, where a domestic attachment was issued against an absent debtor by a magistrate, a creditor who had proceeded by foreign attachment on motion vacated the domestic attachment on the ground that the domestic attachment could not issue against a debtor absent from the state, and therefore

that the attachment in that case was void. Judge O'Neill said: "If it had been merely irregular, then indeed third persons, garnishees or creditors, could not take advantage of the irregularity. But the domestic attachment being void, it follows that the levy under it is as nothing, and the levy of the foreign attachment must prevail."

In *Byne v. Byne*, 1 Rich. 438, junior attaching creditors were permitted on motion predicated on a rule to set aside a junior writ. See also *Gardner v. Hust*, 2 Rich. 601; *Weyman v. Murdock*, Harp. 125; and *Walker*

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er & Bradford v. \*Roberts, 4 Rich. 563. In the latter case the authorities in our state and elsewhere are collected and discussed.

We think the failure of the respondents to have their summons served by publication, if true, was something more than a mere irregularity. Without service of summons as required by the law, when not dispensed with by acceptance, appearance, or in some other way, the court has no jurisdiction of the party, and the judgment in such case is a nullity; and where the want of jurisdiction appears the judgment may be treated as a nullity wherever it is met with.

It does not appear that the presiding judge made any ruling upon the merits of the question involved below. He dismissed the motion on the ground that motion was not the proper proceeding, but that plaintiff should have commenced by rule on the sheriff. It may be that a rule would not have been objectionable, yet the practice in the cases referred to above seems to have been by motion; and upon the authority of these cases we think the judge was in error in declining to hear appellants' application.

The respondents in the argument before the court raised the question that they had not been made parties below to appellant's motion; that the service of notice of the motion had been made upon their attorneys instead of themselves; and on the authority of *Duncan, Malony & Co. v. Brown*, 15 S. C. 414, they claimed that they were not before the court. If this ground had been taken

tice derives no express authority from Sections 248, 249 [250, 251] of our code to grant an order of publication, and the power cannot be taken by implication—certainly not unless the implication be necessary. Nor can he derive any such authority from Section 88 [91], Subd. 15, of the code. It would seem to follow that the order for publication required in the chapter on attachments cannot be granted by a trial justice, but must be granted by one of the officers designated in Section 156 [158]. If it be objected that it could not have been the intention of the legislature to authorize an order of publication to be granted by an officer not connected with the court in which the proceeding is pending, the reply is that this same section does that very thing in the power granted to a Probate judge to order publication in actions for partition and foreclosure where there are unknown defendants. See, too, Section 136 [138], and *Trapier v. Waldo*, 16 S. C. 276.—REPORTER.

5 Otto, 714 [24 L. Ed. 565]. To authorize publication of a summons by order of a trial justice the statute power must be shown. There is no such statute. Section 156 [158] of the code relates only to cases in courts of record. See Section 148 [150]. The term court, therefore, in that section does not include trial-justices' courts. This further appears from the use of the words trial justice in this same section, in connection with service upon persons confined in prisons, &c., within the state. On turning, however, to Sections 248, 249 [250, 251] of the code, we find jurisdiction given to trial justices in attachment where the defendant is a non-resident. In New York under its revised statutes the right of the justice in attachment to proceed against the property is perfect upon an ineffectual effort to serve the summons. 1 *Wait's Law and Prac.* 76. So it is in this state in a matter of claim and delivery of personal property. Code, § 77 [80]. The trial jus-

below and overruled, we might consider it. But there is nothing in the brief which entitles the respondents to raise this question here. So far as it appears in the "Case" as agreed upon, the respondents were regularly in court. They appeared by counsel and resisted the motion. In the judge's order it is stated, "after argument of counsel for plaintiffs and P. W. Dalton & Co. to set aside the judgment and attachment in this case, it is ordered"... It is too late now for respondents to raise this question, even if they had better ground to warrant it than the facts as appear from the affidavit of Mr. Heyward would imply.

We decide nothing as to the validity of appellant's judgment. The question whether

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he is a creditor is not before us. All \*that we decide is that the questions which he attempted to have adjudicated may be brought before the Circuit Court on motion.

It is the judgment of this court that the order of the Circuit Court be reversed, and that the case be remanded for such further proceedings as may be deemed advisable.

### 17 S. C. 32

ROLLIN v. WHIPPER.

(November Term, 1881.)

[1. *Jury* ⇨17.]

Section 62 of the code of procedure requires a trial by jury in the Circuit Court on appeal from the Probate Court, in those cases only where, according to the rules of law, a jury trial may be demanded.

[Ed. Note.—Cited in *Ex parte Apeler*, 35 S. C. 420, 14 S. E. 931.]

For other cases, see *Jury*, Cent. Dig. §§ 95-98; Dec. Dig. ⇨17.]

[2. *Appeal and Error* ⇨87.]

Section 276 specifies the classes of cases in which a jury trial may be demanded as a legal right. In all other cases it is discretionary with the Circuit judge, and from his determination no appeal lies.

[Ed. Note.—Cited in *Pelzer*, *Rodgers & Co. v. Hughes*, 27 S. C. 418, 3 S. E. 781; *Cudd v. Williams*, 39 S. C. 456, 18 S. E. 3.]

For other cases, see *Appeal and Error*, Cent. Dig. § 586; Dec. Dig. ⇨87.]

[3. *Appeal and Error* ⇨899; *Jury* ⇨17.]

On appeal to the Circuit Court from an order of the Probate Court revoking letters of administration, the Circuit judge committed no error in refusing to submit to a jury issues of fact involving questions of fraud and waiver.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3665½; Dec. Dig. ⇨899; *Jury*, Cent. Dig. § 97; Dec. Dig. ⇨17.]

[4. *Executors and Administrators* ⇨32.]

Upon the application of the widow filed within five weeks after the death intestate of her husband, the judge of Probate revoked the letters of administration previously granted to a daughter of the intestate. *Held*, that in so doing he did not transcend his powers.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 195; Dec. Dig. ⇨32.]

[This case is also cited in *Ex parte White*, 38 S. C. 47, 16 S. E. 286, and distinguished therefrom.]

Before Kershaw, J., Charleston, July, 1881. The opinion states the case.

Mr. W. J. Whipper, for appellant.

Messrs. De Saussure & Son, contra.

March 22, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Within a few days after the death of William Rollin, late of Charleston county, Frances A. Whipper, wife of W. J. Whipper, applied to the judge of the Probate Court of said county

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for letters of administration. \*The petitioner represented that she and her three sisters were the heirs of the deceased. Upon this showing the letters were granted.

Within a month afterwards, Margaret Rollin filed a petition claiming that she was the widow of the intestate, and therefore entitled to administration; that by reason of her absence she was ignorant of the application of Frances Whipper, and she now applies for the revocation of the letters granted to the said Frances. Upon this petition the Probate judge revoked the appointment of the said Frances, and ordered that citation be issued under the application of the said Margaret Rollin. From this order Frances A. Whipper appealed to the Circuit Court.

On this appeal the following issues of fact were submitted as raised by the pleadings: 1st. Whether or not fraud was practised by Frances Whipper in obtaining letters. 2d. Whether or not the respondent in the case, Margaret Rollin, waived her primary right to the letters. The appellant below demanded a jury for the trial of these issues. The judge declined to submit the issues to a jury, and having heard the case, dismissed the appeal with costs. The appellant below, Frances A. Whipper, has appealed from this order of Judge Kershaw upon four grounds in form, but really upon but one, to wit: that his Honor erred in refusing to submit the questions of fact raised in the appeal to a jury.

Section 62 of the code provides that upon appeals from the Probate Court to the Circuit Court "such court shall proceed to the trial and determination of the questions according to the rules of law, and if there is any question of fact or title to land to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by the jury." This section requires, first, that the appeal shall be heard according to the rules of law, and then provides for a jury, where according to the rules of law a jury can be demanded. This must be the meaning of this section, otherwise the right of trial by jury would be enlarged in appeals from the Probate Court without reason. Any other construction would bring this section in conflict with other sections of the code on



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the \*subject of the trial of causes, and produce discord in the system.

Section 276 specifies the character of facts which must be tried by a jury, unless a jury trial is waived. In such cases the parties interested have a legal right to demand a jury, and its refusal would be legal error. In every other issue the court may try the questions involved or may order to a jury or referee, as may be deemed advisable. § 277.

The issues of fact raised in this appeal do not belong to any of the classes mentioned in Sec. 276, where a jury may be demanded as a legal right. These classes are: 1st, actions for the recovery of money; 2nd, for specific real or personal property, and 3d, for divorce on the ground of adultery. (This was when divorces were allowed.)

In this case the issues of fact submitted were fraud and the question of waiver on the part of the widow of the deceased. These facts, if entitling the appellant to any relief, appealed to the equity side of the court instead of the common law. They involved fraud, and the doctrine of estoppel invoking equity jurisdiction. In such cases it is discretionary with the judge whether he will hear the facts or seek the aid of a jury. In either event this discretion is unappealable.

But in addition to this, the decision of the issues of fact, especially the issue of fraud, could have had no influence upon the final judgment. It made no difference as to the right of the respondent to administration upon the estate of her husband whether the Probate judge was kept in ignorance of her existence through fraud or inadvertence. Under the act (Gen. Stat. 451), she was entitled to administration. She above all others had the legal right to administer in the first instance. She applied within a month after her husband's death. This was as prompt as necessary, and the Probate judge did not transcend his powers in revoking the letters granted on the application made within a few days after the death of the intestate. *Thompson v. Hockett*, 2 Hill, 348.

In no event, therefore, was there error in the order of the Circuit judge in sustaining the decree of the Probate judge. It is the judgment of this court that the order of the Circuit Court be affirmed.

17 S. C. \*35

\*HART v. BATES.

(November Term, 1881.)

## [1. Election of Remedies ◊3.]

Where a judgment creditor purchases at sheriff's sale the "land assigned as a homestead" to the judgment debtor, supposed at the time to include an entire tract, he or his assignee are not thereby estopped from afterwards bringing an action as owner of a junior judgment to set aside as fraudulent a prior deed covering such part of the tract as has been judicially as-

certained not to have been included in the sheriff's sale and deed. No question of election of remedies is here involved.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. ◊3.]

## [2. Judgment ◊540.]

According to the Duchess of Kingston's case (2 Sm. Lead. Cas. 424), three things are necessary to sustain the plea of *res judicata*: 1, the parties must be the same, or their privies; 2, the subject-matter must be the same; 3, the precise point must have been ruled.

[Cited in *Warren v. Raymond*, 17 S. C. 202; *Ex parte Roberts*, 19 S. C. 156, 157; *Woods v. Bryan*, 41 S. C. 80, 19 S. E. 218, 44 Am. St. Rep. 688; *Babb v. Sullivan*, 43 S. C. 440, 21 S. E. 277; *Newell v. Neal*, 50 S. C. 87, 27 S. E. 560; *Du Pont v. Du Bos*, 52 S. C. Append. 607; *Mauldin v. City Council of Greenville*, 53 S. C. 289, 31 S. E. 252, 43 L. R. A. 101, 69 Am. St. Rep. 855; *Smith v. Smith*, 55 S. C. 510, 33 S. E. 583; *Verner v. Simpson*, 68 S. C. 460, 47 S. E. 729; *Sarratt v. Gaffney City Carpet Mfg. Co.*, 77 S. C. 89, 57 S. E. 616; *Kirven v. Virginia-Carolina Chemical Co.*, 77 S. C. 508, 58 S. E. 424; *Earle v. City of Greenville*, 84 S. C. 196, 65 S. E. 1050.

For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. ◊540.]

## [3. Judgment ◊683.]

An assignee of a judgment is a privy of his assignor only in regard to the judgment, and is not bound by an adjudication in an action between the assignor as purchaser of land covered by the lien of such judgment and a third person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. ◊683.]

## [4. Judgment ◊735.]

An assignee of a junior judgment is not estopped from attacking a deed of the debtor as fraudulent, because that, subsequent to the assignment, in action between himself (as purchaser, prior to the assignment, of the judgment-debtor's land under a senior judgment) and a grantee of such debtor by deed intermediate the judgments, a part of the land was recovered by the grantee on the ground that it was not included in the sheriff's sale and deed, no question of fraud in the grantee's deed being there made. And the assignee not being estopped, a subsequent purchaser from him is not estopped.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. ◊735.]

## [5. Judgment ◊724.]

A judgment is not conclusive of every question which might have been made in the case, as is sometimes erroneously said, but only of matters that had of necessity to be determined before the judgment could have been given.

[Ed. Note.—Cited in *Trimmier v. Thomson*, 19 S. C. 254; *Fraser & Dill v. City Council of Charleston*, 19 S. C. 399, 400; *Hosford v. Wynn*, 26 S. C. 132, 1 S. E. 497; *Ruff v. Doty*, 26 S. C. 176, 178, 1 S. E. 707, 4 Am. St. Rep. 709; *Faust v. Faust*, 31 S. C. 580, 10 S. E. 262; *Harrison v. Lynes*, 36 S. C. 598, 15 S. E. 335; *Rhoad v. Patrick*, 37 S. C. 519, 16 S. E. 536; *Duren v. Kee*, 41 S. C. 176, 19 S. E. 492; *Anderson v. Cave*, 49 S. C. 512, 27 S. E. 478; *Wagener & Co. v. Kirven*, 52 S. C. 35, 29 S. E. 390; *Willoughby v. Northeastern R. R. Co.*, 52 S. C. 175, 29 S. E. 629; *Kirven v. Virginia-Carolina Chemical Co.*, 77 S. C. 503, 58 S. E. 424; *Greenwood Drug Co. v. Bromonia Co.*, 81 S. C. 519, 62 S. E. 840, 128 Am. St. Rep. 929; *Marion County Lumber Co. v. Tilghman Lumber Co.*, 84 S. C. 510, 66 S. E. 124, 877; *Sovereign Camp of the Woodmen of the World*



v. Means, 87 S. C. 133, 69 S. E. 85; Cannon v. Cox, 98 S. C. 192, 82 S. E. 401.

For other cases, see Judgment, Cent. Dig. § 1254; Dec. Dig. ⚡724.]

[6. *Judgment* ⚡735.]

A judgment is certainly not conclusive of a matter of fraud, when the question of fraud was not raised, and the facts constituting the fraud were not known to the party injuriously affected.

[Ed. Note.—Cited in *Ruff v. Doty*, 26 S. C. 176, 178, 1 S. E. 707, 4 Am. St. Rep. 709; *Spoon v. Smith*, 36 S. C. 594, 15 S. E. 800; *Greenwood Drug Co. v. Bromonia Co.*, 81 S. C. 518, 62 S. E. 840, 128 Am. St. Rep. 929.

For other cases, see Judgment, Cent. Dig. § 1263; Dec. Dig. ⚡735.]

[7. *Fraudulent Conveyances* ⚡199.]

A recorded deed from an embarrassed father to his son, expressed to be for valuable consideration, is no notice to parties in interest of fraud in the conveyance.

[Ed. Note.—Cited in *Garvin v. Garvin*, 40 S. C. 443, 19 S. E. 79.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 616; Dec. Dig. ⚡199.]

[8. *Limitation of Actions* ⚡100.]

Adverse possession is not complete until full ten years have expired, and the statute of limitations does not begin to run in favor of a fraudulent deed until the discovery of facts constituting the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 489; Dec. Dig. ⚡100.]

[9. *Judgment* ⚡522.]

[Cited in *McMakin v. Fowler*, 34 S. C. 287, 13 S. E. 534, on the question of admissibility of extrinsic evidence of issue decided by verdict or judgment.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 965; Dec. Dig. ⚡522.]

Before Thomson, J., Greenville, March, 1880.

Action by Sarah J. Hart, assignee, against John Bates, Sr., John Bates, Jr., Green L.

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Walker, Mary A. Walker, Sarah C. \*Good, and Valentine G. Wood—the last three being made parties under order of Judge Pressley. The facts and the order of the Circuit judge sufficiently appear in the opinion of this court. The exceptions are long, but they raise only the precise questions considered by this court.

Mr. T. H. Cooke, for appellant.

April 5, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to set aside certain deeds of land as fraudulent and void. A short statement of the facts is necessary to make the judgment intelligible. John Bates, Sr., of Greenville, became embarrassed, and on March 5, 1867, Turner and Barton recovered judgment against him, and in May, 1869, E. A. Kelly and J. W. Coleman and other creditors obtained judgments against him. On October 23, 1867, he made a deed to his son, John

Bates, Jr., of his lands, consisting of two tracts, which for convenience we will call No. 1 and No. 2, consisting in the aggregate of 492 acres. The deed expressed the consideration of \$385.63.

John Bates, Jr., on Oct. 26, 1869, conveyed back to John Bates, Sr., a part of tract No. 2 (87 acres) in trust for his daughter, Sarah C. Good, the consideration stated being \$125, and the remainder of that tract, 199 acres, to the defendant Green L. Walker, in trust for his wife, Mary, another daughter of John Bates, Sr., upon the consideration stated of \$175. John Bates, Jr., still lived with his father on No. 1 until 1874, when he moved to tract No. 2. John Bates, Sr., and Green L. Walker are now in possession of tract No. 2. On July 16, 1869, while John Bates, Sr., was living on tract No. 1, he had a homestead assigned to him by metes and bounds, represented as containing 410 acres, more or less, and believed to embrace all the lands covered by the deed from John Bates, Sr., to John Bates, Jr.

In this way John Bates, Sr., and his family held all his lands until 1876, when Turner and Barton, whose judgment was not only older than the constitution allowing homestead, but also older than the deed to John

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Bates, Jr., had the "homestead" \*assigned to John Bates, Sr., levied on and sold, and one A. A. Hart became the purchaser and received sheriff's titles; which described the land levied and sold as that which had been assigned to John Bates, Sr., as his "homestead." After this sale John Bates, Sr., removed to the parcel of tract No. 2 which had been reconveyed to him as trustee for his daughter, Mrs. Good, and A. A. Hart, the purchaser, under some proceeding ousted John Bates, Jr., from tract No. 1. About that time Hart discovered that his deed conveying the land which had been assigned as homestead did not include tract No. 2, and he purchased the judgments of Kelly and Coleman, and had them levied upon tract No. 2. He became the purchaser also of that tract and took sheriff's titles.

In 1877 John Bates, Jr., brought an action against A. A. Hart for tract No. 1, from which he had been ousted. Hart stood on his first deed from the sheriff, describing the land purchased by him as that which had been "assigned as homestead," but when that was located it was found not to cover 151 acres of tract No. 1, for which Bates had a verdict and Hart for the remainder. This recovery must have been founded upon the original deed from John Bates, Sr., and in this action the question of its bona fides was not made. There was no appeal.

There was still a balance upon the judgments unpaid, and in 1879 A. A. Hart assigned them to his wife, Sarah J. Hart, who as assignee of the judgments instituted these

proceedings to set aside as fraudulent and void the deed from John Bates, Sr., to his son, the said John Bates, Jr. The plaintiff offered proof that the deed was without consideration and void as to creditors. The defendants offered no evidence, but moved to dismiss the complaint on the ground mainly that the question of the bona fides of the deed from father to son had been adjudged in the case of *Bates v. A. A. Hart*, and that Sarah J. Hart was a privy of A. A. Hart, the defendant in that case, and could not now assail the deed as fraudulent. The plaintiff replied that as assignee of the judgments she was not a privy of A. A. Hart in respect to the deed to John Bates, Jr.; but if she were such privy, the fact that the deed

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was fraudulent was not known at the time of the trial of the case of *Bates v. A. A. Hart*, but was discovered afterwards, and being subsequently discovered, the question was not made and could not have been adjudged in that case. There was no evidence going to show that the plaintiff or her assignor had knowledge of the alleged fraud at the time of the trial of the former case. On the contrary, the plaintiff showed that she had no knowledge of the alleged fraud until after said trial, and that she heard of the same for the first time in the latter part of 1878, and only shortly before the judgments were assigned to her. There was evidence showing that the alleged fraud had been talked about on the streets of Greenville many years before the plaintiff brought her action, but none showing that the plaintiff or her assignor had any knowledge of the same until the latter part of 1878. There was no evidence introduced to establish the fact that on the trial of the case of *Bates v. Hart* the question of the mala fides of the deed to John Bates, Jr., was in any way considered.

The presiding judge held as matter of law that while there was no proof of such issue having been made and determined, "he took it for granted it had been done," and dismissed the complaint. The plaintiff appeals to this court. The exceptions are long and numerous to the rulings both of law and fact, but we do not think it necessary to consider them all seriatim, as enough has been stated to present the questions which, according to our view, must decide the case.

One of the findings of fact, however, should be considered before we reach the main point. The presiding judge found as follows: "That the plaintiff's assignors had exhausted their remedy under the executions, and should not be remitted to another mode of relief affecting the same property; that having exhausted their measure of relief by sale, their assignee again presents the executions and asks that the land be sold—not indeed under the executions, but what is substantially the same thing, for their payment. This approaches a case of election of remedies where a choice is presented, and such election hav-

ing been made by the sale of the property, the parties are bound by it."

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\*According to the facts stated in "the case," this appears to be a misapprehension of both fact and law. The piece of land containing 151 acres of tract No. 1, which John Bates, Jr., recovered from Hart, and which substantially is the subject of this controversy, was never sold under the executions at all. The very ground upon which Bates recovered it from Hart was that the sheriff at his first sale sold only "the homestead," and when that was located it appeared that the sheriff's deed did not include this particular parcel, which had not been sold at all.

It is a mistake to say that "the creditors have exhausted their remedy under the executions." They could now levy and sell all the interest of John Bates, Jr., in the 151 acres, being outside of the lines of "the homestead." But as the parcel is claimed by John Bates, Jr., under the deed from his father, it was better possibly to make the issue of fraud in the deed, so as to remove that cloud from the title before levy and sale. That A. A. Hart for a time supposed that "the homestead," which he had purchased and which called for 410 acres, covered this parcel, could not alter the fact that it did not. The parcel of land in controversy was never sold under the executions either by the plaintiff or her assignors, and as to that the question is still open. A. A. Hart made a mistake as to what lands his deed from the sheriff covered, which was corrected in the first case; but that affords no reason why he should not be allowed to conform his actions to the facts as they were established by the decision of the court. We see nothing to raise a question of election.

The presiding judge held as matter of law "that the action of plaintiff prayed relief by a sale of lands, a portion of which, in a suit between her immediate assignor, A. A. Hart, and John Bates, Jr., had been declared the property of the latter, which judgment had not been reversed; that this suit was between parties who were privies in interest, and the right in question was adjudged." The question is was this ruling error.

As we understand it, the object of this action was not to sell the land but to set aside deeds, so that it could be sold under the executions as the property of John Bates, Sr.

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At all \*events we shall consider that as the scope of the proceeding. The judge did not consider the evidence of fraud, in the deed, but, disregarding it entirely, dismissed the complaint; and therefore, in considering the question whether he committed error, we may assume that fraud was or could be proved.

The doctrine of "res judicata" is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a



matter once litigated should not again be drawn in question between the same parties or those claiming through them. But whilst it is important to maintain the principle in all its integrity, it is no less important that it should be clearly defined and kept within its proper limits. All agree as to its utility and necessity, but there has been difference of opinion as to its precise limits and its application in particular cases.

As we understand it, the rule established in the *Duchess of Kingston's* case is, "first, that the judgment of a court of competent jurisdiction, directly on the point, is as a plea in bar or as evidence conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." 2 Smith's Lead. Cases, 424, and notes. It seems, therefore, that to make out the defence at least three things are necessary: the parties must be the same, or their privies; the subject-matter must be the same, and the precise point must have been ruled.

Was the judge right in holding that Sarah J. Hart, the plaintiff, was a privy in interest with A. A. Hart so as to be bound by whatever in the case of *Bates v. Hart* was decided against him? The parties in this action are certainly not the same as in that of *Bates*

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*v. Hart*, nor is the cause of action the \*same. In the first *Bates, Jr.*, sued Hart for land, and in this Sarah J. Hart sues John Bates and others to set aside as fraudulent the deed to Bates covering this same land. The defence therefore cannot prevail as a plea in bar, but it may be offered in evidence as an estoppel of the plaintiff, Sarah J., if she is a privy of A. A. Hart, the defendant in the first action, and the precise question she now makes was then decided against him.

Privies are defined to be "those who are partakers or have an interest in any action," and are of three kinds—in blood, in law, and in estate. Sarah J. Hart was neither privy in blood nor law of A. A. Hart; was she a privy in estate? She purchased the judgments from A. A. Hart, and as his assignee was his privy as to all questions affecting these judgments, and is bound by all that was binding against him in regard to them; but that does not make her his privy as to any other matter. Nothing decided in the case of *Bates v. Hart* touched the judgments. It is true that at the time of the trial they were the property of A. A. Hart, and that

circumstance may confuse the mind; but the question decided had no connection with the judgments. The only question decided was one of location as to what land passed under the words, "the homestead of John Bates, Sr."

A. A. Hart did not defend as owner of the judgments but as purchaser of the land. Indeed, at the time he purchased "the homestead" under these judgments he did not own them. He afterwards purchased them for another purpose and owned them at the time of the trial, but that was an accidental circumstance, which cannot affect his assignee. If Hart himself had instituted these proceedings it would have been in a character different from that in which he defended the case of *Bates*. "A judgment against one as executor does not bar his individual claim." *Charles v. Charles*, 13 S. C. 385.

But suppose that Sarah J. Hart, as assignee of the judgments, was a privy of A. A. Hart, not only as creditor but as purchaser, the question then next in order is whether the fraud alleged in this case was conclusively decided in the former suit. The argument for *Bates* is that he could recover a parcel of the land only upon the assump-

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tion that his deed from his \*father was bona fide, and whether in the former suit Hart made that question or not he might have done so, and the mere omission to avail himself of a defence which the nature of the case and the scope of the pleadings allowed estops him and his privies from making that question in another action.

The form of the proceeding in the two cases was certainly not the same. The first was an action at law for land, and this, as stated, is a proceeding in the nature of a bill in equity to set aside a deed of that land for fraud. It may be that the defence of fraud might have been made in the first suit. Fraud vitiates everything, and in one sense all courts take cognizance of it; but the jurisdiction to set aside a deed for fraud is most appropriately exercised through equitable proceedings. In the case of *Bradley v. McBride*, Rich. Eq. Cas. 204, it was held that after a trial at law, in which lands were recovered, the losing party might go into equity, and have the deed upon which the recovery was based, set aside for a fraud perpetrated before the first trial. Judge O'Neill said, "The recovery in equity is more convenient, and as the jurisdiction of this court over this class of cases is unquestionable, I think the recovery at law cannot conclude the complainant."

But both law and equity are now administered in the same court, and there is not the same difference in the forms of proceeding as formerly. It seems to be now settled that, though the proceeding is in another jurisdiction and for a different purpose, the judgment will be conclusive, provided the court



has jurisdiction and the judgment was directly on the point. "A decision by a court of competent jurisdiction is binding upon all other courts of concurrent power." *Maxwell v. Connor*, 1 Hill Eq. 22.

It is claimed, however, as a sequence of this rule that the defence of *res judicata* extends to every question which could have been made, whether it was considered or not. There are cases which seem to go to that extent; but we think the decided preponderance of authority maintains the more reasonable doctrine, "that a judgment is not technically conclusive of any matter, if the matter is not such that it had of necessity to be determined before the judgment could have

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\*been given—that it was not merely collateral, nor to be inferred by argument from the judgment." 6 *Wait's A. & D.* 785, citing *Hunter v. Davis*, 19 Ga. 413, and other cases. Or in the language of Mr. Justice Miller of the U. S. Supreme Court, in his dissenting opinion in the case of *Aurora City v. West*, 7 Wall. 106 [19 L. Ed. 42]: "The rule is, that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the last eight years by this court, viz., in the *Steam Packet Co. v. Sickles*, 24 How. 333 [16 L. Ed. 650]; *Same v. Same*, 5 Wall. 580 [18 L. Ed. 550]; *Miles v. Caldwell*, 2 Wall. 35 [17 L. Ed. 755]."

The record in the case of *Bates v. Hart* did not show that the question of fraud in the deed to Bates had been necessarily decided, nor was it shown as matter of fact by extrinsic proof. On the contrary, there was proof tending to show that neither the plaintiff nor her assignors ever heard of the fraud in the deed until 1878, a short time before this proceeding was instituted. The judge "remarked that while there was no proof of such issue being made and determined, he took it for granted that it had been done." It surely cannot be that a judgment must be considered as conclusive not only of the matters actually decided by it, but of every question which by probability could have been made in the trial, including that of fraud in one of the deeds in evidence, fair on its face, which fraud was not then known to the party now to be estopped, for not then alleging it.

It is true the deed had been regularly recorded, and the plaintiff must be held to have had notice, but surely notice as it stood expressed to be for valuable consideration. The fraud had then been perpetrated, but it did not appear on the face of the deed. The registry gave no clue to it, but on the contrary tended to conceal it by misrepresentation. The fraud in the deed was conceded by the party who now claims advantage from having been able to keep the secret

so successfully as to escape discovery. It was in its character collateral and exceptionable.

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\*Fortunately fraud is not universal. The charge of *mala fides* is not expected to be made as matter of course against every deed offered in evidence. There is yet some faith in fair dealing. The general rule certainly is, that deeds expressed to be for valuable consideration are what they purport to be. The charge of laches cannot justly be brought against one for omitting to assail a deed for fraud, when he had no knowledge of the facts constituting such fraud. To assail a deed for fraud without satisfactory evidence would be inexcusable. It cannot be necessary for every suitor to assail as fraudulent every deed proved on the other side in every case in order to escape the penalty of being precluded from doing so at a future time, in case he should discover evidence that would justify such charge.

In the great leading case of *Le Guen v. Gouverneur & Kemble*, 1 John. Cas. 494, after holding the doctrine that a judgment is not only final as to matters actually determined, but as to every other matter which under the pleadings might have been determined, Mr. Justice Radcliffe said, "It is, however, admitted that cases in which there are no laches or neglect form exceptions to the rule. Thus where a party has no notice of a defence to which he is entitled, or can make it appear that material evidence has been subsequently discovered which would probably support that defence and alter the determination, he ought not to be concluded."

The Court of Vermont has held as follows: "The rule is, that when the jurisdiction of the courts of law and equity is entirely concurrent, the adjudication of the former is conclusive upon the latter, except in the cases of new matter discovered subsequently to the trial at law, or of fraud by the opposite party, or of mistake or accident. But when a party has equitable rights not cognizable in a court of law but only in equity, a court of equity will grant him relief from such adjudication." *Dunham v. Donner*, 31 Verm. 249.

We think it was error to hold that the plaintiff was estopped from making the question of fraud in the deeds.

The statute of limitations is not pleaded, but lapse of time and adverse possession

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are informally set up as matters of defence. The judgments now owned by the plaintiff were obtained in May, 1869, and this action was brought January 8, 1879, within less than ten years. Besides, the statute did not commence to run until the discovery of the facts constituting the fraud. *Beattie v. Pool*, 13 S. C. 379.

The judgment of this court is that the judgment of the Circuit Court be reversed and the case remanded for a new trial.

## 17 S. C. 45

McCREARY v. BURNS.

(November Term, 1881.)

[1. *Wills* ⚭616, 675.]

The provisions of a will were: "I desire that the land and other property remaining shall continue in the possession of my beloved wife L. during her life, believing she will make use of it to the best advantage for the benefit of our children as well as her own comfort. At her death, I wish the property sold and an equal division made. If it should be deemed advisable by the executors to dispose of or exchange the property, I authorize them to do so, having confidence that they will in all things consult the best interest of the family." The widow was executrix. *Held*, that under the will construed as a whole L. took only a life-estate, with no power of consuming the corpus and without any trust during her life, enforceable by the courts, in favor of the children.

[Ed. Note.—Cited in *Bank of Florence v. Gregg*, 46 S. C. 182, 24 S. E. 64.]

For other cases, see *Wills*, Cent. Dig. §§ 1424, 1588; Dec. Dig. ⚭616, 675.]

[2. *Partition* ⚭48.]

To action brought after the widow's death for partition of this property, the personal representative of the widow is not a necessary party.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 123; Dec. Dig. ⚭48.]

[3. *Wills* ⚭616.]

A tract of land purchased with money realized from the sale by L. of the lands included in this devise is governed by the terms of this will, even in the hands of a remainderman who took titles in his own name, but with full knowledge of the facts.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1429; Dec. Dig. ⚭616.]

[4. *Executors and Administrators* ⚭132.]

There was nothing in this will which empowered the widow to pay to her sons, for services rendered in keeping up the place and family, any part of the purchase-money of the lands sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 437, 545; Dec. Dig. ⚭132.]

[5. *Partition* ⚭83.]

Under complaint for a partition of the substituted land, demanding also an accounting, the decree may order one of the co-tenants to refund, out of his share, a part of the purchase-money of the first tract received by him.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 228; Dec. Dig. ⚭83.]

[6. *Wills* ⚭551.]

The only child of one of testator's daughters, who died after testator, is entitled to her mother's vested interest in the remainder, and may, after the death of the life-tenant, bring action for partition.

[Ed. Note.—Cited in *Roundtree v. Roundtree*, 26 S. C. 474, 2 S. E. 474; *Tindal v. Neal*, 59 S. C. 11, 14, 36 S. E. 1004.]

For other cases, see *Wills*, Cent. Dig. § 1188; Dec. Dig. ⚭551.]

[7. *Partition* ⚭83.]

In such action she cannot be required to account for maintenance gratuitously extended to her in childhood by her maternal grandmother and uncle.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 228, 229; Dec. Dig. ⚭83.]

[8. *Remainders* ⚭17.]

The statute of limitations did not begin to run against plaintiff's action \*until the death of the life-tenant, even though plaintiff may have known of the claim made by her uncle to the substituted land.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 16; Dec. Dig. ⚭17; *Limitation of Actions*, Cent. Dig. § 231.]

[9. *Remainders* ⚭14.]

But the other remaindermen, who agreed to the arrangement by which titles were made to two sons of the life-tenant, should not now be permitted to disturb it.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 10; Dec. Dig. ⚭14.]

[10. *Tenancy in Common* ⚭37.]

The rule governing accounting between tenants in common for rents and profits, as declared in *Jones v. Massey*, 14 S. C. 292, approved.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 106; Dec. Dig. ⚭37.]

[11. *Wills* ⚭672.]

[Cited in *Brennan v. Winkler*, 37 S. C. 463, 16 S. E. 190, to the point that vague and uncertain testamentary directions will not create a trust.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1579–1581; Dec. Dig. ⚭672.]

[This case is also cited in *Lanham v. Lanham*, 38 S. C. 135, 16 S. E. 609, and distinguished therefrom.]

Before Kershaw, J., Anderson, February, 1881.

Action for partition and account instituted by Alice J. McCreary against Thomas Burns, Robert Burns, and others, devisees and heirs at law of Anderson Burns, deceased. The opinion states the case.

Messrs. Murray & Murray, for appellants. Mr. J. L. Trimble, contra.

April 5, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. Anderson Burns died in 1846, possessed of a small tract of 140 acres of land and some personal property. He left eight children, all minors, six daughters and two sons, viz., Maria Burns, Robert Burns, Thomas Burns, Nancy Stephens, Harriet Hunt, Hester Rochester, and Mary Reese (who has died since, leaving distributees, John Reese, Lucy Woolbright, and Sidney Reese, now also dead, leaving heirs in Virginia whose names are not known), and also Sarah Grogan, who died after the death of her father, but before her mother, leaving as her sole heir Alice J. Grogan, who intermarried with L. C. McCreary.

The deceased left a will, of which his widow Leah was the sole qualified executrix, and which provided as follows: First. I wish as soon as convenient that my debts, of which there are not many, shall be paid. Secondly. I desire that the land and other property remaining shall continue in the possession of my beloved wife, Leah Burns, during her life, believing she will make use of it



to the best advantage for the benefit of our children—as well as her own comfort. Thirdly. At her death I wish the property

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sold and an equal division made, except \*that the sons, none of whom have had the advantages of education, shall each have one hundred dollars over and above an equal distributive share, and each of the daughters now under ten years of age (three) to have fifty dollars over and above an equal distributive share. If, as I expect, another should be added to the number either of boys or girls, I wish it included in the provisions of this clause. Fourthly. If it should be deemed advisable by the executors to dispose of or exchange the property, I authorize them to do so, having confidence that they will in all things consult the best interests of the family.

The widow alone qualified. There were some but not many debts. The family continued to live on the place. The mother and the two sons managed, and by the work of all the family was barely supported. As the children grew up they married and moved off. Robert remained four years after he came of age before he married prior to 1860. When he left, his mother gave him her note for \$400 for his services after he came of age. Afterwards she conveyed 40 acres of the land to pay this note, but when she was about to sell the land he reconveyed to her, still retaining her note. After Robert left, Thomas became the head of the family, remaining with his mother, giving his labor and being clothed and supported for thirteen years after he came of age.

In May, 1869, having incurred some debts, and among them that to Robert, Mrs. Burns sold the homestead to one E. G. Roberts for \$2000 in currency, which was reduced somewhat by being brought to a gold basis, and on July 5, 1880, another tract of land was purchased from one Alonzo J. White for \$1000, the titles of which were made to Thomas Burns. To this place the family removed, then consisting of Mrs. Burns, Thomas, and Maria (who had never married), and the grand-daughter, Alice J. Grogan, whose mother had died years before, and who had been reared from infancy by her grandmother. Thomas conveyed 100 acres of the land to Robert, who now lives on it. Alice Grogan married and went off, and things remained in this general condition until 1876, when the widow, Mrs. Burns, died. There has been no administration upon her estate.

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\*In 1879 Alice J. McCreary instituted these proceedings, alleging that the White tract of land now in possession of Thomas and Robert was paid for with the proceeds of the sale of the homestead, and therefore falls under the provisions of the will and is subject to partition among the brothers and sisters and the children of those who have died since the

testator. Thomas and Robert answered in substance that Mrs. Burns, by authority of the will, had directed titles made to Thomas, with the consent of the other children, in payment for his long and faithful services to her and the family, and that there was no estate to divide. The case came on to be heard before Judge Kershaw, who decreed that under the will Mrs. Burns was simply a tenant for life, and as such trustee for the remaindermen; that the White place had been purchased with proceeds of the sale of the homestead and was subject to partition. He directed a sale, and ordered an account of the rents and profits since the death of Mrs. Burns, and also ordered that Robert should pay back \$400 of the purchase-money which he got in satisfaction of the note his mother had given him, as stated, for his services.

Thomas and Robert appeal to this court upon the exceptions: I. "That under the will Mrs. Burns was not merely a life-tenant, holding the property in trust for the children at her death, but entrusted with it for the benefit of herself and children, with a superadded power to sell and dispose of the property as would be most conducive to their best interest.

II. "That the testimony does not show that more than \$500 of the proceeds of the homestead were invested in the tract of land purchased by Thomas Burns.

III. "That the decree that Robert Burns should pay \$400 was not asked for in the complaint, and was a surprise, and all the facts in regard to the transaction not inquired into either by the plaintiff's or defendants' counsel.

IV. "That Alice J. McCreary, the sole plaintiff, having received, as shown by the testimony, far more than her distributive share of the estate, even if she was entitled to anything, is estopped in equity and conscience from her present unconscionable demand.

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\*V. "That Alice J. McCreary, the sole plaintiff, being a granddaughter of the testator, has no interest under the will of the testator, and therefore cannot maintain this action.

VI. "That the action has been prematurely brought, no administration upon the estate of Leah Burns, deceased, having been taken, nor any decree fixing her liability, nor evidence showing the inability of her estate to respond to any demand against it, growing out of the trust estate.

VII. "That the statute of limitations is a bar to the recovery of the plaintiff, as the deed to Thomas Burns was made and recorded more than six years previous to the institution of this or any other action to impair its validity, and the circumstances connected with the purchase of said tract of land were known to the plaintiff at the time of the purchase."



The fundamental rule prescribed for the construction of wills is that the intention of the testator, to be collected from the whole will, must govern, and that if possible it must be so construed that the whole must stand together and effect be given to every provision in it. What was the intention of Burns the testator? Did he mean to give his little property to his wife to use and enjoy during her life, paying his debts and rearing his family upon the usufruct alone, and at her death the whole corpus to go over to his children—in other words, to make her simply a tenant for life with limitation over to the children; or did he intend to give his property to his wife in trust for herself and children, not only with the right to use it, but with the power to dispose of it, to consume it in the use, to spend it all if necessary in rearing his family? If the latter, it would be necessary that the representative of Leah, the trustee, should be made a party to account for the property and to show whether it was necessary to sell it, and also whether the proceeds of sale were properly and necessarily spent in the support and maintenance of the family. But if the former, the ordinary principles as between tenant for life and remainderman must be applied.

The first part of the second paragraph of the will undoubtedly gives a simple life-estate to Leah. There is no direct gift in terms, but being in a will the word "desire"

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\*means that. If the clause had stopped there, no doubt could exist that she took a life-estate pure and simple; but these words were added: "believing she will make use of it to the best advantage for the benefit of our children as well as her own comfort." Should these words change the construction of the clause so as to make Leah a trustee of the property "for the benefit of the children," giving them an equitable charge on it during her life for their support, or were they simply expressions of faith intended to stimulate the discretion given to her?

With some hesitation we concur with the Circuit judge in taking the view that Leah Burns was simply a life-tenant, and as such trustee of the property for the children as remaindermen. No such trust for the children was created in Leah during her life, as the court would compel her to execute. The purposes were too vague and uncertain, and the word "believing" was not intended to be more than precatory.

Without going into the numerous authorities upon the subject, we content ourselves by citing the remarks of Mr. Justice Story: "The doctrine of construing expressions of recommendation, confidence, hope, wish and desire into positive and peremptory commands, is not a little difficult to be maintained, upon a sound principle of interpretation of the actual intentions of a testator.

It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one and omitting the other he should not have a determined end in view. It will be agreed on all hands, that when the intention of the testator is to leave the whole object, as a pure matter of discretion, to the free-will and pleasure of the party enjoying his confidence and favor, and when his expressions of desire are entrusted as mere moral suggestions to excite and aid that discretion, but not absolutely to control and govern it, then the language cannot and ought not to be held to create a trust. Now, words of recommendation and others precatory in their nature imply that every discretion as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a dif-

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ferent sense is irresistibly forced upon them by the context. Accordingly, in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peculiar sense." 2 Story Eq., § 1069; *Harding v. Glynn*, 2 White & Tudor's Equity Cases, 1833, and notes; *Lesesne v. Witte*, 5 S. C. 450.

The fourth clause is not in conflict with the construction that Mrs. Burns was a tenant for life of the property. In that the testator "having confidence that they will in all things consult the best interest of the family" gives to the executors the power "to dispose of or exchange the property as they think most advisable." We cannot suppose that by this he meant that the executors might dispose of the property, in the sense of consuming or spending it without accountability for the proceeds. That view is negatived by the words which follow in the same connection "or exchange." The third clause is in harmony with this construction, for it presupposes that the property will remain unexpended at the death of Leah, and in that event provides that "the property shall be sold and equal division made," etc.

The determination that Leah Burns took simply a life-estate substantially disposes of most of the other questions in the case. The principle is well established that the tenant for life is a trustee for the remaindermen, and, whilst entitled to the use, must preserve the estate in the same general condition in which he received it. The execution of the power given conferred a good title on the purchaser, and the purchase-money constituted the estate, and "so long as it can be traced and distinguished it will inure to the benefit of the cestui que trusts, and all claims of the creditors of the trustee must

be postponed until the trust is discharged." *McNeil v. Morrow*, Rich. Eq. Cas. 172; 2 Wait A. & D. 449.

The homestead place was sold to E. G. Roberts for \$2000 in currency—something less when reduced to a gold basis. What became of the money? It appears with reasonable certainty that \$1000 went to pay

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for the White place. Mr. Gail\*lard says that as the agent of White he sold the place. Thomas Burns asked him if it was for sale, and Cyrus Stephens, a son-in-law of Mrs. Burns, came and made the purchase. He paid \$500 cash and gave a note of E. G. Roberts for \$500, payable to Mrs. Burns as executrix. This made the purchase-money \$1000. Another portion of the purchase-money, \$400, was paid to Robert in liquidation of the note before referred to as given to him by his mother for services rendered before he married. It does not appear what became of the remainder of the purchase-money. The White place then became part of the corpus of the estate.

It is claimed, however, that at least \$500 of the purchase-money was paid to Thomas by his mother, by virtue of her large powers under the will, for his long and faithful services in charge of her business and family. It really does seem as if in justice he should receive more than his equal share as compensation for his services. All agree that he was industrious, close, and faithful. No doubt the mother wished to compensate him, and most of his brothers and sisters seem willing that he should have it. But in strict law, according to the proper construction of the will, Mrs. Burns had no right to receive services and pay for them out of the corpus of the estate. She and her family were entitled merely to the usufruct, which was her only means of paying debts. Thomas chose to stay with her, and possibly he may have been compensated in the comfortable living he received or by the surplus of crops which he controlled; but if not it is his misfortune.

The same may be said as to Robert and the \$400 of the purchase-money he received. In reference to him it is said that the complaint only asked partition of the White tract of land as part of the corpus of the estate, and the decree against Robert for the money cannot stand, as there is nothing in the complaint to sustain it. It is true the complaint did not specifically state this matter, for the reason probably that it was not known; but Robert was a party. He admitted that he got the money, and the third paragraph of the prayer for judgment did ask "that an accounting be had before W. W. Humphreys, master." This was enough to cover this particular matter as

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\*an incident to the scope and general allegations of the complaint.

The objection is made that Alice J. McCreary, the sole plaintiff, cannot maintain this action, for the reason that she is not a child, but a grandchild of the testator, and as such not entitled to a distributive share under the will. The third clause of the will does not expressly declare that the division at the death of Mrs. Burns should be among his "children," but as in that clause he speaks of "sons" and "daughters," that was manifestly his intention. The children then living took a vested interest in remainder to be reduced to possession after the death of Mrs. Burns. Sarah Grogan, the mother of Alice, was then living, and took a vested interest in a child's share, which upon her death was transmitted to her only heir, Alice J. McCreary, the plaintiff. *Bentley v. Long*, 1 Strob. Eq. 43 [47 Am. Dec. 523].

It is further said that the plaintiff before her marriage received more than her mother's distributive share of the estate and therefore a recovery upon her part would be inequitable. If true, this is no matter for counter-claim or equitable set-off. It appears that her mother, Sarah Grogan, soon after her marriage died, leaving her an infant, and she was taken by her grandmother and reared in the family. It may be that in this way she enjoyed a support and maintenance furnished by her grandmother, at least in part, from services, which she is now unwilling to have paid out of the corpus of the estate; but she lived with her grandmother and Uncle Thomas by invitation, and they cannot now raise that voluntary support into a charge. It is not the province of the court to consider questions of gratitude or moral propriety, but to announce the law.

The statute of limitations is also pleaded. Without going into the general law upon this subject, it is enough to say that as against a remainderman the statute does not begin to run until the death of the life-tenant. Mrs. Burns died in 1876, and this action was brought in 1879. Mrs. McCreary was living with her grandmother in 1870, when the title to the White place was made to Thomas, and she went with her grandmother to live on that land with Thomas, where a short time

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\*after she was married. There is proof that the matter of the ownership of the land was talked about in the family, she being present; but there is no proof that she ever agreed to or was consulted about the arrangement with Thomas and Robert, or bound herself not to make a claim for a share of the estate. Mere knowledge before the life-estate fell in would not put the statute in motion.

Mrs. McCreary is the sole plaintiff, none of the other remaindermen joining with her in the prayer for partition and account. On the contrary, it appears that Cyrus Stephens and his wife and probably others were consulted and agreed to the arrangement by which Thomas was paid by having the titles



of the White place made to him, and Robert also by having his note paid. Such of the adult remaindermen as were consulted and agreed to the arrangement aforesaid should not now be allowed to disturb it or receive a part of the estate, when partitioned at the instance of the sole plaintiff, Alice J. McCreary. An inquiry upon this subject will be included in the order of reference.

After the death of Mrs. Burns the remaindermen stood as to each other as tenants in common, and the account for rents and profits of the land should be stated according to the principles announced in the case of *Jones v. Massey*, 14 S. C. 307.

The order of reference to the master should be so enlarged as to require him to report whether any of the adult remaindermen consented and agreed to the arrangement by which Robert Burns was paid his note and the White tract of land was conveyed to Thomas Burns, and if so which of them—with leave to report any special matter.

It is the judgment of this court that the judgment of the Circuit Court, except as herein modified, be affirmed.

#### 17 S. C. \*55

\*STATE v. BEADON.  
(November Term, 1881.)

1. *State v. McKettrick*, 14 S. C. 347, approved and followed.

[2. *Assault and Battery* ⇨78.]

An indictment in the Court of General Sessions for aggravated assault and battery should not simply characterize the offence as aggravated, but should state the matter which makes the aggravation.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 116; Dec. Dig. ⇨78.]

[3. *Assault and Battery* ⇨97; *Criminal Law* ⇨43.]

The indictment charged in its first count an assault and battery with a shovel with intent to kill, and in its second count an assault and battery with a shovel, and the verdict was "guilty of an aggravated assault and battery." *Held*, that the verdict might be referred to either count, and was a conviction of an offence charged in the indictment and within the jurisdiction of the Court of General Sessions.

[Ed. Note.—Cited in *State v. Smalls*, 17 S. C. 64.]

For other cases, see *Assault and Battery*, Cent. Dig. § 151; Dec. Dig. ⇨97; *Criminal Law*, Cent. Dig. § 161; Dec. Dig. ⇨93.]

Before Hudson, J., Charleston, November, 1881.

Indictment against Edward Beadon. The report of the presiding judge was as follows: This indictment shows on its face jurisdiction in the Court of General Sessions, and concludes *contra formam Statuti*. The finding of the jury may be referred to either count of the indictment; to the first count, ignoring the attempt to kill, or to the second count simply. In either view it is sustained by a good count. Hence I declined the motion in arrest of judgment.

Mr. S. J. Lee, for appellant.  
Mr. Solicitor Jervey, contra.

April 7, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a prosecution for assault and battery. The indictment contained two counts. The first charged that the defendant committed an assault and battery upon one Caesar Dunning "with a deadly weapon, viz., a shovel, with intent to kill." The second simply charged an assault and battery with a shovel, in the usual form, without the intent to kill. The jury found the defendant "guilty of an aggravated assault and battery," who moved in arrest of judgment, and, that being overruled, appeals to this court upon the following exceptions:

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\*I. "Because his Honor erred in refusing to arrest the judgment on the ground that the indictment is fatally defective in that it does not charge the accused with committing an assault and battery of an aggravated nature.

II. "Because his Honor erred in refusing to arrest the judgment on the ground that the verdict of the jury finds the defendant 'guilty of an aggravated assault and battery,' of which offence the Court of General Sessions had no jurisdiction as appears on the face of the indictment."

We do not understand the point of the second exception, as the jury had the right to find the defendant guilty of "an aggravated assault and battery," unless it may be upon the view that the indictment did not sufficiently charge an offence of that character and therefore there was nothing to support the verdict. Assuming that to be the point made, the only question in the case is, whether the indictment contained the charge of an assault and battery of a high and aggravated nature.

Under our constitution and laws the offence of assault and battery is divided into two classes: Those which are not of a high and aggravated nature, of which trial justices have exclusive jurisdiction; and those which are of a high and aggravated nature, of which the Courts of General Sessions have exclusive jurisdiction. *State v. McKettrick*, 14 S. C. 347. The line of demarcation between the two classes has not been very clearly defined. Petty is distinguished from grand larceny by a fact easily ascertained—the value of the property stolen; but whether an assault and battery is of a high and aggravated nature does not depend upon any particular fact, but upon the character of the act itself, which must always, to a large extent, be matter of opinion and judgment. The combinations of circumstances which may enter into the offence are infinitely various, and therefore it is hard to establish a fixed rule upon the subject. The question is ever recurring as to the facts of different



cases as they arise, and all that can be done is to indicate the general outline, which must be observed. Besides the uncertainty which arises from its resting in opinion, there is an additional source of confusion in the absence of provision as to whose judgment shall determine the matter. It is, however,

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neces\*sary that the distinction should be maintained, as upon it depends the jurisdiction of the Court of General Sessions in regard to the offence of assault and battery, and we must draw the line as well as the nature of the subject will admit.

In the leading case upon the subject, that of McKettrick, cited above, the difficulties were foreseen, and the chief justice, whilst announcing the law, endeavored to give certainty to the practice by indicating some general rules upon the subject. It is decided in that case that the character of the charge is not to be determined conclusively by the trial justice, and it follows that the fact of the case being sent up to the Court of Sessions is not conclusive of the question. It was also determined that the indictment should contain something more than was necessary in the ordinary form of charging the offence, "that it should show on its face that the assault and battery charged is of a high and aggravated nature—serious bodily harm, intent to kill, intent to commit a felony, the use of a stick or deadly weapon, or something showing aggravation should appear."

In the case before us the indictment did not charge, in the language of the law, that the assault and battery committed was "of a high and aggravated nature." That was not necessary. The matter to be set out is the fact or facts which make it an assault of a high and aggravated nature, not the mere statement in words characterizing it as such. This indictment did charge in the first count that the assault and battery was committed "with a deadly weapon, viz., a shovel, with intent to kill," and in the second without the intent to kill. We do not think the judge committed error in ruling that "the verdict may be referred to either count: to the first count charging the attempt to kill, or to the second count simply. In either view it is sustained by a good count."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

17 S. C. \*58

\*STATE v. BOWEN.

(November Term, 1881.)

[1. *Arrest* ⚡63.]

Officers, who by virtue of their office are conservators of the peace, have at common law

the right to arrest, upon view, without warrant, all persons who are guilty of a breach of the peace or other violation of the criminal laws.

[Ed. Note.—Cited in *Loggins v. Southern Ry.*, 64 S. C. 328, 42 S. E. 163; *Percival v. Bailey*, 70 S. C. 74, 49 S. E. 7.

Ed. Note.—For other cases, see *Arrest*, Cent. Dig. § 152; Dec. Dig. ⚡63.]

[2. *Arrest* ⚡63.]

And police officers of incorporated towns being charged with duties which make them conservators of the peace, they have the same right of arresting without warrant.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. ⚡63.]

[3. *Obstructing Justice* ⚡1.]

The offense of resisting a public officer in the discharge of his duty is within the jurisdiction of the Court of General Sessions.

[Ed. Note.—For other cases, see *Obstructing Justice*, Cent. Dig. § 1; Dec. Dig. ⚡1.]

[4. *Obstructing Justice* ⚡3.]

[To assault a city policeman, who is trying to preserve the peace, though without a warrant, is to resist an officer in the discharge of his duty.]

[Ed. Note.—For other cases, see *Obstructing Justice*, Cent. Dig. ⚡12; Dec. Dig. ⚡3.]

[This case is also cited in *Ex parte Schmidt*, 24 S. C. 366, without specific application.]

Before Hudson, J., Charleston, November, 1881.

The opinion of the court states all the matters that appear in the brief.

Mr. S. J. Lee, for appellant.

Mr. Solicitor Jervey, contra.

April 7, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a prosecution for resisting an officer in the discharge of his duty, and for assault and battery.

There were three counts in the indictment: First, "That Prince Bowen, with force and arms, etc., in and upon one Samuel G. Gordon an assault did make, the said Samuel G. Gordon then and there being a peace officer, to wit, a policeman of the city of Charleston, an incorporated city in the county and state aforesaid, and then and there being in the lawful discharge of his duty as such policeman, and the said Prince Bowen then and there well knowing the said Samuel G. Gordon to be a policeman as aforesaid, and him the said Samuel G. Gordon then and there did beat, bruise, wound, and ill-treat, and did then and there resist, obstruct, hinder, and oppose the said Samuel G. Gordon in the discharge of his duty as said policeman, etc." The second count charged "an assault with a deadly weapon, to wit, a

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wooden piling, with the intent \*him the said Samuel G. Gordon then and there to kill and murder;" and the third charged "an assault

and battery with a wooden paling," omitting the charge of "intent to kill."

The evidence showed that Gordon was a policeman, and was acting without process, but in the discharge of his duty in keeping the peace, when the assault and battery was committed upon him. The jury rendered the following verdict: "We find the defendant guilty of resisting an officer and assault and battery." The defendant moved in arrest of judgment on the grounds stated in the exceptions. The circuit judge refused the motion, and sentenced him to one year at hard labor in the state penitentiary, and he now appeals to this court upon the following exceptions:

"1. Because his Honor erred in refusing to arrest the judgment on the ground that resisting an officer acting without process is not an indictable offence at common law, and has never been made criminal by any statute in South Carolina.

2. Because his Honor erred in refusing to arrest the judgment on the ground that the indictment is fatally defective in not alleging that the officer resisted was engaged in serving process.

3. Because his Honor erred in refusing to arrest the judgment on the ground that the indictment is fatally defective in that it does not charge the accused with committing an assault and battery of an aggravated nature.

4. Because his Honor erred in refusing to arrest the judgment on the ground that the verdict of the jury finds the defendant guilty only of an assault and battery; of which offence the Court of General Sessions has no jurisdiction."

The first and second exceptions make the point that a policeman in an incorporated city, which by authority of the legislature has the power to appoint police officers to preserve the peace and good order of the city, has not, without a process for that purpose first issued, the right to arrest a disorderly person in the act of disturbing the peace of said city, and in attempting to do so may be assaulted with impunity. All the offences which fall under the general head of "obstructing justice" are considered to be of a very grave and high character, for

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the \*obvious reason that they strike at the very foundation of authority and government, and tend by the strong arm to defeat the administration of justice and to overthrow all peace and order. There is no doubt that it is a criminal offence to resist an officer in the discharge of his duty. "The resisting of judicial process is at all times an offence of a very high and presumptuous nature, but more particularly so when it is an obstruction of an arrest upon a criminal process." 4 Bl. Com. 129; *State v. Sotherlen*, Harp. 414; *State v. Hailey*, 2 Strob. 73; 1 *Bish. on Crim. L.*, § 465.

It is said, however, that resisting an officer in the discharge of his duty means an officer authorized to arrest, and no one can be so authorized without he is armed with a warrant regularly issued. The law is very tender of the liberty of the citizen. The general rule certainly is that one shall not be arrested except by authority of a warrant issued by a proper officer upon information under oath. "It is fitting to examine upon oath any party requiring a warrant, to ascertain that there is a crime committed, without which no warrant should be granted." Gen. Stat. 196. But there are exceptions, growing for the most part out of the nature of the offence and the necessity for immediate action, which are as well established as the principle itself. Blackstone says there are four ways in which arrests may be made: by warrant, by an officer without warrant, by a private person without warrant, and by hue and cry. Our law provides that any trial justice "shall be authorized to command all persons who, in his view, may be engaged in violent and disorderly conduct to the disturbance of the peace, to desist therefrom, and to arrest any such person who shall refuse obedience to his command." Gen. Stat. 198. The same right is given to constables, *Ib.* 207. And the same right is given to the City Guard of Charleston. 12 Stat. 421.

But it is further urged that the case of a policeman in an incorporated city is not one of the officers who are authorized, either by the common law or the statute, to make such arrests without warrant. While the old writers do not,\* in express terms, speak of police officers as among those who have the

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\*right as conservators of the peace to make arrests without warrant, they do refer to a class of officers, conservators of the peace, as having that right. It is said in 1 *East's Pleas of the Crown*, 314, "With regard to such ministers of justice who in right of their offices are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice of the intent with which they interpose. If the officer be within his proper district and known, or but generally acknowledged to bear the office he assumes; or if in order to keep the person he produces his staff of office or any other known ensign of authority," etc. This is a declaration of the rights of conservators of the peace, and we take it that when new officers of that class are created they come within the reason of the principle, and should have the same protection as those formerly existing.

Municipal corporations as now established by law are of comparatively modern origin. They are agencies to assist in the con-



duct of local civil government, and what the state constitutionally empowers them to do may be considered as done by the state. If they are authorized to create officers, as conservators of the peace, they are state officers within the limits of the authority given. Mr. Dillon, in his excellent work on Municipal Corporations, observes that "the office of a police officer is not known to the common law; it is created by statute, and such an officer has and can exercise only such powers as he is authorized to do by the legislature, expressly or derivatively. When police officers are by statute invested with all the powers of constables, or conservators of the peace, this gives them authority to arrest upon view intoxicated persons while guilty of disorderly conduct, or other persons violating the laws; and to detain them until they can be brought before a magistrate." 1 Dillon, § 149. And in a note it is said, "Power to a city corporation to make ordinances for the security or good order or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards or police officers or peace officers, and such offi-

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cers may arrest without \*a warrant persons engaged in breaches of the peace, when such a course is not repugnant to the general law of the state." Commonwealth v. Hastings, 9 Metc. 259; Bryan v. Bates, 15 Ill. 87; State v. Lafferty, 5 Harr. (Del.) 491; White v. Kent, 11 Ohio St., 550; 2 Whart. § 1295; Thompson v. State, 30 Ga. 430; City Council v. Payne, 2 N. & McC. 475.

In the last case cited, concerning an arrest in the city of Charleston by a policeman without warrant, our view is so well expressed that we simply adopt it. "From time immemorial constables and watchmen had authority without warrant to arrest those whom they saw engaged in an affray or breach of the peace, and to detain them until they should find proper sureties. This practice was not only sanctioned by the common law, but by the usage which I believe prevailed in all the large cities of the Union, without which a populous town must frequently be subjected to scenes of violence and disorder. I regarded the city guard, who were peace officers of the city, in the light of watchmen and constables, as possessing the same powers as those officers, and thought that an arrest by the guard was no greater infringement of the rights of the citizen than an arrest under similar circumstances by a constable or a watchman," etc.

We agree with the Circuit judge that the first count of the indictment described an offence cognizable in the Court of General Sessions, and it will therefore be unnecessary to consider the other grounds of appeal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 17 S. C. 62

STATE v. SMALLS.

(November Term, 1881.)

[1. *Criminal Law*, ¶93.]

An indictment charged in its first count an assault with a barrel-stave with intent to kill, and in its second count an assault and battery with a barrel-stave. *Held*, that the assault and assault and battery charged, were of a high and aggravated nature, and therefore within the jurisdiction of the Court of General Sessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 161; Dec. Dig. ¶93.]

[2. *Assault and Battery* ¶97.]

But a verdict on such indictment of "guilty

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of assault and battery" \*convicts of no offence within the jurisdiction of the Court of General Sessions, and upon such verdict that court cannot pass sentence.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 151; Dec. Dig. ¶97.]

[3. *Assault and Battery* ¶97.]

The words "of assault and battery" in the verdict qualify the meaning of the word "guilty," and cannot therefore be rejected as surplusage, so as to make the verdict a conviction of the offence charged in the indictment.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 151; Dec. Dig. ¶97.]

Before Hudson, J., Charleston, November, 1881.

Indictment against Prince Smalls. The opinion fully states the case. The report of the presiding judge was as follows:

This indictment is in due form, and charges an offence within the jurisdiction of the Court of General Sessions, setting forth the murderous intent and aggravated circumstances of the assault and battery. The proper construction of the verdict is that it finds the beating, etc., to have been done with the ugly weapon used, but not with the intent to kill. Such being the reasonable interpretation of the verdict, I refused the motion in arrest of judgment.

Mr. S. J. Lee, for appellant.

Mr. Solicitor Jervey, contra.

April 7, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a prosecution for an assault and battery heard in this court in connection with that of Prince Bowen just decided (ante, p. 58). The indictment contained two counts. One charged that the defendant committed an assault upon one Kit Jackson "with a deadly weapon, viz., a barrel-stave, with intent to kill and murder," and the other with an assault and battery "with a barrel-stave," omitting the intent to kill. The jury found the defendant "guilty of assault and battery," and he was sentenced to six months at hard labor in the state penitentiary. The defendant moved to arrest the judgment, and that being refused, appeals to this court upon the following exceptions:



"1. Because his Honor erred in refusing to arrest the judgment on the ground that the

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indictment is fatally defective in \*that it does not charge the accused with committing an assault and battery of an aggravated nature.

"2. Because his Honor erred in refusing to arrest the judgment on the ground that the verdict of the jury finds the defendant guilty only of assault and battery, of which offence the Court of General Sessions had no jurisdiction."

According to the decision just rendered in the case of the State v. Beadon (ante, p. 55), both the counts in this indictment stated circumstances of aggravation sufficient to bring them within the jurisdiction of the Court of General Sessions. The first charged two matters of aggravation: that the assault was committed with a barrel-stave, and also with intent to kill and murder. The second charged that an assault and battery was committed with a barrel-stave, but omitted the intent to kill.

Each charged an offence of a high and aggravated nature, and therefore the defendant's first exception is not well taken. State v. McKettrick, 14 S. C., 354.

There is more difficulty as to the second exception, that the verdict shows the jury only intended to convict the defendant of a common assault and battery without aggravation, of which offence the Court of General Sessions has no jurisdiction. It is one thing to charge an offence properly, and quite another to make it out and establish it by the verdict of a jury; and until both are done the accused cannot be legally punished. Two things are necessary: the indictment must show that an offence cognizable by the court is charged, and the verdict must show that the party has been convicted of such offence.

It is not allowable in criminal matters to charge one offence and convict of another. There are some cases in which a conviction for a lesser offence of the same character than that charged in the indictment will be sustained upon the principle that the whole includes all its parts. For example, where murder is charged a verdict for manslaughter will be sustained, but in all such cases the court has jurisdiction of both the greater and the smaller offence. That is not true as to assault and battery. This is not a case in which the whole includes all its parts; for the moment that there is a failure to establish the charge with aggravation, there is an

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entire failure and the case \*falls out of the jurisdiction of the court. There is no doubt that if there had been another count in this indictment charging an assault and battery in the usual form without any circumstance of aggravation, it would have been bad. That was the very defect in the case of Mc-

Kettrick, supra, in which the judgment was arrested.

Now in the light of these principles what was established by the verdict of the jury—"We find the defendant guilty of assault and battery"? The natural meaning of the words is that the defendant had been guilty of an ordinary assault and battery without aggravation. If that is the proper construction (and we think it is), the verdict was not responsive to either of the counts in the indictment charging an assault and assault and battery with circumstances of aggravation, but the offence of common assault and battery was found, which was not charged, and if it had been, would not have been maintainable. If it had been a general verdict of "guilty," it might have been referred to any good count in the indictment, for in that case there would be a presumption that the jury spoke with reference to the record; or if it had been "guilty on first count" or "guilty on second count," it would have been good as to that count. The verdict cannot be referred to the first count, for the reason that it does not find "the intent to kill" and finds a battery; nor to the second count, as it negatives the aggravating matter therein charged of the use of "a deadly weapon, a barrel-stave."

The jury did not refer to either count or leave it to presumption to ascertain what they meant, but expressed it themselves—"guilty of assault and battery," that is to say, a common assault and battery. It was in effect a special verdict, and we cannot retain the word guilty and reject as surplusage the additional words "of assault and battery." It is only when a verdict before certain and valid has been cumbrered by the addition of useless matter, not qualifying the previous meaning, that the addition can be rejected as surplusage. In an action to recover a penalty imposed by an ordinance of the City Council of Charleston for keeping spirituous liquors without a license in certain

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places mentioned in the ordinance, \*the declaration to meet the terms of the ordinance charged the offence variously in different counts. The jury found the defendant "guilty of having liquor in the back shop." Held, that the words immediately connected with "guilty" could not be rejected as surplusage, and that the verdict as it stood did not find the defendant guilty of violating the ordinance.

In general verdicts, modo et forma, being merely technical words, may be supplied; if, however, after supplying technical words the intention of the jury be left doubtful, the verdict is insufficient. City Council v. Weikman, 2 Speers, 374, citing 11 Pick. 45; [Patterson v. United States] 2 Wheat. 221 [4 L. Ed. 224]. In that case Judge Wardlaw said, "The certainty essential to that ascertainment of fact upon which judgment is to be pronounced has not been attained. Any doubt

left after reasonable construction must arrest the judgment; any reasonable construction infers that the mention of one of the several particulars is the exclusion of others, that part of a whole adopted is the rejection of the remainder, and that material omissions occurring have been intentional."

The judgment of this court is that the judgment of the Circuit Court be reversed.

17 S. C. 66

DEVEREUX v. CHAMPION COTTON PRESS COMPANY.

(November Term, 1881.)

[1. *Trial* ¶191.]

In an action for damages for obstructing a public street, and for other acts injuriously affecting the plaintiff's property, the Circuit judge committed no error in refusing to charge "that the measure of the damages in this case should be the loss of rent sustained by the plaintiff by reason of the abandonment of his premises by his tenant, caused by the wrongful acts of defendants," for it assumed the existence of facts then in issue before the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. ¶191.]

[2. *Trial* ¶233.]

Where the facts are in dispute they should be hypothetically stated in requests to charge upon propositions of law involved in their consideration.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. ¶233.]

[3. *Appeal and Error* ¶1068; *Damages* ¶217.]

And, moreover, the verdict for defendant was a finding that no injury had been done to the plaintiff's property, and it is now immaterial whether there was error in the judge's charge as to the measure of damages.

[Ed. Note.—Cited in *Mobley v. Charlotte, etc.*, R. Co., 42 S. C. 310, 20 S. E. 83; *Tucker v. Southern Railway*, 75 S. C. 91, 55 S. E. 154.

For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. ¶1068; *Damages*, Cent. Dig. § 556; Dec. Dig. ¶217.]

[4. *Appeal and Error* ¶1032.]

The rule governing the correction of errors

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of law requires two things \*to be made clear by the party alleging error: 1, that some erroneous ruling has been made; 2, that he has been prejudiced thereby as to the merits of his case.

[Ed. Note.—Cited in *Murphy v. Valk*, 30 S. C. 267, 9 S. E. 101.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4047-4051; Dec. Dig. ¶1032.]

[5. *Damages* ¶217.]

But the pleadings having raised the issue of nuisance and injury to the plaintiff's property, and the judge having instructed the jury that the true measure of the damages is the injury to the plaintiff's property, to which interest might be added, he did not entirely take away from the jury the consideration of loss of rent as an element in the injury, and therefore committed no error in refusing a charge which made the loss of rent the exclusive basis of a verdict of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. ¶217.]

[6. *Damages* ¶117.]

The mode of estimating damages in cases of tort is different from that in cases of contract. In the latter the consequences of a breach can be generally ascertained by calculation, but not so in the former.

[Ed. Note.—Cited in *Witte v. Weinberg*, 37 S. C. 593, 17 S. E. 681.

For other cases, see *Damages*, Cent. Dig. §§ 285, 286, 288; Dec. Dig. ¶117.]

[7. *Municipal Corporations* ¶671.]

[Cited in *Allen v. Union Oil and Mfg. Co.*, 59 S. C. 579, 38 S. E. 274, to the point that the blocking of a street is actionable, if thereby real property is injuriously affected.]

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. ¶671.]

[This case is also cited in *Gentry v. Richmond & R. R. Co.*, 38 S. C. 284, 289, 16 S. E. 893, and distinguished therefrom.]

Before Kershaw, J., Charleston, July, 1881.

This was an action by John H. Devereux against the Champion Cotton Press Company, commenced January 10, 1879. The case was once before in this court on appeal, and will be found reported in 14 S. C. 396. The opinion of the court, together with the judge's charge, fully states the case.

The charge of the judge, omitting points having no bearing upon the case presented to this court, was as follows:

In cities where great works have been erected and carried on, which are the means of promoting the public welfare, persons are not to be encouraged to stand upon their extreme rights, and to bring actions in respect of every matter of annoyance, as, if that were done, business would be seriously obstructed and the general interests would suffer. The injury, therefore, in such cases must be real, tangible, and must be capable of estimation and of compensation. It must not be fanciful, trivial, or a matter of fastidious taste. All persons have a right to use the streets for the purpose of receiving and removing their goods, and no temporary obstruction of the streets will be improper or illegal if due diligence was used.

The jury cannot take into consideration anything which occurred since the 10th January, 1879, though that evidence might tend somewhat, when coupled with the evidence of how the business was carried on before, to

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lead the jury to believe \*that that was the habitual mode of conducting the business. The damages must be confined to compensation for the impaired value of the property of the plaintiff, if you find for the plaintiff. In no case could the verdict go beyond the value of that property. If the defendants stored cotton in violation of the city ordinances, and the plaintiff suffered any damage to his property in consequence thereof, he is entitled to recover to the extent of such damage. The testimony of the clerk of the city council does establish that the city gave the authority to the defendants to establish a



cotton press in the place where it was afterwards established, and would have the same effect as if they had given a formal license.

The storing of cotton within the limits of the city of Charleston south of Calhoun and west of East Bay streets is unlawful, and in itself constitutes a nuisance; and if any damage resulted, in violation of that law by these defendants, to the plaintiff's property, the plaintiff is entitled to recover to the extent of such damage. The evidence must satisfy you, however, that they did violate that law; that the ordinance which prohibits the storage of cotton within the limits mentioned was violated; and if you find for the plaintiff on that ground you must find that they did not only pursue the business of a Cotton Press Company, but stored cotton there as a business. You have heard the testimony. You will first determine whether they did store cotton; and, if they did, was it in a building such as was authorized by the ordinance.

The jury has simply to find whether the property of the plaintiff has been injured by the wrongful acts of the defendants; and, second, to what extent it has been injured.

The plaintiff requests the court to charge "that the measure of the damages in this case should be the loss of rent sustained by the plaintiff, by reason of the abandonment of his premises by his tenant, caused by the wrongful acts of the defendants, and the difference between the value of his, the plaintiff's, property before and the depreciated value of the property since the commission of the acts complained of."

I have charged you adversely to that proposition. I think the true measure of dam-

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ages is the injury to the plaintiff's \*property. I don't think we can go into the matter of what rents might have been received. If you find for the plaintiff the extent of the damage to his property, you may add to that a computation of the interest from the time of such injury up to the present time. The plaintiff is entitled to recover the impaired value, if any, of his property, and such interest as would be proper to compensate him if he is entitled to recover at all.

Messrs. McCrady & Son, for appellant.

His Honor erred in withdrawing from the jury the loss of rent as an element of damages, as the action was based upon such loss and there was no other testimony as to damages before the jury. The question of rent being withdrawn, there was nothing left for the jury to base a verdict upon, and the charge was therefore equivalent to a direction to find for the defendant. The weight of authority clearly shows that the loss of rent should be considered as an element of damages. Abb. Tr. Evid. 643, ¶ 9; 4 Wait Act. and Def. 777; 53 N. Y. 155; 67 N. Y. 270; 9 Wend. 326; 55 N. Y. 664; 2 Speers, 550; Wood Nuis. 887. Where the injury

complained of is transient, and capable of being removed by the abatement of the nuisance, then the measure of damages must be the loss of rental value during the continuance of the nuisance.

Messrs. Simonton & Barker and S. Lord, Jr., contra.

April 7, 1882. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action against the Champion Cotton Press Company for injury to the value of a house and lot belonging to the plaintiff, alleged to arise from the operation of the machinery of the company and the manner in which they conducted their business. The plaintiff owned a house and lot on the east side of Cumberland street in the city of Charleston, which was leased to one Guillemín. About 1875 the defendant corporation erected in the neighborhood of the said house and lot a steam cotton-press and warehouse, and has since carried on the business of pressing cotton by

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ma\*chinery driven by steam, called a "steam cotton-press." The plaintiff alleged that the defendant corporation in prosecuting their business blocked Cumberland street with cotton bales, and "still continues so to do, and impedes and sometimes completely obstructs the passage of vehicles and persons in the street, and by which means the said dwelling-house and store of the plaintiff was and is subjected to increased risk of fire and thereby rendered insecure, unsafe, uncomfortable, and of less value, and by reason thereof the said Guillemín had abandoned the said house as a tenant. That plaintiff has not been able to lease the same. That said defendant had rendered the said buildings unfit for business as a store or habitation as a dwelling-house, to the nuisance of the plaintiff and to his great damage ten thousand dollars;" and prays that the defendant corporation should be enjoined from continuing said nuisance and for damages already sustained ten thousand dollars, etc. The corporation denied all unlawful conduct on their part in the use of their own property, and all damage alleged to have been sustained by the plaintiff caused by the operation of their cotton-press.

The case was heard by Judge Kershaw. On the trial, evidence was introduced by the plaintiff tending to sustain the allegations of the complaint, and also the loss of rent by the plaintiff in consequence of the abandonment of the premises in question by his tenant, caused by the danger, annoyance, and inconvenience arising from the erection of the steam press, and by the conduct of business by the defendant and by the inability of the plaintiff to obtain other tenants at an adequate rent in consequence of the same; which evidence on the other hand was met by the defendant with evidence tending to

prove the contrary, and to show that the plaintiff had suffered no such loss in consequence of such abandonment of the premises by his tenant, nor by such danger, annoyance, and inconvenience, nor by his inability, in consequence thereof, to obtain other tenants.

Upon this evidence the case went to the jury. The judge was requested by plaintiff's counsel to charge certain propositions of law, and he charged as requested in every particu-

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lar \*except one hereafter referred to. The jury found for the defendant. The plaintiff moved for a new trial, and that being refused, he appeals to this court upon the single exception, "Because his Honor refused to charge the jury as the plaintiff requested, 'that the measure of the damages in this case should be the loss of rent sustained by the plaintiff by reason of the abandonment of his premises by his tenants, caused by the wrongful acts of defendants, and the difference between the value of his, the plaintiff's, property before and the depreciated value of the property since the commission of the acts complained of.'"

This request in the terms proposed the judge declined; but he did charge as follows: "I have charged you adversely to that proposition. I think the true measure of the damages is the injury to the plaintiff's property. I do not think we can go into the matter of what rents have been received. If you find for the plaintiff the extent of the damages to his property, you may add to that a computation of the interest from the time of such injury up to the present time. The plaintiff is entitled to recover for the impaired value, if any, of his property and such interest as would be proper to compensate him, if he is entitled to recover at all."

The latter part of the request does not seem to be in entire unison with the first part. If the judge charged that the difference between the value of the plaintiff's property before and since the commission of the acts complained of was the proper measure of damages, it could not be that the loss of rent alone could constitute that measure. No objection, it seems, is made to the charge in regard to the latter part of the request, but the complaint is that he did not also charge the first part, claiming, as we understand it, that the measure of damages should be the loss of rent up to the time of trial, and after that the depreciation in the property. In no view of the case could the judge have charged the first part of the request in the terms stated, for it took for granted that the rent was lost, and by the illegal acts of defendant, which were both questions of fact for the jury. If, in directing attention to propositions of law, such charges are not

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carefully put upon a \*statement of facts hypothetical in character, the facts involved

in the proposition seem to be assumed as true. *Thomp. Char. Jur.*, § 47.

The verdict was for the defendant, which indicates that in the judgment of the jury no injury had been done. In the question submitted to the jury two propositions were involved: first, whether the press of the defendant corporation was a nuisance; if not, then there was an end to the matter. But if it was, then, second, what injury, if any, had it inflicted upon the property of the plaintiff. If, in considering these distinct propositions in their order, the jury never reached the subject of damages and it did not enter into their verdict, it would seem to be immaterial now whether there was error in the judge's charge as to the measure of damages. "The rule governing the correction of errors at law requires that two things be made clear by the party alleging error: first, that some erroneous ruling has been made; and, second, that he has been prejudiced thereby as to the merits of his case." *Trotter v. Robinson*, 6 S. C. 410.

As the question of damages was secondary, and could not arise until the question of injury had been determined in the affirmative, and the verdict was generally for the defendant, it is not clearly perceived how the plaintiff was prejudiced, even if the judge committed error in indicating the mode of ascertaining the damages in case there should be a recovery. In the case of *O'Brien & Fryer v. Bound et al.*, 2 Speers, 501 [42 Am. Dec. 384], it was held that "the jury having found the contract of the defendants to be joint, the charge of the presiding judge that the jury might find against one, even if a misdirection was immaterial, as it could not have influenced the verdict." *Vide* [State v. Resolved Slack] 1 Bailey, 330; [Peoples v. Smith] 8 Rich. 103; 3 John. 533; 10 John. 451.

The plaintiff makes no other complaint against the charge than as to the mode suggested for measuring the damages; but he insists that, this being a case in which damages were the essence of the action, the charge as to the mode in which they should be ascertained was in such terms as to confuse the jury and induce a verdict for the defendant, and therefore was error in law affecting the main point of the case. It must

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be kept in \*mind that the judge did not exclude but admitted the evidence as to rents. In charging the jury he said: "I think the true measure of damages is the injury to the plaintiff's property. I don't think we can go into the matter of what rents have been received. If you find for the plaintiff the extent of the damage to the property, you may add to that a computation of the interest from the time of such injury to the present time," etc. Was there any error in this? That must depend to a large extent



upon the nature of the action and the issue joined.

This was not an action against the corporation for a breach of contract, but for a tort, in so using their property as to injure that of their neighbor. It is true statements are made in the complaint alleging a contract with a certain tenant to lease plaintiff's house and lot, which he abandoned, but the defendant corporation was not privy to that. The extent of their liability was the injury to the plaintiff's property resulting from their unlawful acts. The mode of estimating damages in cases of tort is different from that in cases of contract. In the latter the consequences can be ascertained generally by estimating the benefit the party would have received from the performance of the contract, but not so as to the former class.

As Mr. Wood expresses it: "In the case of a contract, the measure of damages is much more strictly confined than in cases of tort. As a general rule, the primary and immediate result of the breach of contract can alone be looked to. The principle seems to be, that in matter of contract the damages to which the party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. \* \* \* Actions for tort are governed by a far looser principle. Torts are divided into two classes—injuries to the property and to the person or character. The difference is, that in cases of contract and in some cases of tort to property a rule can be applied to the facts so accurately as to make the amount a mere matter of calculation. In the other class of offences the rule goes no further than to point out what evidence may be admitted and what grounds of complaint may be allowed for. But when this is done the amount of damages is entirely in the disposition of the

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jury." Woods Mayne on Damages, Sect. \*11, 47. The following cases cited and relied on by plaintiff were cases for breach of contract: *Dewint v. Wiltsie*, 9 Wend. 326; *Ruff v. Rinaldo*, 55 N. Y. 664; *Tappans & Noble v. Harwood*, 2 Speers, 550.

The judge charged "that the measure of damages was injury to the plaintiff's property. The plaintiff is entitled to recover for the impaired value, if any, of his property, and such interest as would be proper to compensate him." Did that not fairly cover the whole ground both before and after the trial, "from the time of such injury up to the present time"? Taking the whole charge together, we do not see that he took from the jury entirely the consideration of the rents, which was only one kind of evidence of injury. "Injury to the plaintiff's property" was more comprehensive, and covered all the elements that entered into the quantum of the jury. The general included all the particulars.

The jury, being told that it was for them to estimate that injury with the right to add

interest as damages, were thereby authorized to consider "injury" of all kinds not only in annual rental, but deterioration from any cause. Whilst the alleged loss of rents under the charge might be considered along with other evidence upon the subject of general injury, the judge informed the jury that they could not go into the matters of rent as the exclusive basis of their verdict. Proof of loss of rent was admitted, but as the only evidence of injury to the property it was not only inadequate but unreliable. The loss of rent might arise from various causes other than the proximity of the cotton-press. In particular localities in cities it sometimes happens that rents rise or fall from causes which are difficult to understand.

The complaint did state matters of agreement between the plaintiff and his tenant in regard to the house and lot in question, but with that, as before stated, the defendant corporation had nothing to do. It may be true also that the plaintiff limited his testimony to the matter of rents and the alleged cause of their falling off, but the issue made by the pleadings was broader than that: "The said defendant has rendered the said buildings unfit for business as a store or habita-

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tion as a \*dwelling-house, to the nuisance of the plaintiff and to his great damage ten thousand dollars, wherefore the said plaintiff demands damages in the sum of ten thousand dollars already sustained by the plaintiff in the premises." The plaintiff's objection amounts substantially to this, that in the matter of measuring the damages the jury were allowed too wide a latitude, although that latitude was not inconsistent with the nature of the case or the issue made in the record.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

17 S. C. 75

BARRON v. DENT.

(November Term, 1881.)

[1. *Judgment* ⇨291.]

Quære: Will the filing of the original proceedings before a trial justice in the clerk's office make the justice's judgment a judgment of the Circuit Court?

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 573-577; Dec. Dig. ⇨291.]

[2. *Justices of the Peace* ⇨164.]

A transcript of a valid judgment only of a trial justice can be filed in the office of the clerk of the Circuit Court: where the trial justice never acquired jurisdiction of the defendant, his judgment is a nullity, and so is the transcript.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 634; Dec. Dig. ⇨164.]

[3. *Process* ⇨134.]

Endorsement of service of summons, unsigned and unproven, is not evidence of service, even if written by the trial justice himself.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 164; Dec. Dig. ⇨134.]

[4. *Justices of the Peace* ¶58.]

An indorsement by the trial justice upon the summons, showing a taxation of costs for "hearing, examination of witness, and subpoena," does not warrant an inference that the defendant appeared in the case.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 214; Dec. Dig. ¶58.]

[5. *Evidence* ¶158.]

The Circuit judge, upon an inspection of a trial-justice's book of civil cases, seeing that it contained only entries of indorsements upon the original papers, which were already in evidence, rejected the book as testimony. In this there was no error.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 472, 473, 474½A-504, 506-526; Dec. Dig. ¶158.]

[6. *Justices of the Peace* ¶164.]

Parol testimony is inadmissible to prove that a defendant in a trial-justice's court appeared at the trial and defended. Service of the defendant, or his voluntary appearance, can be shown only by the original papers, or by the book which the law requires the trial justice to keep.

[Ed. Note.—Cited in *Cantrell v. Fowler*, 24 S. C. 427; *Cothran v. Knight*, 47 S. C. 252, 25 S. E. 142; *State v. Rice*, 49 S. C. 420, 27 S. E. 452, 61 Am. St. Rep. 816.

For other cases, see *Justices of the Peace*, Cent. Dig. § 634; Dec. Dig. ¶164.]

[7. *Damages* ¶3.]

[Cited in *Brock v. Bolton*, 37 S. C. 41, 16 S. E. 370, to the point that in action for tort, as to property, the word "damages" includes any injury to plaintiff's property.]

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. ¶3.]

[This case is also cited in *Benson v. Carrier*, 28 S. C. 119, 121, 123, 5 S. E. 272; and *Love v. Dorman*, 91 S. C. 384, 389, 74 S. E. 829, and distinguished therefrom.]

Before Pressley, J., Richland, July, 1881.

Action for partition instituted by Jacob T. Barron against Alice Dent and others, heirs at law of Samuel Dent, deceased. The plaintiff purchased the interest of James M. Dent,

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the \*other heir at law of Samuel, at sheriff's sale in 1881, under the judgment of Gooding & Son against J. M. Dent obtained in December, 1880, and also claimed title under an execution of *Stokes v. J. M. Dent* then in the sheriff's office, issued in November, 1876, for \$94.32, under transcript (or rather original proceedings) lodged in the clerk's office same day—the original judgment having been obtained before a trial justice in December, 1874. The deed of James M. Dent to the other heirs of Samuel Dent, in consideration of an indebtedness to the estate of Samuel in excess of his distributive share, was executed and recorded in January, 1880.

After the testimony was taken before the Circuit judge the case was submitted to him without argument. After a statement of the case his decree was as follows: The validity of the plaintiff's title rests upon the validity of the *Stokes* judgment. This was a judgment of an inferior tribunal, and "if the proceedings show upon their face a want of jurisdiction, or fail to show that which was

necessary to confer jurisdiction, the whole is an absolute nullity." An inspection of the record offered fails to show that the said James M. Dent was ever served with the summons or otherwise brought within the jurisdiction of the court rendering the judgment against him. This defect the plaintiff proposed to remedy, and offered to prove by a witness that the said James M. Dent voluntarily appeared at the trial upon which judgment was rendered against him. The plaintiff was not permitted to prove such appearance by parol, and the record of the trial justice offered failing to show that the party against whom the judgment in question was rendered was ever brought within the jurisdiction of the trial justice, the judgment was a nullity, and could therefore lend no aid in perfecting a sale otherwise ineffectual to pass the title herein sought to be enforced.

It is therefore ordered, adjudged, and decreed, that the complaint be dismissed with costs.

Other matters, and also the points raised by the exceptions, are fully stated in the opinion.

Mr. W. H. Lyles, for appellant.

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\*Mr. W. A. Clark, contra.

April 11, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action for partition of real estate, which belonged to one Samuel Dent at the time of his death. The plaintiff's claim rested upon an alleged purchase by him at sheriff's sale of the interest of James M. Dent, one of the heirs of Samuel Dent, while the defendants, who were the other heirs, claimed the same interest under a deed from said James M. Dent. The interest of James M. Dent in the land was levied on and sold by the sheriff under an execution in favor of A. F. Gooding & Son against James M. Dent, but it appeared that prior to the recovery of the judgment upon which this execution was issued the said James M. Dent had conveyed all his interest in the land to the defendants.

The plaintiff then sought to sustain his claim by an alleged judgment recovered by one M. A. Stokes against James M. Dent prior to the date of said conveyance, and the question made by this appeal is as to the validity of the *Stokes* judgment. This purported to be a judgment recovered before a trial justice, a transcript of which was lodged in the clerk's office and execution issued thereon. The case was tried before the judge without a jury; and as it did not appear from an inspection of what was called the judgment roll, which had been filed in the clerk's office as the transcript of the judgment, that the defendant therein had ever



been served with process, he held that the alleged judgment was a nullity, inasmuch as the proceedings failed to show on their face that the trial justice had acquired jurisdiction of the person of the defendant therein.

The plaintiff offered parol evidence to show that the defendant in the case before the trial justice had voluntarily appeared and thereby waived the necessity for service; but this evidence was rejected, and this is relied upon as one of the grounds of appeal. It seems also that the book kept by the trial justice was offered in evidence, but it was conceded that this showed nothing more than the indorsements on the original summons found in the judgment roll. The indorse-

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ments on the summons showed the taxation of costs, and among the items were charges for "hearing," "for examining one witness," for "one subpoena writ," and for constable's costs. There was also an indorsement, not signed by any one, however, in the following language: "I have served the defendant with a copy of the within summons. 21st November, 1874"—which seems to have been the date of the original summons.

The appellant contends, first, that after the transcript was filed in the clerk's office it became a judgment of the Court of Common pleas, a court of general jurisdiction, and therefore that it was not necessary that all the jurisdictional facts should appear affirmatively upon the record. Waiving the inquiry whether the filing of the original proceedings before the trial justice in the clerk's office was a compliance with the provisions of the code authorizing the filing of a transcript of a trial justice's judgment in the clerk's office, and thereby imparting to it the character and efficiency of a judgment of the Superior Court, it is sufficient here to say that before such a transcript can be filed in the clerk's office there must be a valid judgment of the trial justice, and if the trial justice never acquired jurisdiction over the person of the defendant, then the so-called judgment was a nullity—and no transcript of it could impart any vitality to it.

Second. Next it is contended that the Circuit judge erred in not finding that the proceedings before the trial justice did show that the defendant therein had been served with the summons. This ground rests upon the position that the unsigned indorsement, copied above, was sufficient to show that the summons had been served by the trial justice himself, inasmuch as one of the witnesses, who was the clerk of the trial justice, testified that all the indorsements on the summons were made by him, in the presence and under the direction of the trial justice; and it was therefore argued that it was the same in substance as if the trial justice had signed this indorsement and thereby declared that he had served the defendant with a

copy of the summons. But even assuming this to be true, improbable as it appears, yet the law requires that where process is served by a person other than the sheriff, proof

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of such service shall be made by the affidavit of the person making the service, and hence his mere certificate will not answer.

Third. Again, the appellant contends that the fact that the defendant appeared and made a defence may be inferred from the indorsements upon the summons, showing that there was a hearing and examination of witnesses, which would not have been necessary if the defendant had not appeared. But Subdivision 8 of Sec. 90 of the code of procedure expressly provides that "in case a defendant does not appear and answer, the plaintiff cannot recover without proving his case." The provision in the next subdivision cannot be regarded as nullifying the provision of the preceding subdivision, but must be construed in connection with it, and its terms show that it does not apply to a case of default, but to a case where the other party appears.

Fourth. The appellant's next position is that it was error to exclude the book of the trial justice. Practically this was not done. The case was being heard by the judge, and inasmuch as, upon inspection of this book, it was found that the book showed nothing more than the indorsements on the original summons, he rejected it as unnecessary, and in this there was no error.

Fifth. Finally, the appellant contends that there was error in excluding the parol evidence offered to show that the defendant appeared at the trial and defended the case. It is quite true that "a voluntary appearance of a defendant is equivalent to personal service of the summons upon him" (Code, Sec. 162). If, therefore, it had appeared that the pleadings in this case were in writing, and that the defendant had put in an answer, or if the pleadings were oral and the book required to be kept by the trial justice, "wherein he shall insert all his proceedings in each case by its title, showing the commencement, progress, and termination thereof" (Gen. Stat., Ch. XXV., Sec. 41), had shown that the defendant had appeared, that would have been sufficient to show that the trial justice had acquired jurisdiction, even in the absence of any evidence that the summons had been served on the defendant or that he had given a written admission of service.

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\*But where the proceedings before the trial justice, either as exhibited in the original papers, or in the book which the law requires him to keep, which, in the case of *Cherry v. McCants*, 7 S. C. 224, is declared to be the highest and best evidence of the proceedings before him, fail to show jurisdiction, we do not think it is competent to show by parol

evidence the fundamental jurisdictional fact that the party had, by service of summons or by voluntary appearance, been brought within the jurisdiction of the trial justice. That fact must appear upon the proceedings, otherwise the whole is a nullity. This doctrine has long been established (*Devall v. Taylor, Cheves, 5*) and has been recently recognized and affirmed in the State, *ex rel. McCall, v. Cohen, 13 S. C. 201*.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

### 17 S. C. 80

STATE, *ex relatione* RICHLAND COUNTY, v. COLUMBIA.

(November Term, 1881.)

#### [1. Courts ⇨1.]

The right and duty of performing acts involving judgment and discretion do not constitute the officer or body so acting a court, which is a tribunal empowered to hear and determine issues between parties upon pleadings and evidence, according to settled principles of law. Hence a municipal corporation invested with power to grant licenses for the sale of liquors is not thereby made a court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1-4, 6-9, 91-106; Dec. Dig. ⇨1.]

#### [2. Intoxicating Liquors ⇨70.]

The city council of Columbia, under its charter, is an inferior court for certain limited purposes, but does not act as a court in passing upon applications for licenses to sell liquors.

[Ed. Note.—Cited in *Hunter v. Moore, 39 S. C. 394, 395, 396, 17 S. E. 797*.

For other cases, see Intoxicating Liquors, Cent. Dig. § 68; Dec. Dig. ⇨70.]

#### [3. Courts ⇨204, 207, 244.]

The jurisdiction of the Supreme Court embraces four classes of powers: 1, appellate jurisdiction in cases of chancery; 2, the correction of errors of law under such regulations as the general assembly may prescribe; 3, the power to issue certain specified writs; 4, the power to issue such other and remedial writs as may be necessary to give it a general supervisory control over all other courts in this State. Const., Art. IV., § 4.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⇨204, 207, 244.]

#### [4. Courts ⇨207.]

The writ of prohibition can be issued by the Supreme Court by virtue only of the power conferred in the fourth class, and can therefore be used only when necessary to enable this court to exercise a supervisory control over other courts. It can issue to an inferior court only for the purpose of keeping it within its jurisdiction.

[Ed. Note.—Cited in *Ex parte Bacot, 36 S. C. 130, 15 S. E. 204, 16 L. R. A. 586; Hunter v. Moore, 39 S. C. 394, 395, 396, 17 S. E. 797*.

For other cases, see Prohibition, Cent. Dig. § 65; Courts, Dec. Dig. ⇨207.]

#### [5. Prohibition ⇨6.]

A municipal corporation having the power

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to issue licenses, the Supreme Court cannot, by prohibition, correct any errors of law or fact

committed by the corporation in determining matters involved in the exercise of such power.

[Ed. Note.—Cited in *State ex rel. Sawyer v. Fort, 24 S. C. 520*.

For other cases, see Prohibition, Cent. Dig. §§ 31-33; Dec. Dig. ⇨6.]

#### [6. Constitutional Law ⇨80.]

[A legislative grant to a municipality of power to grant liquor licenses is not void as an unconstitutional delegation of judicial power to the municipality.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 145; Dec. Dig. ⇨80.]

[This case is also cited in *Blake v. Walker, 23 S. C. 525*, and distinguished therefrom.]

This was a rehearing of the judgment rendered by this court in *State, ex relatione Richland County, v. Columbia*, reported in 16 S. C. 412. It was an application for a writ of prohibition to prohibit the city council of Columbia from issuing any licenses to liquor-dealers until after payment by them of \$100 to the county treasurer, according to the terms of the act of December 24, 1880 (17 Stat. 460). The city of Columbia took the position that under the act of 1879 (17 Stat. 69) this act did not go into operation until January 13, 1881, and did not therefore affect licenses granted January 1, 1881.

Mr. J. R. Abney, for the relator.

Mr. F. W. McMaster, contra.

April 11, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The counsel for the relator has been permitted to argue a motion for a rehearing in this case, not because the court entertained any doubt as to the correctness of its original decision, but because that decision turned upon a question of jurisdiction which was not raised and not argued at the former hearing.

The argument on behalf of the relator rests upon the ground that because the act which is sought to be restrained is an act of a judicial nature it must necessarily be regarded as the act of a court, and therefore this court would have original jurisdiction to issue the writ asked for. It does not follow, however, that a judicial act can only be performed by a court. There is no reason why the legislature may not entrust the performance of acts of a judicial nature to persons and bodies corporate who do not constitute one of the courts of the state; and it is the constant habit to do so.

The legislature has at various times conferred upon clerks, sheriffs, and many other officers the power to perform judicial acts, in the sense that they involve the exercise of

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judgment and discretion; and we do not understand that it was ever supposed that such officers were thereby constituted courts. Indeed, in one sense every ordinance passed by a municipal corporation and every act of the general assembly is a judicial act in that



it involves the exercise of judgment and discretion, and it would lead to very extraordinary and anomalous results to hold that whenever a person or corporation is invested with power to perform a judicial act, in the sense above indicated, that such person or corporation is thereby constituted one of the courts of this state.

There is necessarily involved in the idea of a court that of a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law. It does not seem to us that the granting of a license to sell spirituous liquors involves any such idea. That power might just as well have been conferred upon the mayor of the city, the clerk of the court, or any other officer; indeed, as matter of fact, the legislature has conferred a similar power—that of granting licenses to hawkers and peddlers—upon the clerk of the court.

Again, the city council of Columbia have, by the charter of the city, been constituted a court, but not a court of general jurisdiction. Their jurisdiction as a court is defined and limited to the trial of persons for violating any of the ordinances of the city, and we do not see that the charter constitutes them a court, in the sense of that term as used in the constitution, for any other purpose. Hence when the city council of Columbia grant a license for the sale of spirituous liquors, or do any other act permitted by the charter, they do not act as a court, even though such act may be of a judicial nature, in the sense that involves the exercise of judgment or discretion.

But even if we could hold that the city council act as a court in granting or refusing a license for the sale of spirituous liquors, we think there would be another insuperable objection to our granting the writ prayed for. Whether the Court of Common Pleas can issue a writ of prohibition to an infe-

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rior court for any other purpose than to keep it within its jurisdiction need not now be considered, and as there is some conflict of authority upon that question, we do not propose at this time to express any opinion, but we are satisfied that this court can only issue a writ of prohibition to an inferior court for the purpose of keeping it within the limits of its jurisdiction, and not for the purpose of correcting or preventing any error of law in the exercise of its admitted powers.

The powers of this court are defined in the constitution, Art. IV., § 4, and, as has been said in *Ex parte Childs*, 12 S. C. 117, its jurisdiction embraces four classes of powers: 1st, appellate jurisdiction in cases of chancery; 2d, the correction of errors at law under such regulations as the general assembly may prescribe; 3d, the power to issue certain specified writs; 4th, the power to issue "such other original and remedial writs as

may be necessary to give it a general supervisory control over all other courts in this state."

It will be observed that the jurisdiction for the correction of errors at law is not given in general and absolute terms, like its appellate jurisdiction in cases of chancery, but it is "under such regulations as the general assembly may by law prescribe;" and as it is not pretended that the general assembly has prescribed any regulations by which this court can, through the medium of a writ of prohibition, correct errors of law committed by an inferior court, it would seem to be clear that this court has no jurisdiction to issue the writ for that purpose, but can only do so for the purpose of exercising some supervisory control over the court to which the writ is issued. Now the power to issue the writ for the purpose of exercising supervisory control cannot be construed to embrace the power to correct mere errors of law, for that would be a repetition of the power already conferred in the second class of powers. It must, therefore, be regarded as a power to do just what the word "control" implies—that is, to keep all other courts in the state within the limits assigned to them, so that no one of them may be allowed to overstep the jurisdiction committed to it.

In this case the object plainly is, not to

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prevent the exercise of a power not committed to the city council, but to correct an alleged error of law in the construction of a statute. The power to grant licenses is undoubtedly conferred upon the city council, and the only question raised by the relator is whether there has been an error of law in the exercise of this admitted power. The language of the act of 1880, (17 Stat. 460) is as follows: "No license for the sale of intoxicating liquors shall be granted by any municipal authorities in any city, town, or village in this state, except upon the payment, by the person applying for the same, to the treasurer of the county in which such city, town, or village is situated, [of] the sum of one hundred dollars;" and in the general law (15 Stat. 797) other conditions are prescribed.

The result is that municipal authorities being invested with power to grant licenses upon certain conditions, they must necessarily determine whether the required conditions have been complied with, and having this power they must necessarily have the jurisdiction to decide, first, what are the conditions prescribed, and, second, whether they have been complied with; and any error they may commit, either of law or fact, cannot be corrected or prevented by a writ of prohibition issuing out of this court, for they are simply undertaking to exercise a power conferred upon them, and cannot be said to have exceeded their jurisdiction, even

though they may have erred in deciding upon a matter the decision of which was entrusted to them, as to which, however, we express no opinion.

The judgment of this court is that the motion for a rehearing be refused and that the petition be dismissed.

17 S. C. 84

ARCHER v. MUNDAY.

(November Term, 1881.)

[1. *Partition* ¶91.]

Testator directed his lands to be divided by commissioners equally between his daughter A and the children of his son B, to them and their heirs forever. The commissioners made the division and assessed a sum of money to be paid by A to equalize the partition. *Held*, that the payment of this assessment was not necessary to enable A to recover from a stranger in possession the part assigned to her.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 234; Dec. Dig. ¶91.]

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[2. *Limitation of Actions* ¶70.]

\*The action for recovery having been brought long after the assessment laid, and more than four years after the children attained their majority, the debt of A was barred by the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 386; Dec. Dig. ¶70.]

[3. *Wills* ¶671.]

The title of A to this land was clearly not equitable; if not a devisee, she was certainly an heir at law.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1577, 1578, 1586; Dec. Dig. ¶671.]

[4. *Ejectment* ¶15.]

The facts, circumstances, and pleadings of this case show that the testator of plaintiff was the common source of title of both parties to the action, beyond whom plaintiff need not go in proving her title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 59-62; Dec. Dig. ¶15.]

[5. *Wills* ¶531.]

The devise in this case, taken together with a subsequent clause giving the residue of his property to trustees for his son B, to be fully possessed and enjoyed by B for life, and after his death such property "with the lands already specified to his children, to them and their heirs forever, discharged of the trust," shows testator's intention to have been that A should have a moiety, and that the division was not to be per capita.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1150; Dec. Dig. ¶531.]

[6. *Estoppel* ¶27.]

If A had received property under her husband's will (a fact not established by the evidence), it would not estop her from recovering her land of inheritance from a stranger who held under deed of the husband with general warranty.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 67; Dec. Dig. ¶27.]

Before Kershaw, J., Abbeville, February, 1881.

Action by Frances E. Archer against William R. Munday, commenced August 11, 1879.

It appears from the brief that James M. Calvert had three small children in 1846, and therefore the youngest of them must have attained his majority not later than 1867. The fourth clause of testator's will is given in full in the opinion. The eighth clause was as follows:

"I give, devise, and bequeath to William Hill, my grandson, and Robert A. Archer, my executors, hereinafter named, under the trusts hereinafter set forth, the negroes Charles, Sarah, Anaca, and Edy, Jr., with their future increase. Also an equal share of the rest and residue of my estate which may remain for final distribution at the settlement of my estate upon my decease. To be held by them or the survivor of them and their heirs or successors, in trust for the use of my son, James M. Calvert, they permitting him to use, possess, and enjoy the same as fully and freely as if the same were given to him absolutely, but not to be at his disposal or liable to seizure for his debts or contracts; and after the death of my said son, James M. Calvert, I give, devise, and bequeath all the aforesaid property with the lands already specified to his children, to them and their heirs forever, discharged of the trust."

Other matters are fully stated in the opinion.

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\*Mr. T. P. Cothran, for appellant.

Messrs. M. P. De Bruhl and S. C. Cason, contra.

April 11, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was an action to recover a tract of land in Abbeville county. The plaintiff claimed by a will of her father, who died in 1846. The defendant held a deed from one Geo. Nickles, who was the grantee of Robert A. Archer, the husband of the plaintiff. This deed was executed in 1849, and upon it the plaintiff had renounced her dower. Archer, the husband, died in 1873.

The clauses of the will of plaintiff's father under which she claimed are as follows: "My will is that the remainder of my lands, supposed to be about three hundred and sixty acres, be equally divided between my daughter Frances E. Archer and the children of my son James M. Calvert, to them and their heirs forever. My will is further, as it respects my lands, that three disinterested persons be appointed by the Court of Ordinary for the district in which the premises lie, to go upon the lands and point out such lines of demarcation according to the quantity specified, taking into view situation and timbered lands, as may be best suited to the interests of all concerned."

Shortly after the death of the testator three commissioners, appointed as the will



directed, went upon the lands and divided it into two parts, one of which, containing one hundred and eighty-three and one fourth acres, was allotted to the plaintiff, then the wife of Robert A. Archer.

In the assignment to the plaintiff the commissioners assessed the plaintiff \$120.75, to be paid by her to the children of her brother, James M. Calvert. This is the land now in dispute. There was no direct evidence before the court that this assessment had been paid. The plaintiff herself was examined, but could not say positively whether it had or not. The court held that from the lapse of time, more than thirty years, it might be presumed paid.

There was evidence that the plaintiff was in possession of a house and lot in Abbeville,

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worth some \$2,000 or \$2,500, under the will of her husband, over which, however, there was a judgment in favor of Robert Archer's brother for some \$3,000. This judgment had not been enforced, from leniency to the widow. It further appeared that she has been assigned a homestead in personalty to the amount of \$262.

At the close of plaintiff's testimony defendant moved for a nonsuit, on the grounds, 1st, that the payment of the \$120.75 assessed on the plaintiff at the division of the land by the commissioners was a precedent condition to the vesting of title to the land in her; and, 2d, that the division of the land should have been per capita between the plaintiff and the children of James M. Calvert, and not in equal parts between the two. This motion was overruled.

When the testimony was all in the defendant moved to dismiss the complaint on the further ground that plaintiff, being in possession of property as devisee of her husband, she was estopped from disturbing the defendant, who was in possession by warranty deed from her said husband. This motion was also overruled, the judge holding that under the will of John Calvert the plaintiff took one half of the land devised to her and the children of John M. Calvert.

The jury returned a verdict for the plaintiff for the land.

The appeal brings up the following questions: 1. Should the presiding judge have required further evidence as to the payment by the plaintiff of the \$120.75 assessed upon her at the division of the land?

2. Was plaintiff's title merely an equitable title, and insufficient to defeat the defendant?

3. Did the presiding judge err in holding that the defendant could not dispute the plaintiff's title, as he held the deed of plaintiff's husband, who derived his title from plaintiff?

4. Did the judge err in sustaining the division of the land by the commissioners into two equal parts, instead of per capita be-

tween the plaintiff and the three children of James M. Calvert?

5. Did the warranty deed of plaintiff's husband estop plaintiff, she having been vouched and holding property real and personal through her said husband?

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\*1. We do not concur in the position taken by the defendant that the payment of the \$120.75 assessed by the commissioners was a precedent condition to the vesting of title in the land. There is nothing in the will, either directly expressed or impliedly suggested, to sustain this view. The title to the land was not in abeyance upon the death of the testator until the division. It either passed by inheritance to his heirs at law, the plaintiff being one, or it passed by the will to the devisees. The will is not set out in full, but in either case the plaintiff was invested with title subject to the division which was directed. The payment of the \$120.75 was assessed, not by the testator, but by the commissioners after his death. The commissioners had no power delegated to them to attach conditions either precedent or subsequent.

But if this was otherwise, we think the presiding judge was justified in holding that this assessment was not in the way. Even if this amount had been evidenced by a sealed obligation, the lapse of thirty years would have been sufficient to regard it paid upon the facts here. It is not necessary to express an opinion generally as to the effect of such great lapse of time on sealed obligations. The tendency has been to regard even twenty years as something more than a mere presumption of payment. The recent act, however, placing such obligations on the same footing with unsealed contracts as to the statute of limitations, will soon remove this question from judicial inquiry, and as it is not necessarily involved here we reserve opinion.

The assessment in this case was not evidenced by bond or other sealed paper. It was no doubt accepted by the plaintiff as a debt due by her to the children of James M. Calvert to equalize the division in the land; but at most it was an open contract implied by the circumstances, and we can see no reason why it was not subject to the statute of limitations, and barred by that statute, after four years, from the majority of the children. In any event we sustain the result of the judge's ruling.

2. There is nothing in the case upon which to base the proposition that plaintiff's title was merely an equitable title. As has been said above, she was either an heir at law of

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the testator or a devisee, in either of which cases she had legal title. There was no trust or any species of equitable interest created in her favor. The language of the will is "between my daughter Frances E. Archer

and the children of my son James M. Calvert, to them and their heirs forever." This is the language of the largest legal estates, not equities.

3. Error to the judge is assigned because he held that defendant could not dispute plaintiff's title. We concur in this holding. Ordinarily the plaintiff in an action to recover land must make out a perfect title; until this is done the defendant, though he be a bold trespasser, as to title in himself may hold his arms and rest in safety. But there are exceptions to this general rule, one of which is where both parties claim through a common source. In such case neither party need go further back than this common origin. In this case both parties claimed virtually through the will of old man Calvert—the plaintiff directly and the defendant through plaintiff's husband, whose title depended upon his marital rights. If such be the fact, the defendant could not dispute plaintiff's title, as will no doubt be admitted.

The point, however, which defendant makes is that the judge was not warranted in concluding that Robert A. Archer had no other title than through his wife. The facts are that James Calvert died in possession of this land. At that time the plaintiff was the wife of Robert A. Archer. Mr. Calvert undertook to dispose of this land by his will.

In accordance with directions in the will commissioners went upon it and allotted this portion to the plaintiff, and it is fair to presume that her husband then took possession by virtue of this allotment. Under these circumstances he could not dispute the title of his wife, nor could any grantee of his.

It may be said, however, that there was no evidence that defendants claimed through Robert Archer. This cannot be denied in face of the statement in the brief "that the defendant, by way of defence, set forth the conveyance by Robert A. Archer to George Nickles and the renunciation of dower by the plaintiff." We think these facts precluded defendant from disputing plaintiff's title.

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\*4. Did the judge err in holding that the land was properly divided into two equal parts? It seems that the testator had but two children, the plaintiff and a son, James M. Calvert, the son having three children. It was natural that the testator should desire to make an equal division of his property between these two. The language which he used in his will requires no distinction to accomplish this end. In fact it requires some straining to reach any other conclusion.

An equal division between his two children, Frances being one, and this son and his children representing the other, seems to have been the scheme of the will. This will be seen by a subsequent clause (the eighth), in which he disposes of the rest and residue of his estate. As before stated, the will in

full is not given. But enough is furnished for us to conclude that such was the general scheme, and we have no doubt that the testator intended the land to be divided into two parts. The commissioners so understood it, and for thirty years the parties immediately interested have submitted. We do not see by what right the defendant can now dispute it. The cases of *Conner v. Johnson*, 2 Hill Eq. 43, and *Cole v. Creyon*, 1 Hill Eq. 319 [26 Am. Dec. 192], when applied to the facts of this case, with the light thrown upon the intention by the eighth clause of the will, we think sustain this view.

5. Did the deed of plaintiff's husband with warranty estop plaintiff from asserting her rights under her father's will? An ancestor may bind heirs or devisees to the extent of real estate descended or devised. This is familiar doctrine. But a binding contract of the ancestor does not pass the title of his heirs nor prevent them as devisees from asserting it. One may be estopped by his own acts, but not by the acts of another to which he is no party. This action was for the recovery of plaintiff's land. It was no defence to such claim for the defendant to demand that the plaintiff should make good the warranty of her husband's deed. This she might be compelled to do if she had lands descended or devised from her husband of sufficient value, and still she would be entitled to recover the land if it belonged to her.

In this case, however, the defence, even if

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a good one, was \*not made out. The only property it seems the plaintiff received unencumbered was personally as an exemption under the homestead laws, amounting to \$262. The house and lot she seems to be holding at the sufferance of indulgent creditors.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 91

STACKHOUSE v. WHEELER.

(November Term, 1881.)

[1. *Executors and Administrators* ⚡329.]

When, in action to marshal assets, the court takes possession and control of the property of a testator for the purpose of paying his debts, a purchaser from a devisee of a part of such property, without leave of the court and with knowledge of the action pending, purchases subject to the right of the court to take the property for the purpose of paying the debts of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1353; Dec. Dig. ⚡329.]

[2. *Execution* ⚡272.]

A purchaser at sheriff's sale of the interest of the debtor in land of her deceased husband, of whom she was sole devisee and also executrix, sold under judgment founded upon her individual debt,—such purchaser having knowledge that an action, instituted by the executrix and



with purposes not fully accomplished, is then pending to subject this very land to the payment of testator's debts,—has no valid title as against one who afterwards purchases under a subsequent order of the court in that cause.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 771, 781–788; Dec. Dig. ⚡272.]

[3. *Execution* ⚡264.]

The purchaser at sheriff's sale took only the interest of the devisee remaining after the payment of testator's debts.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 747–758; Dec. Dig. ⚡264.]

4. This case distinguished from *Smith v. Grant*, 15 S. C. 136.

[5. *Executors and Administrators* ⚡329.]

In action instituted by an executrix and sole devisee to have her testator's lands sold in aid of assets, the court enjoined all creditors of testator from proceeding either at law or in equity to sue or collect any claims against the estate of testator. *Held*, that this order prohibited a creditor of testator from bringing action against the devisee to subject the lands descended to the payment of his demand.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1353; Dec. Dig. ⚡329.]

[6. *Appeal and Error* ⚡499.]

Exception alleging error in an omission to charge not considered, it not appearing in the case that the Circuit judge was requested so to charge.

[Ed. Note.—Cited in *Sloan & Son v. Courtenay*, 54 S. C. 345, 32 S. E. 431.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295–2298; Dec. Dig. ⚡499.]

Before Wallace, J., Marion, October, 1881.

This case is fully stated in the opinion of this court.

Mr. C. A. Woods, for appellant.

Messrs. W. W. Harilee, Johnson & Johnson, contra.

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\*April 17, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. John C. McClenaghan, by his will, after directing his executrix to pay all his debts and funeral expenses, devised and bequeathed his whole estate both real and personal to his wife, Mary S., and appointed her executrix. She subsequently intermarried with Duncan McIntyre, and on May 6, 1871, they filed a complaint to marshal the assets of the testator's estate, for injunction and general relief. Under this action an order, without date, was granted enjoining all creditors of the testator, as well as those of McClenaghan & Fairlee, a legal firm of which the testator was the surviving member, "from proceeding either at law or equity to sue or collect any claims against the estate of John C. McClenaghan, deceased;" requiring such creditors to prove their claims before a referee; directing that the executors of McClenaghan, as well as the executor of Fairlee, account before said referee, and that the real estate of the testator be sold by the referee. On February 24,

1872, the referee reported that he had sold a part of the real estate, but that the remainder was not sold for the reason that it was represented by counsel that the executrix, Mrs. McIntyre, was sole devisee, and that she desired to avoid a sale of the balance if possible, and that it was probable enough had been sold to discharge the debts of the testator; consequently, the referee had indefinitely postponed any further sale. This report was confirmed by an order dated February 23, 1872, which must be a clerical error, as the report bears date the 24th.

This report seems to have been made before any proof of claims had been taken, for we find that on September 18, 1872, the referee made another report of the sale, in which he says: "That from the amount of claims proven, after consultation with plaintiffs' counsel, it was thought that a sufficiency had been sold to meet the liabilities of the testator. If, however, in auditing the claims against the firm of McClenaghan & Fairlee, it should become necessary to sell the remainder of the testator's lands, the referee can yet do so; a necessity, however, which the referee hopes will not occur." In this report the referee embraces a schedule of the

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claims proved, in reference to which he says: "To many of the simple contract claims plaintiffs' counsel interpose the plea of the statute of limitations, which, if insisted on, will bar many of that class of claims." In the schedule such of the claims as appear on their face to be subject to that plea are marked "barred by statute." There is also appended to the report a list of claims, signed by plaintiffs' counsel, to which the plea of the statute was interposed; and while the claim presented by E. T. Stackhouse against McClenaghan & Fairlee is marked "barred" on the schedule, it is not embraced in the list of claims to which the statute was pleaded. This report was likewise confirmed, and the referee ordered to pay the costs and fees in the case, the taxes, judgments, and specialty claims, by an order dated February 23, 1872, which no doubt is a clerical error and should be 1873; but no order was made in reference to the simple contract claims, for the reason, doubtless, that the report of the referee left it doubtful which of the simple contract claims were established.

By an order dated March 28, 1873, the referee was required to turn over to the clerk of the court all the funds and assets in his hands belonging to the estate of the testator, with a statement of money received and paid out by him; and the clerk was directed to pay out all funds coming into his hands, "as heretofore ordered by this court." This order was complied with by the referee, and the clerk, by a subsequent order dated December 5, 1874, was directed "to pay over to the cred-

itors of J. C. McClenaghan, deceased, who have proven their claims before him, any funds in his hands or that may come into his hands, pro rata, according to their respective demands."

On July 16, 1875, H. McClenaghan, one of the simple contract creditors, who had presented a claim before the referee, took out a rule on the clerk to show cause why he had failed to pay his claim. To this rule the clerk made return that the counsel for the plaintiffs had been changed since the order to pay out the funds was passed, and that he had received notice from the counsel substituted for those originally representing the plaintiffs that they interposed the plea of the

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statute "to \*claims allowed, and objected to the payment out of the fund." Under these circumstances he did not feel at liberty to proceed in paying out the fund, although before receiving notice of the change of counsel he had made a payment on the claim of H. McClenaghan, inasmuch as that claim was not on the list of those to which the plea of the statute had been interposed by the original counsel appended to the report of the referee; but that it then appeared from an affidavit of the referee, dated July 22, 1875, accompanying the return of the clerk to the rule that the plea of the statute was interposed "to every claim," and that he had overruled the plea as to the claim of H. McClenaghan.

This affidavit is not embraced in the "Case" as submitted here, but by consent of counsel has been introduced; and it is difficult to reconcile its statements with the previous report of the referee, made nearly three years before, except by supposing that the referee after that lapse of time had forgotten the facts; for it is manifest from his report, as well as from the list of claims appended thereto, that the statute was not pleaded to all of the simple contract claims, while in the affidavit it is stated that the plea of the statute was interposed "to every claim." This, however, is not a matter of any consequence to our present inquiry, for this affidavit was not made until long after the sale by the sheriff, under which the defendant claims, and therefore could have had no influence in inducing her to purchase. By an order dated July 23, 1875, the rule on the clerk was discharged, and it was ordered "that unless proper legal steps be taken to test the bona-fide and legal status of the claims proven, or any of them, by the first day of September next, the clerk of the court do proceed without further delay to pay out the funds in his hands upon claims proved according to their priorities and legal rights."

On August 24, 1875, another order was granted, which, after reciting that the referee's report on claims "is too indefinite, and that the clerk was at a loss to know how to pay out the funds in his hands under the va-

rious preceding orders, directed the clerk to pay the specialty claims and hold the balance of the funds subject to the further or-

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der of the court, \*and that he "make a full report on the condition of all claims, including simple contract claims, to the next term of this court, with a succinct statement of the questions he may wish to refer to said court for its decision." Under this order the clerk made a report on November 30, 1875, in which, after setting out what the referee had done together with the schedule of claims substantially as stated by the referee, except that none of the claims on the schedule was marked "barred by the statute," as well as the list of claims to which the plaintiff's original counsel had interposed the plea of the statute, he says: "As the report of the special referee is very indefinite in distinguishing the claims to which the statute of limitations is pleaded, the clerk feels embarrassed, and desires the judgment of the court whether the former order confirming the report shall be his guide, with the after explanations of the special referee contained in an affidavit sustaining the return under the rule against the clerk, and herewith referred to as part of this report."

Upon this report two orders were taken, both dated December 3, 1875, one adjudging that the claim of H. McClenaghan was a valid claim, and the other directing the original referee to "report upon the claims against the estate upon calling upon the creditors to appear before him after due notice;" and this is conclusive evidence that the court did not consider that the amount of the claims had ever been ascertained. Subsequently another referee was substituted to take proof of the claims of J. W. Dillon and Dillon & Russ. Under this last-mentioned order a claim was presented by E. T. Stackhouse as assignee against John C. McClenaghan as agent of the creditors of J. W. Dillon and Dillon & Russ. After protracted litigation, this claim, which is understood to be the same as that originally presented by Stackhouse against McClenaghan & Fairlee, was established (12 S. C. 185), and the remainder of the real estate of John C. McClenaghan, consisting of a house and lot in the town of Marion, which is the subject-matter of the present suit, was ordered to be sold by the master, and the same was sold in November, 1880, pursuant to said order, and bid off by the plaintiff E. T. Stackhouse, to whom

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titles were \*made and the sale confirmed by an order of the court made November 20, 1880.

While the foregoing proceedings were pending, to wit, on the first Monday in August, 1874, the sheriff, under an execution in his office against Mrs. Mary S. McIntyre, issued on a judgment recovered against her for a debt due by her individually, "levied upon



and after due and legal notice sold the interest of Mary S. McIntyre in the house and lot above mentioned." At this sale the defendant, Susan W. Wheeler, became the purchaser, paid the purchase-money, and took titles from the sheriff. On January 7, 1881, this action was commenced to recover possession of said house and lot. It appeared in evidence that the defendant paid full value for the property and had improved it very much since her purchase. There was also evidence from one of the original attorneys for Mrs. McIntyre, that up to April 6, 1870, the rents of the house and lot were collected for her as executrix, as well as evidence from C. Graham "that he rented the house and lot from Mrs. McIntyre and accounted to her for the rents," but when this was, did not appear. It was conceded that the defendant not only had such constructive notice as might be implied from the pendency of the proceedings in the case to marshal assets, but that, through her husband and agent, who had examined these proceedings prior to the sheriff's sale, she had at the time of that sale actual notice of all the facts disclosed by those proceedings. It was also in evidence that the sale to plaintiff was forbidden by the defendant and notice given of her claim. This with the record of the proceedings to marshal the assets of the estate of John C. McClenaghan, of which an abstract has been given, constitutes the substance of the evidence offered at the trial.

The Circuit judge charged the jury that the complaint to marshal the assets of the estate of McClenaghan enabled his creditors to establish their demands under that action, and prevented them from bringing separate actions against the executors; that while the land was in possession of the devisee, who was a party to that action, it was certainly competent for the court to order a sale to

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pay debts of the testator, but if \*there was a bona-fide alienation by the devisee it was not invalid by reason of the pendency of the action to marshal assets, because that action was not a proceeding to subject lands in the possession of the devisee to the payment of the debts of the testator. He also instructed the jury that the sale by the sheriff was a sale by the devisee, and left it to them to say whether the alienation was bona-fide, and what was the nature of the possession by Mrs. McIntyre of the lot in question; telling them that if she held possession as executrix the sale by the sheriff was invalid, but if she held as devisee and executrix the sale if bona-fide would be valid.

To this charge plaintiff excepted, and requested the judge to charge as follows: "That the court having taken charge of the land devised, upon the application of the devisee and executrix, for the purpose of sale and the payment of debts of the testator, there could be no valid alienation except by the order of the court; that under the cir-

cumstances of this case the alienee of the devisee and executrix could stand in no better position than the devisee and executrix before such alienation; that the jury should find for the plaintiff the land in dispute;" all of which was refused.

The jury found a verdict for the defendant and judgment being entered thereon the plaintiff appeals. 1st. Because of error in charging that the sale by the sheriff and purchase by the defendant was an alienation by the devisee before suit brought by the creditors against the devisee to subject the lands devised to payment of testator's debts. 2d. Because the jury were instructed that the action to marshal assets was not an action to subject the lands devised to payment of the debts of the testator. 3d. Because the judge charged that the alienation by the devisee would be valid notwithstanding the pendency of the action to marshal assets. The 4th, 5th, and 6th exceptions allege error in refusing to charge as requested by plaintiff. 7th. Because the judge erred in refusing to charge that Mrs. McIntyre held the property in question as executrix until the debts of the testator were paid, and until then could make no valid alienation as devisee.

The fundamental inquiry in this case is

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as to the effect of \*the proceeding to marshal assets. In the case of Thomson v. Palmer, 2 Rich. Eq. 36, which is regarded as a leading case upon this subject, it is said: "When an executor or administrator comes for the aid of the court in administering the estate in his hands, the court should be placed in possession of the fund to be administered, and when the court is called upon to order a sale of land in aid of assets, it should have the command of the proceeds of sale to be administered. We should not be required to enjoin creditors from proceeding elsewhere unless we are placed in possession of the funds to which the creditors are entitled so as to enable us to satisfy all the just rights with which we have interfered." When, therefore, the action to marshal assets was commenced, the court must be regarded as having taken possession and assumed the control of all the assets of the testator for the purpose of providing for the payment of his debts, and as long as that proceeding was pending any person who purchased any of the property constituting a part of such assets, with notice of that proceeding, must be regarded as having bought subject to the right of the court to dispose of such property for the purpose of effecting the objects of that action, and, if necessary, make a sale of the property. Certainly no party to the action could, by a sale or otherwise, withdraw any of the assets from under the control of the court and thereby defeat the purpose for which the court had assumed the control of such assets. It would

be a reproach to the administration of justice if a court, after prohibiting creditors from pursuing their rights in the ordinary form, and assuming the control of the assets of a debtor for the purpose of providing for the payment of debts, should not be able to protect such assets, and prevent them from being withdrawn and diverted to other purposes.

In *Wiswall v. Sampson*, 14 How. (U. S.) 52 [14 L. Ed. 322], it was held that one having a judgment lien on land of his debtor, which is in the possession of a receiver appointed by the court of chancery under a bill by a creditor against the debtor and a third person to set aside a conveyance to the latter upon the ground of fraud, cannot proceed to levy his execution, if he have notice of the fact that the property is in the custody of

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the law; he must apply to the court of chancery, which will take care to protect his interest in making a sale or in distributing the proceeds. In that case *Wiswall*, having obtained a judgment against *Ticknor*, issued his execution, which was returned nulla bona. Thereupon he filed a bill to set aside a deed for a lot of land made by *Ticknor* to one *Day*, on the ground of fraud. Under this bill the deed was set aside and a receiver was appointed and placed in possession of the land, who remained in possession until the lot of land was sold by the master and bought by *Wiswall*. Pending this proceeding and after the appointment of the receiver the lot of land in question was sold by the U. S. marshal under two judgments against *Ticknor*, prior in date to that of *Wiswall*, and bought by one *Dargan*, the lessor of *Sampson*, prior to the sale by the master, and it was held that *Wiswall's* title was superior to that of *Sampson*, lessee of *Dargan*.

In that case *Nelson, J.*, delivering the opinion of the court, uses this language: "The settled rule, also, appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court, pending the litigation, by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill, and any purchaser pendente lite, even if for a valuable consideration, comes in at his peril." Again he says: "It is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate, without leave of the court, was illegal and void." And again: "While the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without leave of the court for that purpose. And upon this ground we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

That case, the authority of which has been

recognized in *Clinkscales v. Pendleton Manufacturing Co.*, 9 S. C. 323, would seem to be decisive of the question under consideration. For while it is true that in this case no receiver had been appointed, yet it is well set-

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tled that the possession of a receiver \*is nothing more nor less than the possession of the court, he being, as it is said, merely the hand of the court; and as we have seen, where under a proceeding to marshal assets the court is asked to sell land for the payment of debts, the court must be regarded as having the possession and the control of the property which it is asked to sell, for the purpose of applying it to the payment of debts, which it has prohibited creditors from collecting elsewhere or otherwise. In this case the court had assumed the control and directed its officer to sell the real estate, and although the sale had been postponed under the belief that enough had been sold to pay the debts then established, yet the order for sale had never been rescinded, and the very terms of the referee's report showed that a further sale might be necessary. And when it was subsequently ascertained that it was necessary to sell the whole of the real estate, the land now in controversy was actually sold by the proper officer of the court for the purpose of paying debts established against the estate of the testator.

It is contended, however, that when the defendant bought the lot in question at the sale by the sheriff the proceedings in the action to marshal assets showed that enough property had been sold to pay all the debts then established against the estate of the testator. It is clear, however, that at that time there had not been enough sold to pay all the debts then due, even if it be conceded that enough had been sold to pay the debts then established, because another claim was afterwards established which rendered it necessary to sell the land now in controversy; and it is equally clear, from the terms of the referee's report, that at the time of the sheriff's sale other claims were then outstanding which might be established, and if so would render a further sale necessary, though the referee hoped that such a contingency would not occur. At the time of the sale by the sheriff the court had not released its grasp upon the property of the testator of which it had assumed the control, and had prohibited creditors from pursuing it except under the proceeding to marshal assets; and it is well settled that as long as any of the funds or assets are under the control of the court, any creditor may come in, establish his demand,

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and claim payment out of the assets remaining under the control of the court.

But it may well be questioned whether, at the time of the sheriff's sale, enough property had been sold to pay the debts then established against the estate of the testator, for the



simple reason that it is quite obvious from the proceedings in the action to marshal assets, of which an abstract has been given in the commencement of this opinion, that it was a matter of great uncertainty what amount of claims had been then established: so great, that as late as August 24, 1875, long after the sale by the sheriff, the court passed an order which, after reciting that the referee's report was too indefinite to enable the clerk to ascertain what claims had been established, directed the clerk to make a full report of the condition of all the claims, with a succinct statement of the questions which it may be necessary for the court to determine. And even after the clerk made his report under this order, this uncertainty does not seem to have been removed, for on December 3, 1875, the court made another order directing a referee to call in creditors and make a report of claims, and that under his report a claim was established which rendered it necessary to sell the land now in controversy.

This uncertainty as to the amount of claims then established obviously arose from the indefinite character of the original report on claims, from which it appeared that the statute of limitations was not pleaded to some of the simple contract claims which appeared on their face to be barred; and from the fact that the referee, though required to call in the creditors as well of McClenaghan & Fairlee as of McClenaghan individually (one of whom did come in and present his claim), for some unexplained reason, in making his estimate that a sufficient amount of property had been sold, disregarded the claim presented against McClenaghan & Fairlee, which turns out to be the same claim which, in a different form, was afterwards established, and which rendered a sale of the whole of the land necessary. This claim, manifestly, was not rejected by the referee, for although it was marked in the schedule "barred by the statute," yet it was not on the

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list of those to which the \*statute was pleaded; and furthermore the referee says in his report, "If, however, in auditing the claims against the firm of McClenaghan & Fairlee, it should become necessary to sell the remainder of testator's lands, the referee can yet do so:" showing that the purpose of the referee was simply to show what claims had been established against McClenaghan individually, and not to pass upon those which were presented against him as the surviving member of the firm of McClenaghan & Fairlee, but to leave them for further consideration.

It being conceded that the defendant, through her husband and agent, had, before the sheriff's sale, examined the proceedings under the action to marshal assets, she must be regarded as having had actual notice, at the time of her purchase, of every fact disclosed by those proceedings. She knew,

therefore, that the land in question belonged to the unsettled estate of McClenaghan; that there was a proceeding then pending for the settlement of that estate, in which the court had been asked to marshal the assets of that estate and to sell the lands of the testator for the payment of his debts; that an order for the sale of all the lands, including the lot in controversy, had been made; that after this order had been partially executed by a sale of a portion of the land any further sale was postponed, but the order for sale was not rescinded, because it was supposed (not ascertained) that enough had been sold to provide for the payment of the debts then established; that the amount of the claims was not certainly ascertained by reason of the indefinite character of the report on claims and the unascertained claims against McClenaghan & Fairlee, which might render a further sale necessary—a contingency distinctly mentioned in the referee's report; that accordingly the court, while directing the referee who had made the sale to pay the costs and fees, taxes, judgments, and specialty claims, had made no order for the payment of the simple contract claims, a class to which the unascertained claims belonged, amongst which was the very claim which was afterwards established under a different form, and which was not then adjudicated, for the defendant did not then have notice of the fact stated in the affidavit of the referee,

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made long after the sheriff's sale, that \*the statute had been pleaded to every claim, but on the contrary she did have notice that this claim was not on the list of those to which the statute was pleaded; and she also had notice that the lot now in controversy was the only land remaining which was liable to be sold, on the contingency mentioned, which contingency did subsequently occur.

If, therefore, the purchase by the defendant at sheriff's sale be regarded the same as if she had purchased directly from Mrs. McIntyre, the defendant in the execution, she occupies the position of one who has purchased pendente lite from a party to an action, some of the property which was the subject-matter of the action and under the authority above cited, her purchase must be regarded as illegal, null, and void, at least as against the title of one who claims under a sale made by the order of the court in that action. If, on the other hand, the purchase by the defendant at sheriff's sale be not regarded as a purchase from the defendant in execution, Mrs. McIntyre, then she cannot claim as the alienee of the devisee under the statute of William and Mary.

The case of *Smith v. Grant*, 15 S. C. 136, relied on by the respondent, does not apply. The authority of that case is fully recognized, but it differs essentially from the case now under consideration. In that case there was no action pending to marshal the assets of the testator, and the court had not been

applied to for a sale of the land for the payment of the debts of the testator, and had not taken the possession and assumed the control of it for that purpose. Then, too, the alienation by the devisee was voluntary, while here it was involuntary; and one of the purposes of the alienation in that case was for the payment of the debts of the testator, and the proceeds of the sale made by the assignee in bankruptcy were actually applied to the payment of a debt of the testator, while here the sale was made to pay an individual debt of the devisee, and the money applied.

When, however, the court is called upon to say that a purchase from a party to an action, of the property which is the subject-matter of the action, by a person who has notice of the pendency of that action and of

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the purposes for which it was \*instituted, and that such purposes had not been accomplished, gives a valid title against one who claims under a sale made by the order of the court in that action, for the purpose of effecting the object for which such action was instituted, a very different question is presented from that which was determined in the case of *Smith v. Grant*, supra. In this case the creditors of the testator had been enjoined from suing, and the court had undertaken to provide for the payment of their debts, which they had been prohibited from enforcing in the usual way; and before this was done, and while the proceedings were pending for that purpose, certainly no court would allow a purchase, with notice, from a party to the action of a portion of the property which by its order had been withdrawn from the reach of the creditors, to prevail against a purchase at a sale under the order of the court for the purpose of effecting the object for which it had withdrawn the property from the reach of the creditors, and had assumed the duty of applying it to the payment of their debts.

Indeed, the terms of the order enjoining creditors in this case are broad enough to restrain creditors, not only from bringing suit against the executors, but against the devisee also. For its language is, "That all creditors of John C. McClenaghan and of McClenaghan & Fairlee be, and they are hereby, restrained and enjoined from proceeding, either at law or equity, to sue or collect any claims against the estate of John C. McClenaghan deceased." If, therefore, after this order was passed, any creditor had undertaken "to sue or collect" his claim by an action against Mrs. McIntyre as devisee, who was a party to the action in which the injunction had been granted, he would have been violating the order of injunction by undertaking to sue and collect a claim against the estate of McClenaghan by an action against Mrs. McIntyre to subject to the payment of his debt some of the very land which

she had asked the court to sell for the purpose of paying the debts of her testator. She might have had such action dismissed, and the creditor required to come in and enforce his claim, under the action which she had instituted for the express purpose of enabling the creditors to reach the very same land.

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If so, then, \*clearly, any person purchasing from her, either directly or through the sheriff, with notice, could not claim as a bona-fide alienee of the devisee before action brought against her as such.

Again, the rule at all sales by the sheriff under execution is caveat emptor. The sheriff only sells, and the purchaser buys only the interest of the defendant in the execution. Here the only thing sold was the interest of Mrs. McIntyre, and that was only what remained after the debts of her testator had been provided for under the proceedings which she had instituted for that purpose, whereby she had brought all of the property of her testator, including the land in controversy, into court and asked for the sale of it for the purpose of paying the debts of her testator; and while her action for that purpose was pending, she certainly could not, either directly or through the sheriff, make any bona-fide alienation except of such interest as might remain to her after the debts of her testator were satisfied.

From these views it follows that the Circuit judge erred in refusing to charge as requested, and in instructing the jury that the alienation by the devisee, through the sheriff, was not rendered invalid by the pendency of the proceedings to marshal the assets of the estate of McClenaghan.

It does not appear from the "Case" as submitted here that there was any request to charge the proposition of law, the omission of which is claimed to be error in the seventh exception, and hence that matter is not properly before us.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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\*WIESENFELD, STERN &amp; CO. v. BYRD.

(November Term, 1881.)

[1. *Partnership* ⇨ 258.]

Since the adoption of the code of procedure, under whose provisions actions at law and in equity are prosecuted with the same forms, and separate judgments may be entered against the several defendants, there is no objection to a single action against a surviving partner and the representatives of a deceased partner.

[Ed. Note.—Cited in *Pope Mfg. Co. v. Charleston Cycle Co.*, 55 S. C. 528, 536, 33 S. E. 787.

For other cases, see *Partnership*, Cent. Dig. § 575; Dec. Dig. ⇨ 258.]



[2. *Pleading* ⚡433.]

Whether an allegation in the original complaint of the survivor's insolvency was necessary or not (and it would seem not), that objection cannot prevail after evidence introduced to prove it, an amendment allowed by the judge charging it, and the verdict of the jury annulling it.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1466; Dec. Dig. ⚡433.]

[3. *Pleading* ⚡246.]

There was no error in permitting such amendment at the trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 683; Dec. Dig. ⚡246.]

[4. *Partnership* ⚡245.]

Where a surviving partner makes payments with partnership funds to a creditor of the firm, who is also a creditor of the survivor individually, the creditor must apply the payments to the partnership debt, although no direction was given for their application.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 518; Dec. Dig. ⚡245.]

[5. *Partnership* ⚡245.]

Partnership assets cannot be applied to the extinguishment of a higher rate of interest than that established by law upon an agreement made by the survivor with the creditor to which the other partner then deceased was no party.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 515; Dec. Dig. ⚡245.]

Before Pressley, J., Darlington, April, 1881.

Action by Wiesenfeld, Stern & Co. against James E. Byrd and R. Sydney Smith, as executors of Jesse Keith, and Kate Keith as administratrix of Jesse E. Keith.

The Circuit decree thus states the case:

Jesse Keith and his son Jesse E. Keith were partners in trade until the death of Jesse, on 29th April, 1873. The son qualified as executor of his father, and obtained leave from the Probate judge to continue the partnership for that year. It had already made advances to many customers which required further advances by them until the crop could be gathered. To enable the partnership to comply with those contracts, plaintiffs furnished the money before and after the death of Jesse Keith. They also furnished money during the panic in the fall of that year, wherewith Jesse E. Keith paid off several pressing creditors of the partnership.

From time to time, before and after the death of Jesse Keith, produce for sale was

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sent to plaintiffs in the name of \*the partnership, and they, without any instructions as to the application of the proceeds, credited the same on a general partnership account, making no distinction between the part due before the death of Jesse Keith and that contracted thereafter. There is no proof as to how Jesse E. Keith obtained the produce sent by him to plaintiffs after April 29th, 1873. The presumption is that he got it from customers to whom advances had been made before and after that time. Plaintiffs charge twelve per cent interest on their advances, and seek in their suit to secure the unpaid balance, with that rate of interest. Jesse E.

Keith died before the suit. During his lifetime he frequently admitted, by letter and by entries in his books, the plaintiffs' claim, but there is no proof that Jesse Keith ever admitted their rate of interest.

The jury having been instructed to find specially on several questions of fact, rendered their verdict thus: "We find for the plaintiffs the amount sued for, except a deduction of interest from twelve to seven per cent after the death of Jesse E. Keith." "We further find that the estate of Jesse E. Keith is insolvent." As they failed to find the rate of interest chargeable to Jesse Keith, that being one of the matters submitted to them, that matter, by consent, is left with me, and I find that he is chargeable only with seven per cent interest.

Now plaintiffs' attorneys move for judgment in their favor on the said findings, and the attorneys of Jesse Keith oppose the motion as to him, on grounds urged by them before the verdict, to wit: 1st. Because the action cannot be maintained against his executors, there being no allegation or sufficient proof of the insolvency of the surviving partner; 2d. Because the credits admitted by plaintiffs overpay the balance due them at the death of Jesse Keith, and his estate is not responsible for the subsequent business carried on in the name of the partnership. They further oppose judgment at this time against his executors, claiming that the partnership assets and the estate of the surviving partner must be exhausted before resort to the estate of Jesse Keith.

As there was some proof without objection of the insolvency of Jesse E. Keith, the code

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required me to permit amendment \*of plaintiffs' allegations, so as to make them agree with the testimony. That being considered as allowed, the verdict of the jury settles the question of Jesse E. Keith's insolvency.

As to their second ground, I assume that the estate of Jesse Keith is not liable for the debt incurred to plaintiffs after his death, though it is probable. Equity, under the facts proved herein, would, in a proper case, validate the act of the executors, who continued the partnership business, as best for the estate. Waiving that consideration, and regarding the partnership as ended at Jesse Keith's death, it does not follow that it is entitled to be credited with the payments made by Jesse E. Keith after that time. There were no instructions by him as to the application of these payments, and the credits by plaintiffs are on a general account, which includes all their charges to the end of all their advances to him. I cannot hold that credits in that form constitute a special application by plaintiffs of said payments to that portion of their account which accrued before the death of Jesse Keith.

If they had kept two accounts, one with Jesse Keith & Son, and another with Jesse

E. Keith, and had credited payments made by him to the account of Jesse Keith & Son, that would have been a special application, which I could not permit them to change. But in this case they have placed their credits on an account in which the debits of Jesse Keith & Son and of Jesse E. Keith are blended. There is, therefore, no special application of the payments to either account, and I allow plaintiffs now to apply them according to their right. Receiving said payments from Jesse E. Keith, without directions by him as to their application, they had the right to apply them, even if they were partnership assets, in payment of their advances to him to pay partnership creditors as used by him for advances to customers with whom the partnership had so contracted, and I allow the said credits now to be so applied.

As to the delay of judgment against the executors of Jesse Keith until the other sources be exhausted, my judgment is that such power is not to be exercised unless the party seeking it points out assets from which the creditors may surely obtain payment.

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\*It is therefore ordered and adjudged, that all the credits on plaintiffs' account, after April 29th, 1873, be applied to their charges after that time, until the said advances, with 12 per cent interest, be wholly paid. It is further ordered and adjudged, that the remainder of said credits be applied to the partnership account as it would stand at the death of Jesse Keith, that account to carry interest at 7 per cent until the last credit be applied. From that date the balance is to bear interest against Jesse Keith at 7 per cent and against Jesse E. Keith at 12 per cent until his death and at 7 per cent thereafter. Let the clerk of the court make the calculation, and state the account in accordance with this order, and let the plaintiffs enter judgment against the executors of Jesse Keith and the administratrix of Jesse E. Keith, respectively, for the several amounts thus to be ascertained by the clerk.

The exceptions are substantially stated in the opinion.

Mr. B. W. Edwards, for appellants.

Messrs. G. W. Dargan and E. Keith Dargan, contra.

April 11, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Jesse Keith and his son Jesse E. Keith were copartners in trade. While in business they contracted a debt with the plaintiffs for goods furnished and money lent and advanced for their use, evidenced by a running account. Jesse Keith died in 1873, leaving a will in which he appointed Jesse E. Keith and the defendants Byrd and Smith his executors, all of whom qualified.

After his death the survivor continued in business until his death. During this time

he sent considerable sums of money to the plaintiffs, and contracted with them other indebtedness. These new debts were charged upon the general account of Keith and son, although the plaintiffs had received notice of the death of Jesse Keith, and the money sent was credited on this general account. The defendant Kate Keith administered on the estate of Jesse E. Keith. This action has been brought against the representatives of both estates to recover the firm debt.

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\*The defendants Byrd and Smith, executors of Jesse Keith, moved to dismiss the complaint upon the ground that the action could not be maintained against the two estates; that the representatives of a deceased copartner could not be joined in an action at law with the survivor, or his representatives. This motion was refused.

It appeared in evidence that Jesse E. Keith, the survivor, had admitted that the firm debt as well as his own debt bore interest at 12 per cent, but there was no evidence that Jesse Keith ever acknowledged this.

The case went to the jury under instructions to find specially on several questions of fact. Their verdict was as follows: "We find for the plaintiff the amount sued for, except a deduction of interest from 12 per cent to 7 after the death of Jesse E. Keith. We find further that the estate of Jesse E. Keith is insolvent." No objection was taken to the form of this verdict. The jury failed to find as to the rate of interest chargeable against Jesse Keith, and this, by agreement, was left to the judge, who found as matter of fact that he was chargeable with 7 per cent.

In the original complaint there was no allegation of insolvency of Jesse E. Keith, the survivor, but evidence was introduced on this subject without objection, and the judge ordered the complaint amended in that respect.

Upon the rendition of the verdict, the judge ordered and adjudged that all credits upon plaintiffs' general account, after April, 1873 (the date of the death of Jesse Keith), be applied to their charges after that date until said advances with 12 per cent interest be wholly paid; that the remainder of said credits be applied to the partnership account as it would stand at the death of Jesse Keith, that account to carry interest at 7 per cent until the last credit be applied; from that date the balance is to bear interest against Jesse E. Keith at 12 per cent until his death, and at 7 per cent thereafter. And the clerk was directed to make the calculation in accordance with this order; which being done, judgment was rendered against the estate of Jesse E. Keith for \$2390.26, and against the estate of Jesse Keith for \$1586.93, with interest from May 26, 1881.

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\*Byrd and Smith, executors of Jesse Keith, appeal, and present the following questions:



First. "Whether an action at law for the recovery of a firm debt can be sustained against the representatives of a deceased copartner and a survivor jointly;" and if so, must it appear that the survivor had been "exhausted by legal pursuit to insolvency, or properly shown to be insolvent"?

Second. Whether the payments by Jesse E. Keith, the survivor after the death of Jesse Keith, should not have been credited on the firm debt?

Third. Should there not have been an accounting between the two estates before any judgment against the estate of Jesse Keith?

Fourth. Whether the payment by Jesse E. Keith at 12 per cent on the firm debt should have been allowed to the prejudice of the estate of Jesse Keith?

This is a peculiar case, and it is difficult to understand from the pleadings whether it was regarded by the parties to be a case at law or a case in chancery. It partakes of both. In its form it is an ordinary action for the recovery of a debt, and in that respect a law case. In the manner in which it was conducted it has both law and chancery features. A jury was employed as to some of the facts, and the judge found the others; and finally, the clerk acted in the nature of a referee in ascertaining the amount due. We must, however, take it as we find it, and pass upon such questions as the parties have brought before us. The appellant seems to regard it as a case at law, as his first exception raises the question whether an action at law for a firm debt can be sustained against the survivor and the estate of a deceased partner jointly.

It will be conceded that this could not have been done under the former practice. Contracts, when entered into by two or more persons as makers, may be either joint, or joint and several, or several. Whether a contract was the one or the other determined the fact, under the common-law doctrine and modes of action, whether all of the parties should be joined in one action, or whether they should be sued separately. If joint, they could not be sued separately. If joint and

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\*several, they could be joined or severed. If several, they could not be joined. The old forms were inflexible, and allowed no exceptions.

There was this difference as to joint contracts from the others: Upon the death of a joint obligor, such obligation ended as to him, and became concentrated on the survivor. This was absolutely so, until at length equity began to afford relief against the estate of the deceased; but at no time could the estate of the deceased be brought into the law courts. This principle, however, did not apply to contracts which were several, or joint and several. In such cases, upon the death of one of the debtors the right of action at law still existed against the deceased; but his estate could not be joined in an ac-

tion against the survivors, not because all parties could not be sued at law, but because separate and distinct judgments were required, that against the deceased being *de bonis testatoris*, and that against the survivor *de bonis propriis*.

Thus it will be seen that whether a partnership debt be a joint, or joint and several, or several debt, under the former practice the survivor and the deceased could not be joined, for the reason that if the contract was joint the equity forms of procedure and the equity courts had to be resorted to as to the deceased, in which the survivor could not be embraced; and, if it was joint and several, or several, while the law courts and forms of action were available in such cases, yet a separate judgment was demanded, and the old forms did not allow a double judgment in a case.

Has the code made any change in this respect? The code has not altered the principles upon which a right of action accrues, nor has it diminished, enlarged, or in any manner changed the grounds of action. It has given no new course of action nor has it taken any away. Both legal and equitable rights remain as before, and the invasion of either is as actionable as ever. But it has consolidated the two courts, and, abolishing all previous forms of action in both, has substituted one form for all classes of injuries, whether legal or equitable, so that now all parties must apply to the same court and enter it by the same proceeding.

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\*Such being the case, there is no longer any objection to joining both legal and equitable causes in the same action; and it would seem that where a party has the same cause of action against two or more, which formerly on account of the different forms of proceeding he had to enforce in separate courts, now that the forms are the same and the courts the same, there should be no objection to joining them in the same action. The reason for the previous difference ceasing, the difference itself should cease also.

The states which have adopted the code are not all uniform in their decisions on this question. But in this state we have held that there is no difficulty in rendering separate judgments, and in the ordinary cases of joint obligations the representatives of a deceased obligor may be joined with the survivors. *Trimmier v. Thomson*, 10 S. C. 164; *Susong v. Vaiden*, 10 S. C. 247 [30 Am. Rep. 50]. If this can be done, as it was in these two cases, upon a joint bond or note, why should not the same principle and practice apply to a copartnership debt? There is no reason.

As to the question of alleging and proving insolvency of the survivor before holding the estate of the deceased responsible. In the case of *Wardlaw v. Heirs of Gray*, 2 Hill Eq. 644, it was incidentally said, "If the sur-

vivor is insolvent equity always affords relief." The case did not require the consideration of the question whether the deceased could be proceeded against before insolvency of the survivor; but it appearing in the case that the survivor was insolvent, it was held sufficient.

In *Collyers on Partnerships*, § 604, we find the following: "It is now established beyond controversy, that, in the consideration of courts of equity, a partnership debt is several as well as joint, and that upon the death of a partner the joint creditor has a right in equity to proceed immediately against the representatives of a deceased partner for payment out of his separate estate, without reference to the question whether the joint estate is solvent or insolvent, or to state the accounts amongst the partners."

In *Parsons on Partnership*, p. 447, it is

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said: "Thus, after some conflict and uncertainty, it seems now to be settled in England, that on the death of a partner a creditor of the firm may proceed at once in equity against the estate of the deceased, whether the firm or the surviving partners be insolvent or otherwise; the court requiring, however, that the surviving partners should be made parties, because they are interested in the account."

Reserving the question whether the doctrine as laid down by these two writers, in its broad extent, applies in this state, it is enough in this case that the jury found as matter of fact that the survivor was insolvent. We think the finding was sufficient. We think also that the complaint was properly amended. Code, § 196. *Ahrens v. State Bank*, 3 S. C. 410.

Next as to the application of the payments made by the survivor after the death of his copartner. The general rule as to payments is, that where the debtor directs no application at the time of payment the creditor may make the application at any time before judgment or verdict. *Brice v. Hamilton*, 12 S. C. 32. If neither apply the payments, the court will make such application as shall be reasonable and proper. *Jones v. Kilgore*, 2 Rich. Eq. 66.

This no doubt is the governing principle where the party making the payment is the principal debtor and the payments are made from his own funds, but should it apply where there is a joint debt as well as an individual one and the payments are made from joint funds? We think not. In such a case the payment should go to the credit of those to whom the money paid rightfully belongs. 'Tis true, upon the death of a copartner, the partnership property legally belongs to the survivor. The death of one dissolves the partnership, and the survivor holds the property. He does not hold it, however, for his own use, but rather in the nature of a trustee,

for the settlement of partnership debts, and the winding up of the concern.

A surviving partner is entitled to take and hold as survivor for the purpose of administering the copartnership estate. *Moffat v. Thomson*, 5 Rich. Eq. 155 [57 Am. Dec. 737]. *Dunkin*, chancellor in this case, said further:

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"The principle is as old at least as the time of Lord Coke, that copartners constitute an exception to the rule as to the *jus accrescendi* among joint tenants. Co. Litt. 182 a. Though they are joint tenants of all the partnership stock during their lives, there is no survivorship either at law or equity. It follows that upon the decease of one of several partners, his share of the stock and effects of the partnership subject to the partnership debts devolves to his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partner. Such is the doctrine of Kent and Story, and indeed of every elementary writer on the subject." One partner has no right to apply partnership funds to his own debt. This is also elementary.

Now in the case before the court, after the death of Jesse Keith, Jesse E. Keith continued in business with the partnership property on hand. The debts which he afterwards contracted were his individual debts, and the partnership property was not liable therefor. What proportion of his payments to plaintiff came from the partnership assets, did not appear in the case. In fact, no inquiry of that kind seems to have been made. But whatever sum, if any, did thus originate, the estate of the deceased should have the benefit of, equally with the survivor. The money applied was common property and should result in a common benefit.

As to the interest. The jury found that the survivor had agreed to pay 12 per cent. There has been no appeal on that subject, and this finding will not be disturbed. We do not think, however, that any portion of the partnership assets should be applied to the extinguishment of this rate of interest on the single agreement of the survivor. As it appears from the case, this was his independent contract, which did not bind the deceased, the judge finding that the deceased was only bound for 7 per cent. The judgment below must be modified in accordance with this opinion, and for that purpose the case is remanded so that it may be determined upon a second trial what proportion of the payments credited on the general account of the plaintiff was made out of the partnership assets, and to that extent the estate of the deceased partner must have credit on the firm debt as it stood at his death.

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\*It is the judgment of this court that the judgment of the Circuit Court be reversed.



and that the case be remanded for further proceedings in accordance with the principles herein.

### 17 S. C. 116

COPELAND v. PIEDMONT AND ARLINGTON LIFE INSURANCE COMPANY. McGREGOR v. SAME. MORRIS v. SAME. WHITE v. SAME. MOORE v. SAME. GOLDSMITH v. SAME.

(November Term, 1881.)

#### [1. Attachment $\hookrightarrow$ 289.]

No one but a party to the proceedings can move to set aside an attachment for irregularities.

[Ed. Note.—Cited in *Metts v. Piedmont & Arlington Life Ins. Co.*, 17 S. C. 123; *Ex parte Perry Stove Co.*, 43 S. C. 185, 186, 20 S. E. 980; *Ford v. Calhoun*, 53 S. C. 110, 30 S. E. 830; *Howell v. Atlantic Coast Line R. R. Co.*, 79 S. C. 494, 60 S. E. 1114.

For other cases, see Attachment, Cent. Dig. § 1018; Dec. Dig.  $\hookrightarrow$ 289.]

#### [2. Attachment $\hookrightarrow$ 237.]

The assignee under a deed of assignment cannot by motion before judgment vacate an attachment levied upon the assigned property after the recording of the assignment, he being no party to the action.

[Ed. Note.—Cited in *Bryce & Co. v. Foot*, 25 S. C. 473.

For other cases, see Attachment, Cent. Dig. §§ 815-818, 822-824, 827; Dec. Dig.  $\hookrightarrow$ 237.]

#### [3. Attachment $\hookrightarrow$ 237.]

He cannot have the title to the land tried in this summary way.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 815-818, 822-824, 827; Dec. Dig.  $\hookrightarrow$ 237.]

[This case is also cited in *Meinhard v. Youngblood*, 37 S. C. 230, 15 S. E. 947, and distinguished therefrom.]

Before Aldrich, J., Richland, April, 1881.

These were motions made by Angus R. Blakey in the six cases stated and heard together, to dissolve attachments levied in those cases upon real estate in Aiken, Barnwell, and Edgefield counties. The attachments were levied between January 1 and 8, 1881. The deed of assignment from the defendant company, transferring this property to Blakey, was dated November 30, 1880, and was duly recorded in the proper office of the three counties named, on December 2, 4, and 11, 1880.

The exceptions to the order of the Circuit judge refusing the motions (omitting the 2d and 5th, which were not considered by this court) were as follows:

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\*1. Because the said A. R. Blakey, assignee, was a proper party to make the motion to dissolve the attachment; and the holding of his Honor that he was not, is error.

3. Because it was error to hold that there was any question of title which could con-

dict with the right of A. R. Blakey, assignee, to have the attachments dissolved.

4. Because the holding of his Honor, that no sufficient ground was alleged for dissolving the attachments, was error.

6. Because on the case as submitted his Honor should have granted the order to dissolve the attachments, and his refusal to do so was error.

Mr. John C. Haskell, for appellant, cited 1 Bail, 193; 1 Bay, 90; 3 Strob. 236; 1 McC. 80; 4 Id. 519; 6 S. C. 175; Voorh. Code, 320; 34 How. Pr. 409; 12 N. Y. 626; 22 Barb. 110; 2 Bail. 163; 1 Rich. Eq. 187; 3 Strob. Eq. 55; 12 Rich. Eq. 393.

Messrs. J. T. Sloan and J. S. Muller, contra.

April 12, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case attachments were levied upon certain real property in this state, alleged by the attaching creditors to be the property of the defendant company. Angus R. Blakey claims this property to be his by virtue of a certain deed of assignment executed to him by this company, in the state of Virginia, before these proceedings in attachment were commenced. Upon affidavits showing this fact he sought to intervene in these cases and by motion to dissolve the attachments.

It appeared as one of the facts of the case, that before the attachments were issued proceedings had been instituted in the Circuit Court of the United States for the district of Virginia, to have the deed of assignment under which Blakey claims set aside as null and void, and for the appointment of a receiver. Upon this proceeding no final judgment has been pronounced and the case seems to be still pending, but a receiver was appointed by an order of Judge Hughes in the

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case, dated \*December 23, 1880. It further appeared that an action was pending in the Court of Common Pleas for Aiken county, in behalf of certain creditors of the company therein named, to set aside this deed to Blakey as fraudulent and void.

Judge Aldrich, who heard the motion below, declined to dissolve the attachments, holding that Blakey was not such a party to the actions of the plaintiffs as to entitle him to make this motion; also, that he could not try titles to land on a motion; and lastly, that as the deed of assignment under which Blakey claimed was attacked as fraudulent, the attachments could do no harm to Blakey, because if the deed was valid the attachments could not defeat it, and if it was fraudulent the attaching creditors should not be deprived of the benefit of their diligence. Blakey has appealed upon several exceptions, most of which raise the ques-

tion whether Blakey was such a party as authorized him to make this motion.

Under the former attachment acts, of force before the adoption of the code in March, 1870, it had been repeatedly decided that no one but the defendant in the attachment could question the regularity of the proceeding or move to dissolve it on that ground, not even the garnishee, although served with process. In *Foster v. Jones*, 1 McC. 116, it it said "a garnishee has no right to question the regularity of the proceeding against an absent debtor." In *Kincaid v. Neall*, 3 McC. 201, the court held "that a third person though a judgment creditor cannot set aside the lien of the attachment on account of irregularities." In *Camberford v. Hall*, 3 McC. 345, it was decided that no one but the debtor himself could take advantage of errors in the judgment rendered against him; that a garnishee could not object to errors or irregularities in the attachment proceedings. In *McBride v. Floyd*, 2 Bail. 214, Judge O'Neill said: "It has been often decided that neither a garnishee, a creditor of the debtor, nor any person other than the debtor himself can question the regularity of the proceedings in attachment." See also *Chambers v. McKee*, 1 Hill, 229; *Harper v. Scuddy*, 1 McM. 265.

These cases would be conclusive under the old law as to irregularities. Has this been

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changed under the new? Our \*present attachment act is found in the code, Part II., Title VII., Chap. IV. In Section 265 there is a provision that defendants may move to discharge attachments, but this privilege does not extend beyond defendants. There is nothing said as to others. This section seems to be a legislative declaration of the law as it formerly stood. As Blakey is not a defendant he cannot come in under any provision of the act, and he is excluded under the decisions above referred to from questioning these attachments for irregularity.

It may be said, however, that he is not attempting to assail the attachments on the ground of irregularity, but because they have been levied upon his property instead of that of the Piedmont Company. Under the former act there was provision made for such cases. Where the property attached was claimed by a third party he had the right to intervene, and by proper pleading to raise the question of title, but he could not do so on simple motion. The act required an issue to be made and to be submitted to the jury. But there is no provision of this kind as to real estate in the present act.

The cases relied upon by appellant, as it appears to us, do not aid him. Some of them decided that the title of an assignee from the debtor vested before the lien of the attachment will be sustained as against the attachment.

There is no doubt as to the correctness of this principle, and if in this case it should subsequently appear that when these attachments were levied the lands attached had been conveyed by bona-fide deed to Blakey, or to any one else, these attachments will not stand in the way of such conveyance; on the contrary, they will be nugatory, and the attaching creditors will take nothing by their proceedings. In the other cases the judgments obtained on the attachment proceedings were assailed, and with it the attachments. But here Blakey comes in before judgment and attempts to intervene on motion, in the midst of the proceedings, raising the question of title to the property, which he submits to the judge. The judge, we think properly, held that he could not try title to real estate on a motion. Code, § 276.

As was said by the presiding judge, we

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cannot see how \*Blakey can be injured by these attachments. If it is true that the property involved in fact belongs to him, the attachments cannot divest his title. He is no party to the proceeding, and cannot be bound by any judgment rendered therein. Only the interest of the defendant company is attached, and if no such interest exists the attachments of course will be fruitless. It will be time enough for Blakey to assert his title when it is attacked in such way, as upon failure to resist he may be concluded.

We think there was no error in the judge refusing the motion below. Inasmuch as Blakey had no legal status in the case below, and therefore not authorized to make this motion, it will not be necessary to discuss the other exceptions.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 120

METTS v. PIEDMONT AND ARLINGTON LIFE INSURANCE COMPANY.

PATTERSON v. SAME.

(November Term, 1881.)

[1. Attachment  $\hookrightarrow$  225.]

There are but two recognized modes of assailing an attachment: 1st, by motion for irregularity appearing on the face of the proceedings, or because improvidently issued; and 2d, by bond to the sheriff for the payment of the debt, thereby releasing the property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 779-781, 807-814; Dec. Dig.  $\hookrightarrow$  225.]

[2. Attachment  $\hookrightarrow$  289.]

A third party has no right to intervene and move to set aside an attachment upon the ground that the attached lands belong to him and not to the defendant. Title to land cannot be so summarily tried.

[Ed. Note.—Cited in *Claussen & Co. v. East-erling*, 19 S. C. 520; *Bryce & Co. v. Foot*, 25 S. C. 473; *Ex parte Perry Stove Co.*, 43 S. C. 185, 186, 20 S. E. 980.

For other cases, see Attachment, Cent. Dig. § 1018; Dec. Dig.  $\hookrightarrow$  289.]



[3. Attachment  $\hookrightarrow$ 302.]

Nor will the court permit such a proceeding even by consent of parties.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1077; Dec. Dig.  $\hookrightarrow$ 302.]

[This case is also cited in *Claussen & Co. v. Esterling*, 19 S. C. 515, 520, and *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 452, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, and distinguished therefrom.]

Before Mackey, J., Charleston, April, 1881.

The attachments in these cases, *Sarah C. Metts* against the defendant corporation, and *S. L. Patterson* and *E. L. Patterson* against the same defendant, were levied in January, 1881. The deed of assignment to *Angus R. Blakey* was dated November 30, 1880, and recorded in the three counties named within fifteen days thereafter. Blakey's notice of

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motion was served \*February 23, 1881. Other matters are stated in the opinion. The three motions were heard together by Judge Mackey, who "ordered, adjudged, and decreed that the attachments in the above causes be discharged and dissolved, and that the defendant, Blakey, have judgment for his costs in the above causes." The plaintiffs appealed upon five exceptions, none of which were considered by the court.

Messrs. Brawley & Barnwell, Simonton & Barker, for appellants.

Messrs. Pope & Haskell, Rutledge & Young, for the assignee.

July 11, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs in the above causes levied attachments on certain real estate lying in this state in the counties of Aiken, Barnwell, and Edgefield, as the property of the Piedmont and Arlington Life Insurance Company, a corporation under the laws of Virginia.

Previous to the issue of these attachments, this corporation being insolvent had executed in Virginia a deed of assignment to *Angus R. Blakey* in trust for its creditors, in which were included these lands, which deed was duly recorded in the several counties where the lands were located. It appeared further, that subsequently to this assignment and previous to the attachments, to wit, December 24, 1880, in a proceeding in the Circuit Court of the United States for the eastern district of Virginia, instituted to set aside this deed as fraudulent, a receiver had been appointed, and the company and Blakey ordered to deliver all of its property of every kind to this receiver.

Under this state of facts Blakey after notice intervened in these actions, and moved to vacate the attachments on the ground that the property attached was his, and not that of the defendant corporation. No objection

was interposed as to the manner of Blakey's appearance in the case, nor do the plaintiffs object now. On the contrary, it is expressly stated in the brief that all objection in that

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respect is waived, as the parties \*desire the case to turn upon its merits. The motion of Blakey was resisted below upon the ground that the deed under which he claimed was fraudulent and void, and as evidence of this fact the plaintiffs relied, first, on the fact that certain creditors of the company in this state had instituted proceedings in the county of Aiken to vacate the deed for fraud, which proceeding was still pending; and secondly, upon the terms of the deed itself. The Circuit judge ordered the attachments dissolved, and that Blakey have judgment for his costs. The appeal presents the single question whether under the circumstances stated the attachments should have been dissolved. The decision of this question in our opinion does not involve the validity of the deed to Blakey, whether fraudulent or not, and we do not deem it proper, therefore, to pass upon that matter.

There are but two recognized modes of assailing an attachment. One is by motion on account of some irregularity appearing on the face of the proceedings, or because it has been improvidently issued, the allegations upon which it issued being false. The other is by giving bond to the sheriff to pay the debt, thereby releasing the property. These are the only modes of dissolving attachments known to the law, applicable to such proceedings. Blakey has not resorted to either of these, but relies solely upon the ground that the property in question is his. *Mr. Drake*, the highest authority on attachment proceedings, says that the defendant debtor cannot move to discharge an attachment on the ground that the property attached did not belong to him. *Drake Attach.*, § 417; *Langdon v. Conklin*, 10 Ohio St. 439. There is no greater reason why a third party should have this privilege. *Mr. Drake* says further (Sec. 234): "Another established principle affects with peculiar fitness attachments of real estate—that the attachment can operate only upon the rights of the defendant existing when it is made. If prior to the attachment he had sold and conveyed the land in good faith, it cannot be held for the debt of the vendor. 23 Ill. 422. Nor, on the other hand, can any interest which the defendant subsequently acquires be reached by it."

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\*The attachment can operate only on the interest of the debtor. It cannot divest any lien, incumbrance, or title of a third party, or affect his interest in any way. If the debtor has no interest, the proceeding is futile and its results will be fruitless. The creditor levies on the property of persons other than the debtor, at his peril. But this

fact affords no ground, as far as we have been able to find, for the dissolution of the attachment. The attachment is based upon facts disconnected with the property, and it must stand or fall upon these facts. If Blakey's rights have been interfered with, he has his remedy, and the courts will afford him full protection through some proceeding more appropriate than the one he has adopted. His motion involves the title to real property, which ordinarily should be determined by a jury. We have held in a recent case, *Copeland v. Piedmont and Arlington Life Insurance Company* (ante, p. 116), that a third party cannot intervene in an attachment proceeding and have title to land tried in this summary way.

It is true that the appellants have waived the point of Blakey's right to appear, but we do not understand that they consented that he shall invoke a remedy for which there is no precedent for the courts to afford. But even if the plaintiffs have consented to this, it is best that uniformity and system should be observed in the administration of the law, and to that end that well-established rules should not be departed from, even where the parties consent. Consent cannot give jurisdiction.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

### 17 S. C. 123

McCASLAN v. LATIMER.

(November Term, 1881.)

[Pleading  $\S$  274.]

Allegations of facts occurring since the commencement of the action and of facts not then known to the plaintiff can be brought before the court by supplemental complaint only; and it is error of law to permit them to be incorporated as amendments into the original complaint.

[Ed. Note.—Cited in *Ex parte Maurice*, 24 S. C. 178; *Sparks v. Green*, 69 S. C. 229, 48 S. E. 61.

For other cases, see Pleading, Cent. Dig.  $\S$  832; Dec. Dig.  $\S$  274.]

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\*Before Fraser, J., Abbeville, November, 1881.

This action was commenced and the complaint filed June 23, 1881, by James McCaslan and several others, residents and taxpayers of certain townships of Abbeville county, suing in behalf of themselves and of all others who have a common interest, against James M. Latimer and others, claiming to be president and directors of the Savannah Valley Railroad Company, and against J. Wardlaw Perrin as treasurer of Abbeville county.

The complaint alleged the incorporation of the company (16 Stat. 435), and the subscription of certain townships of Abbeville county, payable in three instalments, of which

one had been paid and the second was about to be enforced by the said county treasurer; that some of the plaintiffs had voted for this subscription; that the company had not been properly organized and the subscribing townships not properly represented; that the annual meeting prescribed by the charter had not been called, and the defendants now exercising the functions of officers have continued themselves in office; that an amended charter (17 Stat. 418), changing the location of the road and otherwise affecting its interests, had been obtained from the legislature by defendants, but had never been assented to or adopted at any meeting of the stockholders, but defendants were now proceeding to act and expend money under the terms of this amendment. The complaint alleged other irregularities and illegalities. The judgment prayed was an injunction restraining the defendants from acting as officers, or expending the money received from the subscribing townships, and the county treasurer from collecting further instalments, and that the townships be discharged from their payment.

On June 24, 1881, the plaintiffs procured an order from Judge Hudson requiring the defendants to show cause at Greenville, on July 12, why an injunction should not be granted. Defendants on that day served their answer (which does not appear in the brief) and "the cause was heard by Judge Hudson on the rule." He filed his decree July 22, in which he fully discussed the

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merits of the case, and thought the plaintiffs had failed to make out any grounds for an injunction, and held the return sufficient, and denied the motion for preliminary injunction with costs.

In October plaintiffs gave notice that, at the next ensuing term of court in Abbeville, they would move for leave to amend the complaint in several particulars, which were substantially as follows:

1. That the subscription of the townships had not been made and certified as required by the charter.
2. That plaintiffs paid their first instalment under a mistake of fact, supposing that the subscription had been duly made.
3. That the amendment to the charter had been requested by a convention of so-called stockholders in November, 1879.
4. That at a convention of so-called stockholders held June 30, 1881, James M. Latimer had informed them that the amendment to the charter was not accomplished until the session of the general assembly in 1880.
5. That said convention adopted a resolution declaring it inexpedient to elect officers, and requesting those in office to hold over until the next annual meeting.
6. That no election was then held, nor since, and that no time has been appointed for such an election.



Judge Fraser heard the motion and granted it, on payment by the plaintiffs of \$15 costs. Defendants appealed on the single ground stated in the opinion.

Mr. B. F. Whitner, for appellants.

Mr. A. Burt, contra, contended that the order was in the discretion of the judge and therefore not appealable, and cited Code, §§ 11, 196; 4 Wait Prac. 252, 256, 262; 12 Abb. 414; 21 How. Pr. 296; 16 N. Y. 242; 50 N. Y. 689; 52 N. Y. 248.

April 12, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought to restrain the defendants appellants, president and directors of the Savannah Valley Railroad Company, from doing certain acts of official character, and also

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to restrain the treasurer of the county of Abbeville from collecting and paying over the uncollected portion of the tax subscribed to the company.

After filing the complaint and before answer, the plaintiffs respondents made application at chambers before Judge Hudson for a preliminary injunction. Upon this application Judge Hudson granted a rule to show cause before him at Greenville on July 12, 1881. On that day the defendants answered, and the case was heard upon the rule. Judge Hudson declined to grant the restraining order applied for pending the litigation, and leaving the matter to the court to be acted on at term time, dismissed the motion with costs.

At the next term of the Court of Common Pleas for Abbeville county, plaintiffs, upon notice, moved for leave to amend their complaint in various particulars. This motion was granted by Judge Fraser, the presiding judge. From this order the defendants have appealed, upon the single ground that the additional allegations thus incorporated by amendment were not the subject of amendment, but were the subject of supplemental pleading, and could be brought before the court by a supplemental complaint only.

The only question therefore before this court in the appeal is: Did the judge err in permitting the additional allegations to be incorporated by amendment? This question must be determined upon the provisions of the code and the construction applicable thereto. Both amendments and supplemental pleadings are provided for in the code, but there is a marked distinction between the two. They are allowed upon different conditions and are intended to meet different contingencies. They are not interchangeable remedies, to be employed indifferently at the choice of the pleader, but distinct and separate proceedings, each depending upon its own principles and governed by its own facts. Where the one is required, it is error to substitute the other.

The important sections of the code relating to amendments are 195 and 196. The first allows pleadings to be once amended by the parties of course, and without costs at certain stages of the cause. This section has no application here, and need not be considered further. The second authorizes the

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\*court to amend "either before or after judgment in furtherance of justice, \* \* \* or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence by conforming the pleading or proceeding to the facts proved."

Section 200 is the important section in reference to supplemental pleading. This permits a supplemental complaint, answer, or reply where facts material to the case have occurred after the former complaint, answer, or reply, or where the party was ignorant of such facts when the former pleading was made, or where a judgment or decree of any competent court determining the matter in controversy has been rendered since the commencement of such action. This section, as it will be observed, specifies the character of facts or rather the condition of the facts which are the subject of supplemental pleadings. They must be such as have either occurred since the suit, or if in existence at the time of the suit, the party was ignorant thereof. Such being the conditions which must attach to allegations subject to supplemental pleadings, this, by strong implication at least, excludes such facts from the operation of amendment.

The mind would reach this conclusion simply upon reading these different sections and without the aid of commentators. But when we find that the best annotators of the code have placed this construction upon these sections, this view is not only strengthened and confirmed, but is left without doubt. Mr. Wait says: "Whenever a plaintiff or defendant in any action becomes informed of certain facts material to his case, which have occurred after service of his complaint, answer, or reply, or of which he was ignorant when his former pleading was made, he should apply to the court for leave to serve a supplemental pleading. Supplemental pleadings in such cases are not only allowable, but indispensable, as such newly discovered facts cannot be inserted in the pleadings by amendment. Amendments can only relate properly to the time when the original pleading was made, and can only state facts in existence at that time."

He refers to numerous cases, among them

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Hornfager v. \*Hornfager, 6 How. Pr. 13; Hendricks v. Decker, 35 Barb. 298; Hoyt v. Sheldon, 4 Abb. 59; S. C., 6 Duer., 661. "Supplemental complaints cannot be allowed to set up facts existing and known to the pleader when the original pleading was served." 2 Wait Prac. 467. Again, at page 504,

he says: "Amendments to a pleading can only state facts in existence at the time when the original pleading was made. A plaintiff cannot, therefore, introduce, by an amendment of the complaint, facts occurring subsequent to the commencement of the action." See also *Moon v. Johnson*, 14 S. C. 436; 2 Abb. Forms, 201, note k. This is conclusive, and determines indisputably the meaning and intent of the code upon this subject.

It only remains to inquire whether the facts alleged in the amendment here were in existence at the institution of the action or were such as have occurred since, or if in existence before, that plaintiffs were ignorant thereof at that time. There seems to be no doubt but that the facts alleged in the fourth, fifth, and sixth proposed amendments occurred after the commencement of the action, and under the principles laid down above could only be incorporated by supplemental complaint. As to the first, second, and third proposed amendments, while the facts appearing in the brief afford strong presumption that the plaintiffs were ignorant of the matters therein proposed at the time of the filing of the complaint, yet the statements are not sufficiently full and definite to enable the court to determine this fact with certainty. We therefore decide nothing in reference thereto.

It is the judgment of this court that the order below be reversed, without prejudice to the plaintiffs as to any motion they may make to the Circuit Court upon proper showing, as they may be advised, to have the first, second, and third proposed amendments inserted and allowed as such.

### 17 S. C. \*129

#### \*LYNN v. THOMSON.

(November Term, 1881.)

##### [1. Evidence ⇨131.]

The issue being whether a mill-dam injured lands of the plaintiff lying higher up on the same creek, evidence of the effect of the removal of dams from other creeks in another county upon the lands situated on those streams was properly excluded.

[Ed. Note.—Cited in *Hand v. Catawba Power Co.*, 90 S. C. 271, 73 S. E. 187.

For other cases, see Evidence, Cent. Dig. § 401; Dec. Dig. ⇨131.]

##### [2. Witnesses ⇨226.]

Whether a question asked a witness is relevant to the issue must, in great measure, be left to the discretion of the trial judge, with the burden upon him who asks it to show that it is relevant.

[Ed. Note.—Cited in *McGee v. Wells*, 37 S. C. 368, 16 S. E. 29; *Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 26, 43 S. E. 307.

For other cases, see Witnesses, Cent. Dig. §§ 792-797; Dec. Dig. ⇨226.]

##### [3. Evidence ⇨317.]

Under an issue involving the raising of a dam, the declarations of the builder, who died

ante litem motam, as to the height of the dam are incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1191; Dec. Dig. ⇨317.]

##### [4. Waters and Water Courses ⇨164.]

The admission of the owner of a dam that it had been raised, and his promise to restore the former height when another dam was built, does not prevent a prescriptive use in favor of the increased height, as against other persons than him to whom the admission and promise were made.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 212; Dec. Dig. ⇨164.]

##### [5. Evidence ⇨114.]

Where, in action for damages caused by a mill-dam, plaintiff brings out testimony of an offer, made by him to defendants just before suit, to purchase the dam for the purpose of destroying it, there is no error of law on the part of the judge in charging the jury that this offer was strong as an acknowledgment of defendants' right to maintain their dam as it then stood; nor was it a charge upon facts in violation of the constitution. Art. IV., § 26.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 128; Dec. Dig. ⇨114.]

##### [6. Trial ⇨188.]

The charge upon other matters in this case held not to be in violation of this provision of the constitution, as not a charge upon facts in issue, but a statement of inferences deducible from undisputed facts.

[Ed. Note.—Cited in *Acker v. County of Anderson*, 20 S. C. 499; *Bauskett v. Keitt*, 22 S. C. 191; *McGee v. Wells*, 37 S. C. 368, 16 S. E. 29; *Norris v. Clinkscales*, 47 S. C. 517, 518, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 412; Dec. Dig. ⇨188.]

##### [7. Trial ⇨295.]

The judge charged the jury that the use of a dam for twenty years gave a prescriptive right; but the charge as a whole showed that by "the use of a dam" he meant an adverse use to the injury of plaintiff's land from the back-water caused by the dam. *Held*, no error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 707; Dec. Dig. ⇨295.]

##### [8. Waters and Water Courses ⇨179.]

He also charged the jury that if the dam caused a filling up at the head of the pond, and such filling caused the injury, the defendants were not liable. *Held*, no error.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ⇨179.]

##### [9. Easements ⇨50.]

He also charged the jury that plaintiff could not recover for injury done to his land within the past twenty years, if other appreciable, though less, injury had been done to the same land, or other portions of the same, or contiguous, land, for more than twenty years. *Held*, not erroneous.

[Ed. Note.—Cited in *Reid v. Courtenay Mfg. Co.*, 68 S. C. 470, 47 S. E. 718.

For other cases, see Easements, Cent. Dig. § 112; Dec. Dig. ⇨50.]

##### [10. Evidence ⇨274.]

[The rule that the declarations of surveyors are admissible as to boundaries lateral will not be extended to boundaries vertical, and so will not allow such proof to be made of the height of a mill-dam.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1131; Dec. Dig. ⇨274.]



[11. *Waters and Water Courses* ⇐164.]

[In an action to recover damages alleged to have been done to plaintiff's land by back-water from defendant's mill-dam, an instruction that, where an easement has once been gained by prescription, new and different injuries to the servient property or the rights of the servient party, resulting from the use of the easement, after the period of 20 years' adverse use, cannot affect its enjoyment, is proper. In such case the grantor is presumed to have parted with the right for a sufficient consideration, and must take the consequences, present and prospective.]

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 211; Dec. Dig. ⇐164.]

[12. *Trial* ⇐194.]

[Cited in *State v. Norton*, 28 S. C. 577, 6 S. E. 820, to the point that a charge that a certain undisputed fact is strong evidence is not erroneous.]

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 452; Dec. Dig. ⇐194.]

Before Thomson, J., Union, October, 1879.  
Action by Mathew S. Lynn against J. S. R. Thomson, Wade Fowler, and J. C. Spears

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for damages done to the plaintiff's \*lands within the past twenty years by a dam which had existed for a century, and also for damages for injuries resulting from the raising of the dam. The answer denied the injury and the raising, and alleged that if these lands were at all injured they had been injured as much or more for more than twenty years. The action was commenced August 14, 1877.

The opinion sufficiently states the facts upon the four points first considered by this court. There was a conflict of testimony as to the condition of plaintiff's lands for the sixty years preceding action brought, whether in better or worse condition, and whether injuries now done were or were not done more than twenty years ago. Expert witnesses differed as to the causes of injury, of the filling up of the creek, etc. There was also conflict as to the height of the dam built in 1869 as compared with other dams which preceded it, and as bearing upon this point there was a conflict as to where the head of the pond was at the first trial.

His Honor charged the jury that a man cannot, by our law, commence an action for overflowing his land until he is injured. When was plaintiff injured here? When the water began to sob the land from the channel; plaintiff could have sued when the land began to be in a sobbed condition. Though this condition may not have been apparent at first, still the question is, When did this sobbing begin? Whenever that began which the plaintiff calls the injury the right of action accrued. That from such time it is adverse possession. That if Hope or Thomson or anybody else was in possession of the use of the dam in this case for twenty years, they thereby acquired a prescriptive right to use a dam at same place, at same height, and to same extent as the one so used for twenty

years. That if water was backed by this dam as far back as the cane-brake for twenty years, the dam-owners had an indefeasible right to keep it there, no matter what results followed. That mill-owners had rights as well as land-owners. That dam might say to the stream: You are going to fill me up with sand. That owners of dam could say: We have a right that you shall not fill us up with

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sand. That the owners of the dam \*had a prescriptive right that the dam should not be filled with sand brought down in the stream above. That if land-owners above cleared and cultivated their lands, whereby sand was washed down into the creek and accumulated at the head of the pond, and thereby injured plaintiff's lands, that defendants were not responsible for such injury, although such accumulation would not have occurred in the absence of the dam. That if the waters expanded and were extended by accumulation of sand and not by act of defendants, then the jury must find for the defendants. That there was proof that the head of the dam had been at the same place for some forty years before the last trial. That prescriptive rights began to run in favor of dam-owners from time the land above was sobbed by water, so that injury accrued therefrom as against such land-owner. That the offer made by plaintiff and others to defendants, just before this action, to buy out the dam and mills and ten acres of land on each side of the creek, accompanied with the statement that if their offer was accepted it was their purpose to tear out the dam, was strong as an acknowledgment by parties making it of right of defendants to keep the dam as it then stood. He said to the jury, "Would you, gentlemen, raise your dam higher when persons were watching you? Would you do so and risk a lawsuit?"

The requests to charge made by plaintiff and refused by the judge were as follows:

4. That until appreciable injury to plaintiff's lands results, and thus a right of action arises, there can be no prescription in favor of the dam or its effects upon the water above. This he qualified by saying that it would be so in a new case, but that where a prescriptive right is acquired, to that extent it may be kept.

7. That twenty years of user affords a presumption of a grant of license or easement only to the extent and in the state to which there was enjoyment for the whole twenty years; and if any lands of plaintiff have been injured by back water, caused by the dam for the first time within twenty years before action brought for the damage to such lands, plaintiff is entitled to a judgment, al-

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though other lands of the plaintiff were \*injured more than twenty years before action brought. This request in its first sentence

was granted but the remainder as asked was refused, and the jury were instructed that if the lands were contiguous and all belonged to one individual, that injury to one part was injury to all; but if in separate tracts, injury to one tract was not injury to the other tracts.

8. That prescription is only coextensive with the injury done—*tantum prescriptum, quantum possessum*. This request was granted, with the remark that a prescriptive right was gained to the extent of the possession, when the possession was of that character for which an action could be brought as before stated in this charge.

9. That if plaintiff's lands were injured by defendants' dam for a greater period of time than twenty years, and such injury ceased to exist for more than a subsequent period of twenty years, and the same or other injury again commenced within twenty years before action brought, that the prescription gained after the first twenty years was lost by non-user during the subsequent period of twenty years, and there is no prescription now. This request was granted, but qualified by the additional remark that there would be no non-user if the dam was used.

10. That the plaintiff had a right at any time to dig a ditch in his bottom lands to drain them; that if such ditch was dug and has been rendered useless by back water caused by defendants' dam within twenty years since, that plaintiff is entitled to his damages, if any, from such back-water, although the water may have been for more than twenty years thrown back by said dam as far and as high as when the ditch was rendered useless. This request was refused.

The following requests of defendant were granted:

1. If the jury find that the land now owned by plaintiff has been injured to some extent, however little, if appreciable, for the entire period of twenty years next preceding the bringing of this action, then the fact that the land is now injured to a greater extent than before does not give the plaintiff the right to recover damages unless the greater extent of injury is caused by defendants' raising

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their dam, or the water \*in the dam, by means other than ordinary repairs. This request was granted.

2. If the foregoing stated increased injury does exist, but defendants have not raised their dam, then this increase of injury does not entitle plaintiff to recover damages. This was granted.

6. In no event has the jury a right to give damages upon a finding that the removal of the whole of the dam would benefit plaintiff's land. This was granted.

13. If the jury are satisfied as last above, and that the owners of the dam, now owned by defendants, have, for twenty consecutive years, kept up a dam of the same height and

kind as the present one, and that such a dam has been kept up to the present time, then the jury should find for the defendants. This was granted.

14. If the prior owners of defendants' dam did at any time acquire a prescriptive right to keep up a dam of the same height and kind as the present one, and such a dam has been kept up since then to the present time, the fact that plaintiff's land may at any time have been better fitted for cultivation than it was at the time his action was brought does not entitle him to a verdict. This was granted.

15. The prescriptive rights claimed by defendants when once acquired, cannot be lost by their dam having ceased to produce injurious effects for any interval of time after the right was acquired, the dam having remained of the same height in this interval. This was granted.

The exceptions suggest error in these charges made on defendant's request, and in his refusals to charge those above stated requested by the plaintiff. Exceptions to the charge itself, and to the rulings on points of evidence, are sufficiently stated in the opinion.

Mr. R. W. Shand, for appellant.

Messrs. Rion & McKissick, contra.

April 13, 1882. The opinion of the court was delivered by

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\*Mr. Chief Justice SIMPSON. This action was brought to recover damages alleged to have been done plaintiff's land by backwater from defendants' mill-dam. The jury found for the defendants on the last trial, from which this appeal comes. On the former trial they failed to agree. The plaintiff grounds his appeal upon numerous exceptions, nineteen in number, assigning errors of omission and commission, refusals to charge on request and in charges made. The appellant in the argument reduces these nineteen exceptions to nine points, one of which (the 7th) was abandoned at the hearing, as we understood. The respondent discusses the case under two heads:

1. The first of the nine heads of the appellant raises the question of the competency of an interrogatory propounded to a witness on the stand for plaintiff, and which was excluded by the judge. The premises involved in the case were situate in Union county, on Thickety and Gilky creeks. The witness on the stand was a resident of an adjoining county, Laurens. "He was asked by plaintiff what effect he had observed upon streams of water in Laurens county following the removal of dams?" The defendants objected, and the question was ruled by the judge incompetent. We think a general question of that kind was irrelevant. The matter under investigation was whether damage had been done to plaintiff's land, located on Thickety and Gilky creeks, miles away from the resi-



dence of the witness. Whether the lands on the streams in Laurens were similarly located with reference to those streams, as the plaintiff's land was in reference to Thickety and Gilky creeks, had not appeared; and, even if such had been the case, the question seems to us to be irrelevant. It is difficult to say distinctly what constitutes relevancy, so that a definite rule may be established by which the matter in every case may be at once determined. It must therefore be left in a great measure to the discretion of the presiding judge, subject to the right and privilege of the party to show the relevancy of the question when objected to. We have failed to be satisfied by appellant's argument, or by any authorities referred to, that the presiding judge was in error here.

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\*2. David Smith, a witness for plaintiff, testified that Alex. Goforth was the builder of a new dam, erected in 1869, in place of an old one, and that Goforth was now dead. He was asked by plaintiff's counsel if Goforth, at or about the time this dam was completed, made any statement to the witness about the height of his dam. The question was objected to, and ruled incompetent. This was an attempt to bring into the case the declarations of one who was not before the court, either as a party or in any other way—declarations made without the sanction of an oath, and without an opportunity to defendant to cross-examine. If this had been admitted, its truth would not have rested on the credibility and character of the witness on the stand, but upon one who could not be put to the usual tests required. Unless it can be made an exception, to have admitted such declarations would have been in direct conflict with the general rule of evidence in reference to hearsay.

In questions of boundary hearsay is competent testimony, and the declarations not only of surveyors and chain carriers, but of other persons, will be admitted, under one of the exceptions to the general rule, excluding hearsay. The declarations of surveyors in the cases of *Coate v. Spear*, 3 McC. 229 [15 Am. Dec. 627], and *Blythe v. Sutherland*, Ib. 259, relied on by the appellant, were admitted and properly admitted under this exception. But it would be straining the exception as to boundary lateral very far indeed to admit hearsay testimony as to the height of a mill-dam at a particular time on the ground of boundary vertical. Hearsay testimony has none of the safeguards of truth. We think the door for its admission has been opened wide enough by the exceptions already established, and we have no warrant to extend the doctrine further.

3. Davidson, a witness for the plaintiff, owning lands opposite on Gilky and Thickety creeks, below the plaintiff's, testified that when the Massey dam was built in 1852 he complained to Waddy Thomson, the then owner, now deceased (and through whom

defendants derived title), that this dam was higher than the previous one, and that Waddy Thomson said, "Let it stand, and that he would bring it down to its former height when he built again." The next dam was the

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\*Goforth dam, built in 1869. Plaintiff requested his Honor to charge, that if they believed Davidson's testimony, and that the Massey dam was raised, that a prescriptive right for the increased height did not begin to run until the Goforth dam was built. The judge refused.

It is true that an easement cannot be acquired by permissive use. On the contrary, it is founded upon adverse use. It is an enjoyment claimed and exercised as a right; and if, in this case, the witness Davidson had been the plaintiff for an injury to his land, upon such testimony, if believed by the jury, he might have urged with force the proposition contended for by appellant. The prescription as to his land could not have commenced so long as Thomson was exercising the privilege to overflow it by permission. But we do not see how this fact, if true, could protect the present plaintiff. He does not claim through Davidson, and there is no evidence that he gave Thomson permission to raise the dam either directly or indirectly.

4. A short time before action brought the plaintiff proposed to buy the dam, mills, and twenty acres of land of defendants, at \$5,000, saying the object in buying was to pull the dam down. His Honor charged that this offer "was strong as an acknowledgment of the right of defendants to keep the dam as it then stood." We do not see such error at law in this as to require redress from this court. This was not a charge upon the facts, and therefore an invasion of the province of the jury. The fact that the proposition to buy had been made was a fact proved by the plaintiff. It was admitted to be a fact in the case, and the judge in commenting on this fact stated to the jury his interpretation of its force and effect. The case of *Chandler v. Geraty*, 10 S. C. 308, referred to by appellant's counsel, was a case where it was held that a proposition of compromise made by a party to an action was properly excluded as testimony against him, it being the policy of the law to encourage compromises. But here this testimony was brought out by the plaintiff himself. He was responsible for its being before the jury. He made no motion, as we can see, to strike it out. And

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we cannot say that the construction \*put upon it by the judge was so far wrong, as upon that ground, to require of us to prolong this litigation by ordering a new trial.

5. The appellant excepts to certain expressions used by the judge in his charge, to wit, to the following: "Would you, gentlemen, raise your dam higher when persons were watching you? Would you do so and risk a lawsuit?" These are objected to on the

ground of conflict with the constitution, Art. IV., § 26, which forbids judges from charging on the facts. It is difficult to lay down an infallible and inflexible rule by the application of which it can be determined, in every case, whether this section of the constitution has been violated. A clear violation is where the judge decides a question of fact about which there is dispute, and so instructs the jury; but where there is no dispute as to the immediate fact testified to, and the question is as to the effect of such fact, it being susceptible of one or more inferences, we do not see that it would be an invasion of the province of the jury for the judge to point out to them the different conclusions which may be drawn, and the circumstances which might incline them to believe the one or the other, reserving his own opinion. We do not know, nor can we say, that the presiding judge in this case intended to do more than this by the questions which he propounded to the jury.

What the judge said as to there being proof that the head of the dam had been for twenty years at the same place, we do not think was in violation of his duty. He did not intend to take that fact from the jury and decide it himself, but we think he used the word proof in the sense of evidence.

6. It is objected that the judge instructed the jury that the use of a dam for twenty years gave a prescriptive right. This charge, without explanation, separated from its connection, and applied whether the use was adverse, permissive, or upon the party's own land, without doing injury to another until very recently before action, would be error; but, if adverse from the beginning, and giving a cause of action to another during all this time, it would be strictly in accordance with the settled law upon that subject. The judge, we think, intended this, because he used the following language: "Though this condition may not have been apparent at first, still the

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question \*is, When did this sobbing commence? Whenever that began which the plaintiff calls injury, the right of action accrued. That from such time it is adverse possession." And then follow: "That if Hope or Thomson, or anybody else, was in possession of the use of the dam in this case for twenty years, they thereby acquired a prescriptive right to use a dam at same place, at same height, and to same extent, as the one so used for twenty years." So it is apparent, when the charge is taken as a whole, as it should be, and not in detached portions, that it is not subject to the exceptions presented.

7. We understand the seventh ground to be abandoned.

8 and 9. These appear to raise substantially the same question, to wit, that his Honor erred in holding that where an easement has once been gained by prescription, that new

and different injuries to the servient property, or the rights of the servient party resulting from the use of the easement, cannot affect its enjoyment; that the easement will stand, notwithstanding the new and recent injurious consequences. We think this principle is a correct deduction from the character of easements, and the theory upon which they are maintained. An easement is founded upon a grant which is supposed to have been lost. The grant is understood to have been executed by the party over whose property and rights the easement has been acquired. The twenty years' adverse use is the evidence of the previous execution of the grant. The right to enjoy the easement is therefore conveyed to the grantee, and the grantor is ever afterwards estopped from denying its use by such grantee. The grantor is supposed to have parted with the right for a sufficient consideration, and must take the consequences, present or prospective. There was no error, therefore, in the ruling of the judge as to this point.

In fact, when the charge of the judge is read as a whole, with the direct propositions charged, and the qualifications to the various and numerous requests made of him, compared together, we think, standing as a whole, it was free from any such legal error as would warrant the interposition of this court.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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\*RENNEKER v. WARREN.

(November Term, 1881.)

[1. *Adverse Possession* ⚡100; *Ejectment* ⚡20.]

In case of a disputed claim to land not in the actual possession of either party, but held by both under color of title, the well-established principle in this state is, that the older title must prevail.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 547; Dec. Dig. ⚡100; *Ejectment*, Cent. Dig. § 74; Dec. Dig. ⚡20.]

[2. *Evidence* ⚡230.]

An admission against interest, as to whose title is the older, made, after a comparison of papers, by an owner of land at the time of a survey of lines between his own and adjoining lands, would be competent evidence against himself and his privies and successors.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 835-851; Dec. Dig. ⚡230.]

[3. *Evidence* ⚡230.]

But such admission made by a subsequent owner two years before his purchase is the admission of a stranger, and is not competent evidence against his alienees upon a question of disputed title afterwards at issue.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 841; Dec. Dig. ⚡230.]

[4. *Principal and Agent* ⚡22.]

Declarations made by one professing to be an agent are not admissible in evidence against



the alleged principal until the agency is established by proof.

[Ed. Note.—Cited in *Knight v. Jackson*, 36 S. C. 10, 16, 14 S. E. 982; *Martin v. Suber*, 39 S. C. 535, 18 S. E. 125; *New England Mtg. Security Co. v. Baxley*, 44 S. C. 91, 21 S. E. 444, 885.

For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. ¶22.]

Before Kershaw, J., Orangeburg, May, 1881.

Action by Elizabeth C. Renneker and J. H. Renneker, Jr., her husband, against Auken Warren. Verdict was for defendant. The plaintiffs moved for a new trial on the minutes, and that being refused appealed to this court. Upon the points decided by this court the case is fully stated in the opinion.

Messrs. Walker & Bacot, Lord & Inglesby, and J. F. Izlar, for appellants.

Mr. Jeff. Warren, contra.

April 17, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was tried at the May Term of the court, 1881, for Orangeburg county, the venue having been changed to that county from Colleton. It is an action to recover a tract of land lying in Colleton county, containing three hundred and ten acres, some fifteen or twenty of which are enclosed and in cultivation, the remainder being uninclosed and adjoining. As we understand the facts, the trial below, from which this appeal comes, was the third trial, the verdict being for the defendant in each.

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\*The plaintiff connected herself with a grant from Governor William Moultrie to David Coalter for twenty-three thousand five hundred acres, dated in 1793. She was in the actual possession of a part of this grant and claimed to its full extent. The land in dispute is in the lines of this grant.

The defendant introduced a paper title executed to him in 1867 by Harriet and L. B. Stewart. This deed called for one hundred acres, more or less, bounded on the north by Jennings, east by the same, south by Campbell, and west by Jennings. These boundaries, it is stated, will be satisfied, whether the lines be run to include one hundred acres or three hundred and ten. The occupancy of the land in dispute, according to the testimony of the defence, commenced some forty-five years before the trial. The Robertsons cleared the field, now enclosed, about that time. Then one Robertson went into possession, and after being in the possession of two or three parties, in some way not clearly explained, it finally came into the hands of Duncan Stewart some two or three years before his death, which took place in 1850. The evidence does not show whether these successive parties claimed from each other, or how Stewart obtained possession. It was,

at length sold, however, by the Stewarts to the defendant in 1867, and the defendant since then has been in the actual possession of the enclosed fifteen or twenty acres—during this time cutting wood, getting rails and clapboards beyond the enclosure, as it suited him.

It is admitted that the defendant has been in the actual possession of the enclosed portion long enough to protect him under the statute of limitations, and the real contest is over that portion outside of the enclosure, to wit, some two hundred and eighty-five acres. Both parties claim it by being in possession of a part and color of title over the remainder. In such case the well-established principle in this state is that the oldest and best title as to the portion of which each is seized will prevail, and will carry with it the part in dispute. It was said in *Sims v. Meacham*, 2 Bail. 101, "that where there are interfering claims to land, without any actual possession of the disputed parcel, the possession shall be

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adjudged to him who has the \*right." In *Alston v. Collins*, 2 Speers, 459, it was held that where there are two possessions in the same body of land, one under a senior and another under a junior grant, the senior title will prevail.

Now, these parties claimed under grants: the plaintiff under the Coalter grant, dated in 1793; and the defendant under a grant, the existence of which was presumed from the long possession of himself and those under whom he claimed, but which had been lost or mislaid. The principle that successive possessions of parties claiming from one to the other for a period of twenty years and over will raise the presumption of a grant is not denied. And although it is denied that there is satisfactory evidence in the case of a continuous and successive possession by conveyances from the Robertsons forty-five years ago down to the defendant in 1867, yet there is no doubt that the possession of the Stewarts and of the defendant has been long enough, independent of the prior possession, to found the presumption of a grant. The defendant relied on this grant.

Under this status, the important question before the jury was, Which of the parties had the senior grant? This being a question of fact, the judge made no ruling upon the subject; but the plaintiffs' first exception assigns error to the judge in admitting certain testimony bearing upon that question.

Paul Warren, a witness for defendant, was permitted to testify that at some time when a survey was made by Mallard and Gavin, the adjoining landowners being present, to wit, Smiley, Robert Black, Stewart, Padget, and John T. Jennings as the representative of his father, John S. Jennings, "that they compared papers, and that Smiley's, Stewart's, and Black's outdated the others. Stew-

art claimed two tracts—the one he was living on and the tract in dispute.” The jury, no doubt, based their verdict to a great extent on this testimony. Mallard and Gavin were running the Coalter grant, and this testimony was introduced to show that the Jennings papers, under which plaintiff claimed, were junior to Stewart’s, under which the defendant claimed; that the Coalter grant produced by the plaintiff was junior to the one of which the long possession of those under whom defendant furnished

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the evidence of a prior \*issue. This testimony was objected to by the plaintiff upon several grounds: First. Plaintiff objects that at the time of the Mallard and Gavin survey, when this comparison of papers was made, John S. Jennings was not the owner of any portion of the Coalter grant, and was not, therefore, in a position to make admissions as to title derived therefrom, even had he been present at that survey. Second. That John S. Jennings was not present at this survey, and that it was error in the Circuit judge to permit the witness, Paul Warren, to testify that John T. Jennings, the son of John S., was present claiming to be the representative of his father, and that he admitted that the Stewart papers were the oldest, there being no other evidence that John T. Jennings was agent, except his statement made at that time.

The purpose of this survey, as we understand it, was to run the lines of the Coalter grant, and to determine these lines with reference to adjoining owners. Any admission made by an adjoining owner under such circumstances, with papers present and compared, would not only be competent as to the dates of such papers between the parties, but would be binding upon all privies and successors. And if it had appeared in this case that John S. Jennings was at the time of this survey one of the adjoining owners claiming under the Coalter grant, and that he was present either in person or by an authorized agent and made the admission testified to by Paul Warren, then the ruling of his Honor on the subject could not be questioned.

But these important facts seem to be wanting in the evidence. John S. Jennings had not become the purchaser of any portion of this land at that survey. The conveyance to him is dated in 1852, whereas the survey was made in 1850. Under these circumstances, had John S. Jennings himself been present at this survey, we do not see that he could have occupied any other position than a mere stranger, having no power to make admissions or declarations which would be competent testimony in any future proceeding between the parties then present and really interested.

We think, too, that the admission of this

testimony was obnoxious to the second ob-

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jection. The declarations or acts of \*an agent within the scope of his agency are the declarations and acts of the principal. This is familiar law. But before it can have application in a special case the agency must be established, and we do not think that this can be done by the declarations of the agent himself. He would be a competent witness if produced, but his declarations made out of court cannot be substituted in his stead.

On both the grounds, then, we think that the testimony of Paul Warren on this subject should have been excluded. This holding will necessitate a new trial, and it will not be necessary therefore to consider the other questions raised on the appeal.

The judgment of this court is that the judgment of the Circuit Court be reserved.

## 17 S. C. 143

HYATT v. MCBURNEY.

(November Term, 1881.)

[1. *Appeal and Error* ⇨§70.]

Where a defendant gives notice of exceptions, for the purpose of appeal, to an intermediate decree, but not within the ten days prescribed by law, and takes no further steps to perfect an appeal, and the plaintiff brings up his appeal from this same decree, and it is heard and a final judgment afterwards rendered on Circuit, the defendant may then appeal from the final judgment and on such appeal ask a review of the intermediate decree so far as it affects the final judgment.

[Ed. Note.—Cited in *Fields v. Hurst*, 20 S. C. 293; *Thatcher & Co. v. Massey*, 20 S. C. 547; *Elliott v. Pollitzer*, 24 S. C. 85; *Wallace v. Carter*, 32 S. C. 318, 11 S. E. 97; *McCrary v. Jones*, 36 S. C. 176, 15 S. E. 430; *Morgan v. Smith*, 59 S. C. 51, 37 S. E. 43.

For other cases, see *Appeal and Error*, Cent. Dig. § 3492; Dec. Dig. ⇨§70.]

[2. *Appeal and Error* ⇨§70.]

And this may be done even if defendant’s notice had been given within the ten days.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3451, 3487–3489, 3491–3512; Dec. Dig. ⇨§70.]

3. This case distinguished from *Pringle v. Sizer*, 7 S. C. 131.

[4. *Appeal and Error* ⇨§70.]

The act of 1878 (16 Stat. 698) regulating appeals to the Supreme Court does not repeal Section 11 of the code, which authorizes this court on appeal from a final judgment to review any intermediate decree, not before appealed from, necessarily affecting the judgment.

[Ed. Note.—Cited in *Lee v. Fowler*, 19 S. C. 608; *McCrary v. Jones*, 36 S. C. 175, 15 S. E. 430; *Cauthen v. Cauthen*, 70 S. C. 176, 49 S. E. 321.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3492, 3495; Dec. Dig. ⇨§70.]

[5. *Appeal and Error* ⇨§70.]

The act of 1878 regulates the mode and manner of appeals, but does not relate to the matter from which an appeal may be taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3451, 3487–3489, 3491–3512; Dec. Dig. ⇨§70.]



This is a motion to dismiss an appeal from a final judgment upon the ground that this appellant had given notice of appeal from an intermediate decree in the cause, but had failed to perfect his appeal, thereby waiving it. The notice which was claimed to be the notice of appeal from the intermediate decree was as follows:

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"The defendant, Caroline Carson, excepts for the purpose of an appeal to the Supreme Court to so much of the decree of his Honor Judge Pressley as decides that the plaintiff has a valid mortgage on the property mentioned in the pleadings, or any lien thereon superior to the mortgage of Ball to the executors of Carson, which, in the case in the Supreme Court of the United States to which McBurney, the mortgagor, was a party, was adjudged a subsisting mortgage, when McBurney became a purchaser of the property, and prior to the date of the mortgage to the plaintiff's testator.

A. G. Magrath,

James Lowndes,

Attorneys for Caroline Carson."

"We acknowledge service of a copy of the within paper, but do not waive our objection to the fact that the time for an appeal has passed.

McCrady & Son.

"September 20, 1880."

Other facts are stated in the opinion.

[For subsequent opinion, see 18 S. C. 199.]

Messrs. McCrady & Son. for the motion.

Messrs. A. G. McGrath and H. E. Young, contra.

April 17, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case the plaintiff respondent instituted an action to foreclose a mortgage covering a tract of land in Charleston county claimed by the defendant Mrs. Caroline Carson by virtue of an alleged older mortgage and a sale thereunder through proceedings in the United States Court. The case was heard first by Judge Pressley in April, 1880. The main question at that hearing was whether the mortgage under which Mrs. Carson claimed had been satisfied.

This question had previously been made in the United States Court as between some of the parties, and had been there decided in favor of Mrs. Carson. But this plaintiff was

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not a \*party to that proceeding. This fact was recognized by the United States Court, and in the judgment which was there pronounced it was expressly declared that the rights of the plaintiff were not concluded thereby. This question then being an open question before Judge Pressley, on the hearing of the case he decided that Mrs. Carson's mortgage had been satisfied and that plaintiff's mortgage was the only lien upon the land. Judge Pressley, however, in deference

to the judgment of the Supreme Court of the United States, declined at that stage of the case to order the foreclosure sought by the plaintiff, and instead thereof remanded the case to the master to inquire and report whether or not the plaintiff could, without much expense and delay, make her claim out of other property of her debtor, McBurney & Co. holding in abeyance the order of foreclosure in the mean time.

From this decree the plaintiff appealed, and Mrs. Carson gave notice of exceptions for the purpose of appeal; but this notice was not given within the ten days required, and Mrs. Carson afterwards concluded not to perfect her appeal, being satisfied with the general result of Judge Pressley's decree, or at least preferring to await the report of the master as to the matter referred to him, hoping that this report would release the land from the encumbrance of plaintiff's mortgage by throwing plaintiff on other property of McBurney & Co., and consequently leave the land in her possession. The plaintiff's appeal, however, was perfected and was heard at the last term of this court, upon which hearing this court, assuming the facts found by Judge Pressley to be true, to wit, that the mortgage of Mrs. Carson had been satisfied, and that there was no other lien upon the land than that of the plaintiff, adjudged upon these facts, that plaintiff was entitled to a judgment of foreclosure, and sent the case back to the Circuit Court for such judgment. 15 S. C. 393.

Under this state of facts, the case came up before Judge Kershaw at the last term of the Circuit Court for Charleston county, who, in accordance with the opinion of this court, gave the plaintiff a judgment of foreclosure and ordered the land to be sold in satisfaction of plaintiff's mortgage. From

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this \*judgment Mrs. Carson now appeals, and seeks to contest the questions of fact as to the satisfaction of the mortgage under which she claims found against her in the decree of Judge Pressley, and to which she was then willing to submit because the decree, notwithstanding the findings adverse to her therein, was in its general result satisfactory.

Mrs. Hyatt moves to dismiss this appeal upon two grounds:

First. Mrs. Carson having given notice of exceptions on September 20, 1880, for the purpose of appeal from the intermediate decree of Judge Pressley filed a short time before, and having failed to perfect her appeal by preparing a case, \* \* \* the plaintiff contends that her appeal has been waived as to that decree, and that she cannot now renew it in such way as to contest the facts found against her in said decree.

Second. That the act of 1878 on the subject of appeals, which requires the appellant to give notice of his intent to appeal within

ten days. \* \* \* has repealed Section 11 of the code, under which an intermediate order or decree might be reviewed upon an appeal from a final decree; and consequently Mrs. Carson, having failed to perfect her former appeal under the notice which she then gave, has no right now to review the intermediate order of Judge Pressley by an appeal from the final decree of Judge Kershaw.

It appears from the statements in the brief that the notice of exceptions given by Mrs. Carson to the decree of Judge Pressley was not given within ten days after the filing of the decree. The decree seems to have been filed on September 3, 1880, and the notice was not given until September 20. There is nothing said as to whether Mrs. Carson had received written notice of the filing of the decree, but the attorneys of the plaintiff, on accepting service of her notice, incorporated into the acceptance a statement that they did not waive objection to the fact that the time of appeal had passed. We suppose then that Mrs. Carson had received notice of the filing of the decree, and that she failed to initiate her appeal within the ten days required, and consequently she had lost the right to appeal from the decree, as an intermediate order, at that time.

Such being the fact, it will not be neces-

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sary to consider the \*question as to what would have been the effect had her notice been in time, and no subsequent steps taken. Upon the facts as they exist in the case, the question of abandonment and waiver cannot arise. That question could become involved only where in a case some step had been taken which gave the party the right to proceed further, and without which further action the right gained by the first step would be forfeited or waived. But where the first step is without effect, the failure to follow it up is needless and harmless, as there can be no abandonment until a right attaches.

Here, assuming that Section 11 of the code is still of force, Mrs. Carson had the right to appeal from the decree of Judge Pressley as an intermediate order by giving notice within ten days after written notice of the filing of said decree, and had she given that notice within the required time her appeal would have been initiated; and then a failure on her part to take the next step necessary to perfect it would have amounted to a waiver as to the rights attached. But having failed to initiate the right to appeal from this decree as an intermediate order by notice within the time, her notice beyond the time was nugatory, and her failure to proceed further on that notice amounted to nothing.

We must look at the case, therefore, as an appeal from a final decree, and as if no appeal had been attempted by her from the intermediate decree. Considering the case in

that aspect, the important question is, Can she appeal from the judgment of Judge Kershaw as a final judgment, and on that appeal have the intermediate decree of Judge Pressley reviewed? The right to review intermediate decrees on appeal from final judgments is expressly provided for by Section 11 of the code, and unless the act of 1878 has repealed this section, there would seem to be no doubt as to this question, if Judge Kershaw's decree can be regarded as a final Circuit decree.

The decree of Judge Pressley was not a final determination of the rights of the parties. Certain facts were found by him, but there was no final judgment on the merits pronounced. On the contrary, the case was remanded by Judge Pressley to the master, and the future and final judgment was to de-

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pend \*upon the report subsequently to be made by that officer. At that stage of the case the plaintiff appealed. Upon that appeal the court in effect determined that upon the facts found by Judge Pressley a final judgment of foreclosure should have been then granted by him, and ordered the case back for that purpose. So that the judgment subsequently granted by Judge Kershaw is the only final judgment which has been pronounced in the case, and although this has been pronounced in accordance with the opinion of this court on the former appeal, yet it is not the judgment of this court in the sense that it has finally determined the rights of the parties, as the judgment of a court of last resort from which there could be no appeal.

The former appeal was from an intermediate order referring the case to the master for further report as to certain facts. The then appellant denied the necessity of this reference, and claimed that the decree at that time and upon the facts then found should have been a final decree of foreclosure. This court sustained this view of the appellant, and sent the case back for such a decree, which now having been pronounced by the Circuit Court, must be regarded as a final decree of that court, from which Mrs. Carson has the right to appeal under the general law authorizing appeals from final judgments, and unless Section 11 of the code has been repealed by the act of 1878, upon this appeal to have reviewed the findings of the Circuit judge in any intermediate decree affecting this judgment.

Now, has the act of 1878 repealed Section 11 of the code? We find in the act the usual repealing clause only, to wit, "That all acts and parts of acts inconsistent herewith are hereby repealed." There is no express repeal in terms of section 11, and if this section has been repealed, then it has been done by implication. Repeals by implication are not favored. *Scurry v. Coleman*, 14 S. C. 166. Construed under the light of this principle,



is there such inconsistency between the two as that they cannot stand together? Section 11 provides that appeals may be taken from any intermediate judgment, order, or decree involving the merits, and from final judgments, provided, if no appeal be taken until

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final judgment, the court \*may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from. The act of 1878 provides that in every appeal from matters contained in judgments or decrees at chambers \* \* \* the appellant must give notice of his intention to appeal within ten days after written notice of the filing of said decree, \* \* \* otherwise the right to appeal is lost.

The respondent contends that where a party desires to appeal from an intermediate order or decree he cannot await the final decree, but must appeal at once from the intermediate, because of the provision in the above act as to the ten days' notice of intent to appeal required to initiate the appeal. To illustrate by the facts of this case. The intermediate decree of Judge Pressley, which the appellant desires to have now reviewed, was filed in February, 1880; the final decree of Judge Kershaw September 9, 1881. The respondent claims that the act of 1878, having provided that in every appeal \* \* \* the appellant must, within ten days after written notice of the filing of the decree appealed from, give notice of his intent to appeal, and the appellant not having given this notice as to the intermediate decree of Judge Pressley has lost her right to have this decree reviewed by the court, by appeal from the final decree of Judge Kershaw.

We do not concur in this view for several reasons. The act of 1878 was not intended to limit or curtail the right of appeal existing before the passage of the act, but its purpose was to prescribe the mode and manner of inaugurating and perfecting appeals; and although it does use the language "that in every appeal \* \* \* the appellant must give notice of his intent to appeal within ten days after he receives written notice of the filing of the decree which he desires to appeal from," yet this was not intended to deprive parties of any rights as to appeals which they previously had, but simply to prescribe what was necessary to be done as a first act where a party intended to appeal.

For instance, before the act of 1878, parties under Section 11 of the code could appeal from an intermediate decree when pronounced, or they could let that rest, and,

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awaiting the final \*decree, appeal from that. Now, the true meaning of the act of 1878 is that when an appeal is intended from either the one or the other of such decrees, the appellant must give his notice within ten days after the written notice to him of the filing of the decree, either intermediate or final,

from which he desires to appeal. He loses his right to appeal in either case by failing to give this notice, and the right is secured in either case by giving it; and when thus secured in either, it is secured with all of its incidents.

Now, one of the incidents which belongs to an appeal from a final judgment is the power which is conferred on this court by the proviso to Section 11 of the code to review on such appeal any intermediate decree or matter which may have led to or affected such judgment. This review, as it will be observed from reading the proviso, is not a right conferred upon the parties so much as it is a power given to this court, and it is a very important and necessary power. Without it, appeals would be multiplied, causes delayed, and this court, being unable to look into the very matters which may have caused errors in the final judgment, rendered powerless to correct them. The legislature scarcely intended to limit this court in this respect, and cut off this important power of review in such indirect and obscure manner.

The decree of Judge Kershaw is a final decree of the Circuit Court. Mrs. Carson has complied with the act of 1878, by giving notice, within the ten days, of her intent to appeal, and by the preparation of the other papers required by that act. This brings the appeal properly before this court. When here, though she did not appeal from the intermediate decree of Judge Pressley, yet if it has affected the final judgment of Judge Kershaw, under the proviso of Section 11, we have the power to review it. The case of *Pringle v. Sizer*, 7 S. C. 131, does not, in our judgment, conflict with this conclusion. That case decided that where a party appeals from a later order, leaving the first unaffected, he is concluded as to the first. There are no such facts in this case; Mrs. Carson's attempt to appeal was from a former order, not a later one, and the principle of *Pringle v. Sizer* does not apply.

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\*The act of 1878, as decided in *Scurry v. Coleman*, 14 S. C. 168, and *Rogers v. Nash*, 12 Ib. 560, relied on by respondent, as we have already stated, has reference only to the mode and manner of appeal, initiating and perfecting it, and not as to the matter from which an appeal may be taken, or as to the powers of this court, when the appeal reaches it. Nor does it in any way conflict with Section 11 of the code, or the important proviso thereto attached.

It is the judgment of this court that the motion to dismiss the appeal be refused, and it is so ordered.

Plaintiffs presented a petition for rehearing, alleging that the decree of Judge Pressley was filed September 3, 1880, in vacation, but that notice of the filing of the decree was not served upon Mrs. Carson's attorneys until September 11, and that therefore her no-

tice of appeal served September 20 was within the ten days required by law. Mrs. Carson answered this petition denying that she or her counsel had ever received from the executors of Hyatt, or their counsel, notice of the filing of Judge Pressley's decree, but that she had received such notice from the clerk of court on September 3, 1880.

May 12, 1882. The following order was passed:

PER CURIAM. It is ordered that this petition be dismissed. It is true that this court, in refusing the motion made at the last term to dismiss the appeal, understood, as stated in the petition, that Mrs. Carson failed to give her notice of intent to appeal from the intermediate decree of Judge Pressley within the ten days required by the act of 1878, and upon a re-examination of the brief we do not see how the court could have reached any other conclusion. Whether this was the fact or not, the parties do not seem now to agree. But be that as it may, we do not see that the result should be changed. Because, while it may be admitted that a failure by Mrs. Carson to take the next step after her notice of appeal given in time would have waived her appeal from the decree of Judge Pressley as an intermediate decree, yet she was not bound to appeal from that decree as an intermediate decree. And

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we do not think that a failure to do so, or a waiver of her privilege in this respect, would have forfeited her right to appeal from the judgment of Judge Kershaw as a final judgment in the case, subject to the power on the part of this court to review upon such appeal any intermediate decree affecting said judgment.

[NOTE.—Under a strict construction, the notice given by Mrs. Carson on September 20, 1880, might be treated as a notice of exceptions taken to that decree, and not a notice of intention to appeal therefrom in advance of the final judgment. It is not designated as a notice of appeal, nor does it use the language of Section 2 of the act of 1878, but is in the very words of the first section, "Excepts for the purpose of appeal to the Supreme Court." Every exception to an interlocutory order or intermediate decree of a Circuit judge is taken for the purpose of appeal, inasmuch as only the Supreme Court can consider such an exception. It would seem to be proper practice and prevails generally, it is believed, to take exceptions to intermediate decrees and put them upon the record, although there is no intention of then appealing. When the final judgment is rendered and appeal is then taken, the "case" will show that errors in the judgment resulting from errors in interlocutory orders and decrees in the cause were duly excepted to at the proper stages, and again excepted to as embodied in the final judgment. That exceptions to such an order should be taken at the time seems to be contemplated by Section 290 [292] of the code of procedure. It is somewhat analogous to exceptions taken to the rulings of the presiding judge upon questions of evidence, where witnesses are examined before him in a case in chancery. His decree may not be filed for two months afterwards;

it would then be too late to note exceptions to such rulings at the hearing, but if taken within proper time they would come up to this court in the appeal taken from the decree.

It should be observed that in this case the respondents did not make the point that the appellants could not now except to the final judgment because that the alleged errors in such judgment were matters already passed upon in the intermediate decree, to which no exceptions were taken; but the motion is based solely upon the failure to perfect at the time an appeal from the intermediate decree, notice of appeal having been given and then abandoned. To this point the opinion of the court must be considered as responsive, for it was the only point made by the motion. Respondents and appellant both treated the notice of September 20 as a notice of appeal, and as such the court considered it in connection with the act of 1878 and Section 11 of the code. Section 11 of the code relates to appeals, not to exceptions.—REPORTER.]

### 17 S. C. \*153

\*Ex parte LEWIE, In re GEIGER v. DRAFTS.

(November Term, 1881.)

#### [1. Courts ⇨118.]

The Court of Common Pleas, as the general fountain of justice, has jurisdiction of every invasion of legal civil rights where no special direction is given; but where a statutory right is created and its enforcement and protection are conferred upon a designated tribunal other than that court, it has no jurisdiction in the matter.

[Ed. Note.—Cited in Jennings v. Abbeville County, 24 S. C. 549; Murphy v. Valk, 30 S. C. 267, 9 S. E. 101; Moore v. Barry, 30 S. C. 533, 9 S. E. 589, 4 L. R. A. 294; Ex parte Ware Furniture Co., 49 S. C. 28, 27 S. E. 9; Davis v. Whitlock, 90 S. C. 241, 73 S. E. 171, Ann. Cas. 1913D, 538.

For other cases, see Courts, Cent. Dig. § 375; Dec. Dig. ⇨118.]

#### [2. Homestead ⇨150.]

The Court of Common Pleas has no original jurisdiction of a petition filed by a widow in May, 1880, for a homestead in her deceased husband's estate.

[Ed. Note.—Cited in Scruggs v. Foot, 19 S. C. 274, 279; Myers v. Ham, 20 S. C. 528; Bridgers v. Howell, 27 S. C. 431, 3 S. E. 790; National Bank of Newberry v. Kinard, 28 S. C. 106, 5 S. E. 464; Ex parte Brown, 37 S. C. 184, 15 S. E. 926; Ex parte Worley, 49 S. C. 57, 26 S. E. 949.

For other cases, see Homestead, Cent. Dig. § 296; Dec. Dig. ⇨150.]

Before Aldrich, J., Lexington, February, 1881.

This was a petition for homestead presented by Mrs. Carrie S. Lewie, widow of Dr. F. S. Lewie. Dr. Lewie died in June, 1873, considerably in debt, but it does not appear that there were any judgments against him. The most valuable part of testator's lands were sold in 1874 by the executors under a power in the will. In March, 1875, an action in the nature of a creditor's bill was instituted by H. H. Geiger against S. P. Drafts and D. J. Griffith, as executors of the will of Dr. Lewie. It does not appear that there were any other parties to this action except those named,



but creditors were called in. It was in this action that Mrs. Lewie presented her demand for dower in 1876, and received its equivalent out of the proceeds of sale. Nothing seems to have been done in the cause after 1876 until this proceeding, although still open on the dockets. The petition for homestead was entitled in the same cause. The summons is dated January 15, 1880; the petition is without date. Both summons and petition were served May 13, 1880.

The Circuit decree granted the prayer of the petition, and the executors of Dr. Lewie appealed.

Messrs. H. A. Meetze, H. W. Rice, for appellants.

Messrs. T. S. Arthur, G. T. Graham, contra.

April 17, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Dr. F. S.

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Lewie, late of Lexington county, died in June, 1873, possessed of considerable property, real and personal. At the time of his death he owned a homestead at Summit in said county. This homestead was occupied by one of the appellants, and Lewie boarded with this party. He left a will in which, after providing for the payment of his debts and one or two special legacies and devises, he gave one half of the rest and residue of his estate of every kind to his wife, the respondent, to whom he had been married about a month before his death. The appellants and the respondent were nominated as executors of this will; the respondent renounced and the appellants qualified.

Shortly after his death the respondent left the county and found employment in Washington city, in the Treasury Department of the United States Government. She was under the impression that the estate was solvent, and that she would ultimately realize something from the will. Creditors, however, commenced proceedings and the estate turned out not only heavily indebted, but insolvent, and under a proceeding which had been originated in 1875 to marshal assets, etc., she came in by petition and obtained the sum of \$1,437.50 in lieu of dower in the real estate of her husband. In the mean time the creditors had sold the whole estate, except a tract of land in the county containing some 200 acres, known as the Hall or Black Allmon tract, worth, it is said, about \$300; a lot in Summit, of little value, given in the will to one W. F. Oswalt; and one third interest in a small lot of five acres in or near Columbia. At the sale made by the executors in 1874 the homestead at Summit was bought by the appellant Drafts for \$1050. Drafts has since sold this property to J. H. Lewie for \$500. Subsequent references have developed the fact that the appellants as executors have paid for the estate something over \$6000 more than they have received.

This was because they were sureties on many of the debts due by the estate.

Under these circumstances the respondent filed her petition in the Circuit Court in May, 1880, for homestead. The matter was referred by Judge Hudson to a referee for a full report of all the facts connected with the estate, reserving the question of the jurisdiction of this court over the matter of assign-

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ment of homestead. Under this reference a report was made with a mass of testimony, which at the next term came up before Judge Fraser, who recommitted the report for further testimony, with instructions "to report any facts bearing on the right of homestead and the value thereof."

The referee made a second report in January, 1881, in which with other facts, not material here, he stated that the respondent left Summit very soon after the death of her husband in 1873, and since that time has resided elsewhere, with no intention to return; that she had claimed and received dower; that the executors had been in constant communication with her and had never received intimation of her purpose to claim homestead until this proceeding.

This report, with certain exceptions by respondent, came to a hearing before Judge Aldrich, who, finding as matter of fact that the respondent had not left the county permanently and had not abandoned her home, adjudged and decreed that she was entitled thereto, and ordered the executors, appellants, to set her off a homestead both real and personal. The precise property out of which this was to be done was not specified. The defendants executors have appealed, assigning error in the decree of Judge Aldrich on several grounds; but from the view which we take of this case it will be unnecessary to state or consider these grounds.

In our opinion the Circuit Court was without jurisdiction of respondent's petition in its inception. This question does not seem to have been distinctly made below or in the argument here, but in our examination we have reached the conclusion that the Circuit Court had no jurisdiction, and therefore no appeal upon the merits could properly come before this court. It is therefore useless for us to pronounce any judgment upon the legal questions involved. The Court of Common Pleas is the general fountain of justice, and where the rights of a citizen, either derived from the common law or the statutes, are invaded and the power to protect is conferred upon no special jurisdiction, he may seek redress in that court. But where rights are created by statute, to be obtained and protected in a special manner specified in the

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act by a \*special tribunal, no other court can assume jurisdiction. On the contrary, parties interested must pursue the course prescribed, and must seek the aid of the tribunal upon which the power to grant or protect

has been conferred. *Howze v. Howze*, 2 S. C. 232.

Now under the homestead acts all power in cases involving the rights to widows and children as to homesteads is conferred upon the Probate Courts in the first instance. The petition to obtain it must be made to that court, and the act prescribes the machinery to be adopted by which that court may have the homestead marked out, defined, and set off, and the mode by which the judgment may be made binding on the parties interested. On the other hand, none of these powers are conferred upon the Common Pleas Court. Parties are not authorized to petition that court, nor is it invested with the power to appoint appraisers and put in motion the other machinery necessary to mark out and define the homestead required by the acts made and provided in such cases.

Our conclusion, therefore, is that the petition of respondent, whatever may be the merit involved or the rights of the parties, had no foundation in the Circuit Court because of the want of jurisdiction on the part of that court, and the case should have been dismissed.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded with instructions to dismiss the petition for the want of jurisdiction, without prejudice to the rights of the petitioner in such proceedings as she may hereafter institute, as she may be advised.

[NOTE.—The doctrine of this case is in accord with the decision of the court in *Kennedy v. Reames*, 15 S. C. 552. In *Howze v. Howze*, 2 S. C. 232, there was no special tribunal designated, and therefore the Court of Common Pleas had jurisdiction under the principles here declared by the chief-justice. See, too, *Adger v. Bostick*, 12 S. C. 64. In decisions upon the homestead laws, however, care must be taken to note which one of the many statutes on this subject the court is considering. In this case, for instance, the court construes the act of 1873 (15 Stat. 372), which is not now of force. By Section 8 of that act the head of any family, widow, or children, entitled to an estate or right of homestead, and where no process had been lodged with any officer against such homestead, might make application to the judge of the Probate Court, and all subsequent proceed-

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ings in the matter were to be had in that court. In the subsequent act of 1880 (17 Stat. 516), however (now of force as Section 2002 of the General Statutes), the application is to be made to the master or clerk of court, and all proceedings after the filing of the return by the appraisers are to be had in the Circuit Court. In the act of 1873, and also in the statute now of force, this right of application to the master or clerk (formerly probate judge) can be made only where no process has been lodged with any officer against such homestead. In the principal case no such process had been lodged. What is the proper mode of procedure where such process has been lodged in the sheriff's office but no action is being taken to enforce it by reason of the creditor's indulgence,—or because, the debtor being dead, his estate is being administered in the Court of Equity, and the claim of homestead is there asserted in the answer of the widow, or children,—must be settled by some future case.—REPORTER.]

17 S. C. 157

WATTS v. BLALOCK.

(November Term, 1881.)

[1. *Mortgages* ⇨533.]

Plaintiff, by permission of a railroad company, erected a guano house near a depot, and on the right of way of the company, on lands of his wife then under mortgage. Under decree of foreclosure of this mortgage, plaintiff and his wife being parties thereto, defendant became the purchaser of the land, and afterwards took forcible possession of the guano house. Plaintiff brought action for damages and recovered a verdict. *Held*, that the judge committed no error in this case in charging the jury that defendant must show a grant from the State, or a chain of titles for twenty consecutive years.

[Ed. Note.—Cited in *Hillhouse v. Jennings*, 60 S. C. 401, 38 S. E. 596.]

For other cases, see *Mortgages*, Cent. Dig. §§ 1554, 1565, 1565½; Dec. Dig. ⇨533.]

[2. *Judgment* ⇨747.]

Plaintiff is not estopped by reason of the action for foreclosure, to which he was a party, from now asserting his claim under the railroad company (which was not a party) to the guano house built on their right of way.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1294; Dec. Dig. ⇨747.]

[3. *Trial* ⇨191.]

It is no error to refuse a charge which assumes the existence of facts at issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 420; Dec. Dig. ⇨191.]

[4. *Mortgages* ⇨500.]

If defendant owned the fee in the land, and plaintiff had used the guano house only for the storage of guano shipped to him, still it did not give to defendant the right to gain possession by committing a trespass.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1486; Dec. Dig. ⇨500.]

[5. *Mortgages* ⇨551.]

[Plaintiff mortgaged his land to defendant. On the land, but on the right of way of a railroad company, plaintiff, by leave obtained from the company, had put up a building. Defendant foreclosed his mortgage, became the purchaser of the premises, and took forcible possession of the building. *Held*, that he was liable to plaintiff in trespass for so taking possession of the building.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1578; Dec. Dig. ⇨551.]

[This case is also cited in *Ragsdale v. Southern Ry.*, 60 S. C. 388, 38 S. E. 609, on the right to recover a building.]

Before Hudson, J., Laurens, February, 1881.

Hon. THOMAS B. FRASER of the Third Circuit sat in the place of the chief justice, who had been of counsel in the cause.

This was an action by James W. Watts against L. W. C. Blalock for five hundred dollars damages. The opinion states the pleadings and some of the facts of the case.

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\*The testimony shows that this guano house was built by plaintiff in 1875 by permission of the Laurens Railroad Company. The house was eight feet from the track and its rear not over forty feet from the road-bed; it was enclosed by a fence, except on



the side towards the railroad track. Plaintiff testified that he built the house to be exclusively used for guano which he ordered and owned; that when given up by him it was to be the property of the railroad company; that he was agent of the railroad company at Martin's Depot, and also an agent for the sale of guano. "The guano came upon my own order, it came on railroad as freight and was paid for as freight. The railroad had no title to nor interest in it. No reservation was made in the sale of the Martin place. \* \* \* Guano was not then stored in the depot; all that came was stored in this house of mine. The house was then used by and was a benefit to the road."

The judge thus reports his charge:

At the conclusion of the argument the court was asked by the plaintiff's counsel to charge as follows:

"That it is necessary for defendants to connect themselves with grant from state or twenty years' possession to prove title." I charged as follows: That he who defends a trespass to realty on the ground that he is the owner in fee, must show a perfect title, and that can be done only by tracing his title back to a grant from the state, or by showing such possession by citizens of the state as will presume a grant, and from such must derive his title.

The counsel for defendant made the following request to charge:

1. That railways take only an easement, or right of way, in lands through which they pass.

2. That railways take only such interest in the soil through which they pass as may be required for the purposes of construction, for meeting the wants of the public in connection with the railway, and that the interest so taken cannot be diverted to any other purpose.

3. That the guano house, not being used for the purposes and not being under the con-

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trol of the Laurens Railroad, and the \*plaintiff having admitted that he is not the owner of the land lying on either side of said railroad and around said guano house, the plaintiff cannot recover.

The first and second were charged as correct; the third was refused.

In my charge to the jury I instructed them, among other things, that the defendant, Blacklock, having justified the ousting of the plaintiff from the guano house, and his forcible possession and occupation thereof, by alleging in himself title to the Martin place, it devolved upon him to make good his plea of *liberum tenementum*. To do this he must either trace his title back to a grant from the state, or failing in that, he should show a presumptive grant, i. e., he should show that for twenty years or more some one or more of the citizens of this state have occupied and used this land adversely to the state and

the world. That this twenty years' adverse possession against her by her citizens in any order of continuous occupation, created the presumption of a grant; and that from some one of these successive occupants the defendant must derive title. The fact is, however, that I did not regard the question of defendant's title as the serious issue in the case, nor do I think it gave much concern to the jury. Admitting him to be owner of the fee, the real question was as to his right to seize the house.

The jury were also instructed that the company's right of way was an easement, the proper use of which the owner of the fee could not disturb. That the erection of the guano house on the right of way so near the company's depot and so near the track, under license from the company, to be used in relief of the depot, for storing guano, and to be turned over to the company so soon as the plaintiff ceased to use it as such, was not such a violation of the proper use of the right of way by the company and by the plaintiff as authorized and justified the seizure and occupation of the house by the defendant to the exclusion of the plaintiff. In doing this the defendant became a trespasser, and liable in damages. The question of the amount of damages, as all other questions in fact, were left to the jury.

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\*Mr. J. W. Ferguson, for appellant.  
Messrs. Holmes & Simpson, contra.

April 20, 1882. The opinion of the court was delivered by

Mr. Justice FRASER. This is an action of trespass alleging that the plaintiff was in possession of a certain "guano house" on the line of the Laurens Railroad, in the town of Martin's Depot, in Laurens county, claiming \$500 damages for a trespass by defendant, and costs. The defendant after putting in issue all the allegations of the complaint alleges that he "on the first Monday in October, 1877, bought a tract of land commonly known as the Martin place, at Martin's Depot, in said county and state; that on said tract of land and on and near the line of the Laurens Railroad is a "guano house," and it is to this house this defendant supposes the plaintiff to make reference in his complaint. This defendant alleges that the said Martin place was sold by C. L. Fike, as sheriff of Laurens county, at Laurens Court House, on the day aforesaid, without any reservation of any kind, and was purchased by the said defendant as aforesaid \* \* \* "that the said guano house at the time he made the purchase of the said Martin place was enclosed by the fencing on said place, and is so surrounded by the lands of said place as to render it impossible for any one to use the said guano house without the consent of this defendant."

It appears from the "case" before this court that A. P. Martin died in 1862 and that in November following this tract of land containing about 900 acres was sold as his property under proceedings in partition, and was purchased by Kitty G., his widow, who gave her bond with sureties for the purchase money. She afterwards intermarried with plaintiff, J. W. Watts. This bond was given to the commissioner in equity, and when that office was abolished was transferred to the custody of the clerk of the Court of Common Pleas. Ira W. Rice, the clerk, commenced proceedings to foreclose the statutory lien, to which action the said Kitty G. and her husband, the plaintiff, were parties defendant. Under the decretal order in this case the Martin tract was sold in October,

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1877, \*and purchased by the defendant, L. W. C. Blalock. The "guano house" had been built on the right of way of the Laurens Railroad by the plaintiff, with the permission of the authorities of the railroad, and was in the possession of the plaintiff, who was using it for storing guano for which he was agent at the time defendant entered and took possession. The jury found a verdict for plaintiff for \$500, and defendant appeals from certain rulings of the presiding judge.

The first exception is as follows: 1. "Because, it is respectfully submitted, in view of the nature of the cause and the testimony adduced, that his Honor erred in ruling that it was necessary for the defendant to show a grant from the state or a chain of title extending through twenty years to the Martin place." As a general statement of a principle of law we think that there was no error in the ruling of the presiding judge on this point. Add, Torts, § 446. There is, however, a qualification of this proposition which defendant claims to have existed in this case, and the second exception is as follows: 2. "Because the Martin place having been sold, and bought by the defendant at a prior civil sale under proceedings to foreclose a statutory lien, it is respectfully submitted that his Honor erred in ruling that the defendant must show a better title to said Martin place than the deed of the sheriff who executed the order of the court." There are some cases where the party to an action upon whom is the burden of proving title to real estate can rely upon the doctrine of estoppel instead of going into the proof of his title by showing a grant or a presumption of a grant and thence by regular chain of conveyances. Such are the cases where it appears that both parties claim title from a common source, or where one claims under some judicial proceeding to which the other has been a party or a privy. In the latter cases the matter in issue in the cause before the court must have been at issue in the former proceeding, the benefit of which is sought. Now in the case at bar, it appears that the Lau-

rens Railroad had been built many years before the sale for partition of the Martin estate, and had acquired the right of way over the land on which this guano house stands.

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The Laurens \*Railroad Company has never been made a party to any of the proceedings in reference to this Martin place, and cannot be in any way concluded by it; and even if J. W. Watts, the plaintiff, has been concluded as to any other interest in the Martin place in consequence of his having been a party to the proceeding to foreclose the statutory lien, it is difficult to see how he can be in any way concluded in reference to the right of way in regard to which he has never been impleaded. The claim of the Laurens Railroad Company is paramount to that of the heirs of A. P. Martin and those who have their title. In this case plaintiff claims title under the Laurens Railroad Company which was entitled to possession of the locus in quo.

But the defendant in this case claims that if plaintiff is not concluded by the sale under the case of Ira W. Rice, Clerk, v. J. W. Watts and wife, that under the circumstances of this case he had a right to enter and take possession of the "guano house," as appears by the third exception, which is as follows: 3. "Because, it is respectfully submitted, his Honor erred in refusing to charge the jury as follows: 'that the guano house not being used for the purposes and not being under the control of the Laurens Railroad, and the plaintiff having admitted that he is not the owner of the land lying on either side of the railroad, the plaintiff cannot recover.'"

It was entirely proper that the presiding judge should refuse to charge "that the guano house not being used for the purposes and not being under the control of the Laurens Railroad." This was a question of fact for the jury. Again, it does not follow, that because the plaintiff admitted that he was not the owner of the land on either side of the railroad, that the defendant was the owner, and had the right to dispossess him. It does not follow, if all these facts be assumed in favor of defendant, and it be admitted that he is the owner of the fee, and that this guano house was used by the plaintiff for storing guano for sale which had been shipped to him as an individual that plaintiff could not recover in this action.

The defendant is here under the same allegation as to title as was the plaintiff. In *Evans v. McLucas*, 15 S. C. 67. In that case, instead of defending plaintiff brought the ac-

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tion to \*recover a house built on the right of way of the W. C. and A. Railroad by permission of the company as a warehouse for the purpose of receiving guano, etc., from the cars. Plaintiff held the fee, and this court held that she could not recover the house either as a fixture or as personality. The charters of the two companies as to this



point are substantially the same. If the defendant in this case had brought his action against the plaintiff, he could not have recovered on such a title as he has shown in this case, and he cannot be allowed to put himself in a better position by committing a trespass on the plaintiff. The right of possession is a very sacred one, and the court will not allow the repose which it gives to be endangered by giving improper advantages to a trespasser. If defendant had a good title he should have resorted to the courts, where he could have obtained any redress to which by law he was entitled.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

### 17 S. C. 163

#### WARREN v. RAYMOND.

(November Term, 1881.)

##### [1. *Appeal and Error* ¶1097.]

What points were decided, what claims adjudicated, and the status of what parties determined, on the former appeal in this cause (12 S. C. 9), stated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. ¶1097.]

##### [2. *Descent and Distribution* ¶125, 132.]

The lands of an ancestor in the hands of his heir are liable for his debts unless bona fide alienated before action brought; but a mortgage by the heir does not operate as such an alienation until the mortgagor is out of possession.

[Ed. Note.—Cited in *Ex parte Hardin*, 34 S. C. 388, 13 S. E. 615, 13 L. R. A. 723, 27 Am. St. Rep. 820; *Carolina Savings Bank v. McMahon*, 37 S. C. 317, 16 S. E. 31; *Galloway v. Galloway*, 76 S. C. 526, 57 S. E. 528.

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 457-477, 488; Dec. Dig. ¶125, 132.]

##### [3. *Appeal and Error* ¶1097.]

All points decided by this court on appeal, or necessarily involved in what was decided, are res judicata, and cannot be again considered in the cause.\*

[Ed. Note.—Cited in *Pratt v. McGhee*, 20 S. C. 582; *Earle v. Earle*, 33 S. C. 504, 12 S. E. 164; *Jones v. Charleston & W. C. Ry. Co.*, 65 S. C. 418, 43 S. E. 884.

For other cases, see *Appeal and Error*, Cent. Dig. § 4358; Dec. Dig. ¶1097.]

##### [4. *Mortgages* ¶1.]

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\*A mortgage of land since the act of 1791 (5 Stat. 169) is not an alienation but a security by lien for the payment of the debt; and it cannot be held an alienation because that a mortgage was in effect a conveyance in 1712.

† See *Hart v. Bates*, ante, p. 35. The distinction should be borne in mind between the effect of a decision of this court upon the cause itself, and upon the same point involved in another and subsequent suit. In the former it is res judicata, an estoppel by judgment, or matter of record, and, whether right or wrong, cannot be disturbed by this court on a second appeal. But in the latter case the principle may be reconsidered and, if erroneous, reversed.—R.

when the act of 3 & 4 W. & M. ch. 14, was made of force in this state.

[Ed. Note.—Cited in *Hendrix v. Seaborn*, 25 S. C. 485, 60 Am. Rep. 520; *Aultman & Taylor Co. v. Rush*, 26 S. C. 523, 2 S. E. 402; *Johnson v. Johnson*, 27 S. C. 315, 3 S. E. 606, 13 Am. St. Rep. 636.

For other cases, see *Mortgages*, Cent. Dig. §§ 1, 51; Dec. Dig. ¶1.]

##### [5. *Executors and Administrators* ¶544.]

A proceeding against an heir-at-law, not, however, qua heir, but in the character of an executor de son tort, cannot be regarded as an action against the heir for the debt of the ancestor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2594; Dec. Dig. ¶544.]

##### [6. *Executors and Administrators* ¶544.]

A judgment against an executor de son tort cannot be levied on the lands of the intestate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2603; Dec. Dig. ¶544.]

##### [7. *Judgment* ¶770.]

A judgment obtained prior to the act of 1873 (15 Stat. 498), amending the code, has no lien until the requirements of that act are complied with; and a transcript of such a judgment without lien lodged in another county after that act is also without lien.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1328; Dec. Dig. ¶770.]

##### [8. *Executors and Administrators* ¶544.]

A judgment obtained against an executor de son tort in a misconceived action against him to have the lands of the intestate applied to the satisfaction of an unenrolled decree rendered during the intestate's lifetime, did not so merge the intestate's debt as to destroy the bond upon which the whole proceeding was founded.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2602; Dec. Dig. ¶544.]

##### [9. *Courts* ¶107.]

The force of a decision of the Supreme Court upon a point fully argued with all the testimony before it is not affected by the statement of the justice who wrote the opinion that "no exception had been taken to this finding of fact," when in truth an exception had been taken by one of many parties to the cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4411; Dec. Dig. ¶1111, 1112, 1113, 1114, 1116.]

##### [10. *Descent and Distribution* ¶134.]

A mortgagee, with knowledge in part of the ancestor's indebtedness, took from the heir-at-law, to secure the repayment of a present loan, a mortgage of lands descended, with a covenant authorizing the mortgagee on default in his mortgage or in a prior mortgage on the same property, to take possession; learning afterwards that action was about to be instituted to subject the mortgaged lands to the payment of the ancestor's debt, the mortgagee took possession under the covenant of his mortgage. *Held*, a bona-fide alienation under the statute 3 & 4 W. & M. ch. 14, § 5.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 490, 491; Dec. Dig. ¶134.]

##### [11. *Descent and Distribution* ¶134.]

And the mortgagor, being out of possession as to this mortgage, was also out of possession as to the prior mortgage on the same lands.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 490, 491; Dec. Dig. ¶134.]

[12. *Descent and Distribution* ⇨134.]

The question of bona-fides under the statute 3 & 4 W. & M. ch. 14, § 5, is not identical with the question of bona fides in a purchase for valuable consideration without notice.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 490, 491; Dec. Dig. ⇨134.]

13. This case distinguished from *Lowry v. Pinson*, 2 Bail. 324 [23 Am. Dec. 140].

[14. *Appeal and Error* ⇨1022.]

Concurrent findings of fact by referee and circuit judge sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

[15. *Mortgages* ⇨596.]

The obsolete law of double mortgages depriving the mortgagor of his equity of redemption, although incorporated into the General Statutes of 1872 (ch. lxxxii, § 8), is inconsistent with the settled law of the state since the act of 1791 (5 Stat. 170), also incorporated into the General Statutes (ch. lxxxii, § 9), and therefore inoperative.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1742-1752; Dec. Dig. ⇨596.]

[16. *Judgment* ⇨713.]

Action as instituted by a mortgagee to foreclose his mortgage upon descended lands of the mortgagor, and a party defendant claimed

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that \*these lands were covered by the lien of a judgment obtained by him against the ancestor; this defence was overruled and the mortgage held to be the prior lien. *Held*, no adjudication upon the rights of such defendant as a bond creditor of the ancestor binding upon him in action afterwards brought by other creditors of the ancestor to subject these lands to the payment of her debts.

[Ed. Note.—Cited in *Langston v. Shands*, 23 S. C. 151; *Stewart v. Blalock*, 45 S. C. 69, 22 S. E. 774.

For other cases, see *Judgment*, Cent. Dig. § 1234; Dec. Dig. ⇨713.]

[17. *Mortgages* ⇨214.]

And such mortgagee having become the purchaser at the sale in this foreclosure suit, but not until after the action of the ancestor's creditors was instituted, the mortgagor was not out of possession before action brought.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 492-496; Dec. Dig. ⇨214.]

[18. *Mortgages* ⇨214.]

But was out of possession as to a creditor of the ancestor not a party to the original complaint, but brought in by a call to creditors under an amendment, subsequent to the sale, converting the action into a proceeding to marshal the assets of the ancestor's estate, notwithstanding the foreclosure decree saved the rights of the creditors first suing.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 492-496; Dec. Dig. ⇨214.]

[19. *Descent and Distribution* ⇨144.]

Two or more creditors of a deceased ancestor cannot join in one action against the heir-at-law to subject the lands descended to the payment of the debts of the ancestor.

[Ed. Note.—Cited in *Hellams v. Switzer*, 24 S. C. 47.

For other cases, see *Descent and Distribution*, Cent. Dig. § 506; Dec. Dig. ⇨144.]

[20. *Descent and Distribution* ⇨150.]

The proceeds of sale of the property should be applied, after the payment of the ancestor's

creditors (where so liable) to the mortgages of the heir, in the inverse order of their dates.

[Ed. Note.—Cited in *Kennedy v. Boykin*, 35 S. C. 85, 14 S. E. 809, 28 Am. St. Rep. 838; *Watson v. Neal*, 38 S. C. 99, 16 S. E. 833.

For other cases, see *Descent and Distribution*, Cent. Dig. § 519; Dec. Dig. ⇨150.]

Before Thomson, J., Charleston, June, 1880.

This is the second appeal in this case; the first will be found reported in 12 S. C. 9, and should be read in connection with the opinion here.

The report of the referee, G. D. Bryan, Esq., the Circuit decree, and the opinion of this court fully state the case. The referee's report was as follows:

This case having been remanded to the Circuit Court by the Supreme Court, has been again referred to me by an order of date, June 26th, 1879, as follows:

"Ordered that the decree of the Supreme Court herein be filed with the clerk of this court, as the decree and judgment of this court; and that the decree heretofore rendered herein be set aside where inconsistent therewith and opened in other respects to the extent necessary to modify it in accordance therewith. Ordered further, that George D. Bryan, the referee heretofore appointed in this action, do inquire into such matters of fact or law as are opened by the said decree, and that he do report thereon, with the testimony taken before him, with leave to report any special matter to this court. It does not appear to the court that the alienation of a part of the real estate necessarily operates to bar the equity of redemption under the

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\*circumstances in this case, and that the creditors of Mary Raymond have a possible interest therein. The motions to dismiss the complaint as to A. G. Rice, and the estate of Poincignon for this and other reasons are refused without prejudice."

I beg leave respectfully to report that I have held a number of references under this order, at which all the parties to the cause were before me, and have taken testimony which is filed herewith.

Upon a motion made to restrict the new evidence as to whether, prior to the commencement of this action, the mortgages set up by way of defence to sustain the plea of bona-fide alienation as against the rights of the creditors of the ancestor, commenced to operate by way of transferring the legal title from the mortgagors to the mortgagees by reason of the mortgagors being out of possession at any time prior to such suit, I ruled that under the decision of the Supreme Court, the testimony should not be restricted to this point alone, but that evidence would be admitted upon any point made in the case. To this the plaintiff excepted.

I. The complaint in this case was filed on January 17th, 1876, by John D. Warren, on behalf of himself and all other creditors of



Mary Raymond, deceased, who should come in and contribute to the expense of this action. The object of the bill was to subject the real estate in the hands of H. H. Raymond, the heir of Mary Raymond, deceased, to the bond debts of Mary Raymond. The prayer was for judgment for the amount of the debt due to the plaintiff, for an injunction against numerous parties holding mortgages of the heir and judgments against him, for the marshaling of the assets of the estate of Mary Raymond, and the calling in of her creditors to prove their claims in this cause, for the appointment of a receiver of her estate, for the distribution of her estate according to law, and for such other relief as might be proper. The parties defendant in this action are H. H. Raymond, the heir-at-law, and after his death his heir-at-law and his executor, and S. Lord, Jr., administrator of Mary Raymond, deceased, and the creditors holding the mortgages of H. H. Raymond, the heir-at-law, on the property of the an-

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cestor, \*and those holding judgments against him the said H. H. Raymond.

On May 8th, 1876, a motion for preliminary injunction and receiver was made, but was refused, and notice of appeal was given by the plaintiff, but the appeal was not prosecuted, as an order of injunction was subsequently granted as hereinafter stated.

On May 8th, 1876, the court granted leave to the plaintiff to amend his bill by inserting allegations as to the insolvency of H. H. Raymond, and ordered a reference of the case to the undersigned to take an account of the debt due to the plaintiff on the bonds set forth in the complaint, with instructions to call in by advertisement all the creditors of Mary Raymond, to prove their claims against her estate, on or before June 10th, 1876, and to report a correct statement of such debts with their relative priorities, and also to inquire into all the issues of law and fact raised in the pleadings, and especially of the estate, real and personal, of the said Mary Raymond. No exception was taken to this order. The creditors of Mary Raymond were called in by notice as directed and inquiries as required by the order duly made. It was admitted that Mary Raymond left little or no personal property. The real estate set forth in the bill comprised practically her sole estate.

Henry H. Raymond, the heir of Mary Raymond, died May 31st, 1876. Rosalie Raymond, his heir, was duly made a party to the cause, and by S. Lord, Jr., her guardian ad litem, answered the complaint. On February 3d, 1877, the defendant Wm. M. Thomas was by order in this case enjoined from proceeding with the sale of the Waverly House, then advertised for sale under a levy under his execution. On February 20th, 1877, Samuel Lord, Jr., executor of Henry H. Raymond, and administrator of Mary Raymond, was made a party defendant, and answered that

he had received no assets of his or her estate to be administered. On February 21st, 1877, a decretal order was made in this cause, enjoining the defendants and all others, the creditors of Mary Raymond, and Henry H. Raymond, from proceeding further in any action then commenced, or from instituting any proceeding other than in this action, to

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\*enforce or collect any claim or demand against the property mentioned in the complaint, or against the defendant Henry H. Raymond.

The creditors of Henry H. Raymond were called in to prove their claims on or before April 5th, 1877. The real estate was ordered to be sold; the referee was directed to inquire into the liens claimed on said property in connection with the other matters and issues referred to him; the equity of redemption of all parties was barred, and all questions both as to the validity of plaintiff's claim, or otherwise, were transferred from the property to the fund. This order was moved by the plaintiff and consented to by Messrs. Simonton & Barker, Buist & Buist, A. G. Magrath, J. Barrett Cohen, H. L. P. Bolger, Asher D. Cohen, Pressley, Lord & Inglesby, and DeSaussure & Son, representing certain of defendants herein. On April 12th, 1877, the property was offered for sale, and with one exception, to wit, the property at the corner of Pitt and Wentworth streets, was bid in by the parties holding mortgages thereon. On December 7th, 1877, the first report of the undersigned, as referee, was filed, and on December 11th, 1877, plaintiff, by A. T. Smythe, his attorney, filed exceptions to his said report, that the referee had erred both in his conclusions of law and fact as therein reported.

Since the remanding of this case to me, to wit, on the — day of July, 1879, Messrs. Simonton & Barker called attention to the fact, that Peter Thomas, Stephen Thomas, Mary L. Thomas, and William Henry Thomas, were necessary parties to the proceedings, and asked that such proceedings be amended, and that they be joined as defendants. I so ruled, and the parties have duly filed their answers herein. To this ruling of the referee, the defendant, William M. Thomas, excepted.

II. The following claims against the estate of Mary Raymond have been proved before me:

First. The three bonds of the plaintiff, John D. Warren, set up in the complaint, amounting with interest, on January 1st, 1877, to six thousand four hundred and fifty-one 46-100 dollars. These were the joint and

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several bonds of Mary Raymond, with Henry H. Raymond as security. They were past due at the death of Mary Raymond, but interest had been paid on them up to that time. Warren testified that when he loaned her the money, it was understood that as long as the interest was paid he would not ask for the

principal. After her death the interest was paid by H. H. Raymond, and a payment was made as late as November 20th, 1874, on account of the interest on these bonds. On November 10th, 1875, Mr. Raymond accepted Mr. Warren's draft for six hundred and ten dollars, giving receipt, when paid, to be in full of interest on his bonds to January 1st, 1875. This draft matured on January 5th, 1876, and was not paid. This action was commenced on January 17th, 1876. Mr. Warren, the plaintiff, does not live in Charleston, but in Colleton county, and testifies that he had no actual knowledge of the mortgages by Henry H. Raymond. He states that he regarded Mr. Raymond as a man of large means, but that he always looked to the estate of Mrs. Mary Raymond for the payment of his debts.

Second. The bond held by B. J. Whaley, trustee, for forty-two hundred and forty-one dollars, which is also the joint and several bond of Mary Raymond and Henry H. Raymond of date June 1st, 1859, payable on June 1st, 1864, with interest from May 31st, 1876, the date of H. H. Raymond's death. Henry H. Raymond was entitled to the interest of this bond during his lifetime, and the trustee claims interest only from the day of his death. Some question has been made as to the time when this bond was proved before the referee. I do not see that it is material. Mr. Whaley was examined on May 4th, 1877, as a witness, but not to prove the bonds. No exception has, up to this time, been taken as to the time when the bond was proved in the case, and I report as finding of fact that it was properly and duly proven in the cause before me.

Third. The judgments of William M. Thomas which are fully set out in my former report herein. I am requested to find the fact that on November 29th, 1873, the execution of William M. Thomas was levied on the Waverly House; and I so find.

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\*These are the only claims against Mary Raymond proved before me. The mortgage to Charles Astor Bristed, mentioned in a former report, has been foreclosed, and the property sold separately, and there is no proof before me of any deficiency. The several mortgages and judgments against Henry H. Raymond have been fully stated in my former report.

The bonds held by the plaintiff were past due many years before the death of Mary Raymond. The last receipt on the bond, for twenty-five hundred dollars from Mrs. Raymond, was on November 27th, 1861. All the receipts from this time until December, 1869, were to M. and H. H. Raymond, and all receipts from December, 1869, were to H. H. Raymond. On the one for sixteen hundred dollars there appears in May, 1866, a receipt to Mrs. Raymond for three hundred dollars, on account, and receipts from M. and H. H. Raymond of dates January 31st, April 1st, and December 4th, 1867, and January 14th,

1869. Subsequent receipts are found to H. H. Raymond for payments on account of said bond. And on the bond for fifteen hundred dollars there appears a receipt to Mr. H. H. Raymond of one hundred dollars on account of interest, and five hundred dollars on account of principal of said bond. I am requested to report, as matter of fact, that in a certain cause in bankruptcy, *In re William McLean*, bankrupt, there appears the name of William L. King, agent, as one of his creditors for rent. William L. King, agent, accepted the composition in that case, and gave his receipt for the amount offered in compromise. The order calling the meeting to submit the proposition to the creditors in this case was of date February 10th, 1877. The resolution accepting the composition was on February 23d, 1877, and was signed, amongst others, by W. L. King, agent, representing one hundred and seventy-five dollars. The order to show cause why the composition should not be confirmed was dated March 23d, 1877, and the order confirming the same was dated March 29th, 1877.

The mortgage of Mary Raymond to William M. Thomas was recorded on September

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21st, 1863, in the clerk's office of \*Greenville county. William M. Thomas testified that the only proceedings in the United States Court to subject the judgment of Thomas proved in this case, to the bankrupt estate of William M. Thomas, is the proceeding entitled *Joseph Glover against William M. Thomas and A. Blythe*, assignee, which proceeding has been dismissed by the District Court, and there has been no appeal from the order dismissing the same.

III. In construing the opinion of the Supreme Court and the order of reference under which I am acting, it seems to me that the only question upon which a new inquiry is desired, is whether, as to any of the mortgages in question, the mortgagor was out of possession. The decree herein, confirming *Simons v. Bryce*, has decided that a mortgage is not an alienation under the statute, so as to defeat the claim of the bond creditors of the ancestors, and that to amount to an alienation the mortgagor must be out of possession, so that the Act of 1791 does not apply. This was not the view of the referee and the court below, but the Supreme Court says: [Here follows an extract from the former opinion as found on page 25 of 12 S. C. Reports.]

It has been urged in argument, however, that while the Supreme Court has decided that a mortgage is not an alienation, and, therefore, the defendants, mortgagees, cannot claim as alienees the benefit of the exemption under the statute, that they are entitled to be protected as bona-fide purchasers for valuable consideration without notice, and that one object of the Supreme Court in remanding the case as it has done, is to enable them, the defendants, mortgagees, to



make such claim before the Circuit Court, and there derive the benefit thereof.

I cannot agree with this view. In the first place, had the Supreme Court desired to give to the mortgagees the benefit of any such claim, there was no necessity of remanding the case to the Circuit Court for that purpose, as the facts on that point were all before it. But in the next place it seems to me that the Supreme Court has definitely passed on the position contended for, and has decided the question adversely to the defendants, mortgagees. In my former report,

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in considering the point whether the bond of the ancestor took precedence of the mortgages of the heir, I found as follows: "This question is settled by the recent decisions of the Supreme Court of this state, in one of which, *Richardson v. Chappell*, it is held that under the statute 3 and 4, W. and M., and 5 George II., Chap. VII., lands purchased from a devisee are not liable for the debt of the devisor, when the purchase was bona fide, for valuable consideration and without notice; and in the other, *Haynesworth v. Bischoff*, it is held that a mortgagee of lands is a purchaser within the meaning of the rule which protects a purchaser for valuable consideration without notice." This finding was affirmed by the Circuit Court, but the Supreme Court held otherwise, saying: "The fundamental proposition upon which the Circuit decree rests is at variance with the recent decision of this court in *Simons v. Bryce*." The Court then proceeds to reconcile the decision in case of *Simons v. Bryce*, with the decisions in the cases of *Chappell v. Richardson*, and *Haynesworth v. Bischoff*, and after commenting on the doctrine of purchaser without notice for valuable consideration, as laid down in the last-mentioned case, says: "This was far from involving the question of the legal defence of alienation under the statute of 3 and 4, W. and M., nor does it preclude the Court of Equity from giving the same construction to that defence as a court of law would give when arising before it from the provisions of the statute. The Circuit decree is erroneous to the extent that it rests upon the proposition just considered."

Besides this, in the case of *Simons v. Bryce*, after quoting from *Haynesworth v. Bischoff*, the Supreme Court says: "But in this case the mortgagees do not, and could not, invoke any such equitable doctrine, but rely upon the express provisions of a special statute, and by that statute they must stand or fall. The claim which they resist does not rest upon a mere equity, as in *Haynesworth v. Bischoff*, but it is a plain legal right; lands in the possession of an heir or devisee being liable at law for the debts of the testator or ancestor."

IV. The main question then remaining is whether the mortgage, H. H. Raymond, was

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as to any of these mortgages out of possession at any time prior to the commencement of this action. I shall consider these mortgages seriatim.

First. The mortgage to Mrs. Anna Dora Fleming, so far as it covers 280 King street, and the mortgage to William J. Gayer, so far as it covers the house and lot in Wentworth street. There is no evidence before me that the mortgagor was out of possession in either of these cases, and no claim to that effect is made. Mrs. Fleming claims, however, that inasmuch as the money loaned by her went to pay up a prior mortgage to Hannah Butterfield, dated October 21st, 1869, she is entitled to the benefit of that date and to the amount of that mortgage in the event that the mortgages contribute in inverse order to the payment of debts of Mary Raymond. I find that she is not so entitled.

Second. The mortgage held by Mrs. Eliza S. Hopkins, Mr. Brawley, solicitor of Mrs. Hopkins, after testifying as to his intercourse with H. H. Raymond with reference to this property, states that there was no change of possession, and I so find as matter of fact.

Third. The mortgage held by Douglas Nisbit, guardian. In this matter the decree for foreclosure had been signed on January 6th, 1876, eleven days prior to the commencement of this action. No sale was made, however, under such decree until June 6th, 1876, with full notice of this action then pending, and to which Nisbit was in fact a party. The property was bid in at the sale by Nisbit, the mortgagee. I find that as to this mortgage the mortgagor was not out of possession prior to the commencement of this action.

Fourth. The mortgage held by Mrs. Ellen Barker, trustee, on 262 King street. There is no evidence that the mortgagor was out of possession of the mortgaged premises, and I so find. It is contended, however, that the premises were mortgaged a second time to Mrs. Anna Dora Fleming, and, therefore, the equity of redemption of the mortgagor was gone, and the mortgagor was out of possession. Without entering into a discussion of this point, the statutes, when construed together, do not warrant any such interpretation, and the law has long since been repealed as obsolete.

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\*Fifth. The mortgage held by John C. Ojeman and Albert Bischoff, executors of Otjen. The same claim as to the legal effect of a second mortgage, made in this instance to W. J. Gayer, is pressed here; but, as I have already stated, the position is, in my opinion, untenable.

Evidence has, however, been introduced by these defendants, mortgagees, which, they claim, proves that so far as W. J. Gayer, mortgagee, was concerned, H. H. Raymond was out of possession. The assignments of the rents of these premises, by Raymond to

Gayer, has been discussed by the Supreme Court in its opinion as follows: [Here follows extract from former opinion, 12 S. C., 25.]

Under this opinion I am to find "the act and intent of the parties," and whether "the mortgagor surrendered possession." Mr. Gayer's testimony was objected to under Section 415 of the code. He is a party to the action, and, in my opinion, comes within the terms of that section. His testimony, however, is only concerning his acts and intents. There is nothing to show that Mr. Raymond ever knew or consented to or understood this alleged possession. From all the testimony it appears that Mr. Raymond, Mr. Gayer, and Mr. W. L. King were close and intimate friends. Mr. King collected rents for Mr. Raymond for other property. When the mortgage was given, Mr. Gayer testifies that Raymond "gave him the paper referred to" to fully secure him, and for the tenants in his houses to pay over the rents to him. The assignment itself, the only evidence now of what was the intent of Mr. Raymond, recites that it is given "in order to the further security of his bond." Mr. Gayer continued the collection of the rents, through Mr. King, who collected rents for other of Raymond's property, as agent. He never mentioned to Mr. Raymond that he was doing that which might cause him to think he exceeded what was expressed in the paper assigning the rents, and endeavoring to take possession of the property. He never returned the property for taxation, which he says he would have done had he considered it his own, but did pay part of the insurance on it. Mr. King's testimony is very vague as to Mr. Raymond's knowledge of what was being done, and goes

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only \*to the effect that he collected the rents for Mr. Gayer, turning it over to him, and is under the impression that Mr. Raymond knew that the rents for 342 and 344 King street were being paid over by him to Mr. Gayer. He made one lease, as agent for Mr. Gayer, and as agent made a composition in bankruptcy with one of the tenants on account of rent due, and paid the money to Mr. Gayer. This composition, however, was not made until February, 1877, after this action was commenced.

The whole testimony shows that Mr. Gayer did just what, under the assignment, he had a right to do, and that is to collect and secure the rents from the King street property, and shows nothing more. He employed an agent, and the payment of the rent to him, if known by Raymond, was only what was contemplated by the assignment. There is no allegation or proof that either Gayer or King, his agent, was acting adversely to Raymond, or that Raymond ever contemplated or agreed to anything more than the collection of the rents and the retaining of the same by Gayer. In my opinion there is no testimony, even admitting that of Mr. Gayer, to prove that the mortgagor, Raymond, surrendered possession

of the mortgaged premises to the mortgagee, Gayer, or that it was the act and intent of Raymond, as one of the parties, so to do, and I so find and report.

Sixth. The mortgages held by the executors of Poincignon and by A. G. Rice. It is insisted that, under the opinion of the Supreme Court, all questions as to the mortgage of Rice are decided, and that the mortgaged premises are free, and discharged from all claim. A motion was made before the Circuit Court to dismiss the complaint as to the defendant, Rice, but was refused, as set out in the order referring the case back to me. In my opinion, the matter is before me for examination and report. The Supreme Court bases its decision in this matter upon the findings of fact in my former report, and say: "These findings do not appear to have been excepted to, and must stand as final." As heretofore reported, the plaintiffs excepted both to the findings of fact and law in my former report herein, and duly filed such exceptions.

Although the question of alienation may

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have been passed \*upon, it remains to be decided whether it was such an alienation under the statute as to defeat the creditors of the ancestor. The taking possession by Mr. Rice consisted in his attorneys notifying the tenants of the Waverly House and stores not to pay rent to any one but themselves, giving to them as the reason the power to enter contained in the mortgage. It is admitted that at the time this notice was given, the attorneys of Mr. Rice knew of the Warren debt, and that suit was to be brought thereon, and that they were hastened by such knowledge in giving such notice and in attempting to take possession. When the mortgage was taken by Mr. Rice, his attention was called to the judgment of W. M. Thomas, and under the advice of counsel he declined to lend as much as he otherwise would have done, had not the Thomas's judgment been a cloud upon the title. The purpose of taking possession was to defeat the Warren debt, of which the attorneys for Rice had notice, and even an absolute conveyance made under such circumstances would be void. *Lowry v. Pinson*, 2 Bail. 324 [23 Am. Dec. 140]; *Ashmead v. Hean*, 13 Penn. St., 584.

After a careful consideration of the questions connected with the property mortgaged to Col. Rice, and the executors of Poincignon, I find that they were not bona fide aliened before action brought, and that the mortgagor was not out of possession so as to defeat the claims of the creditor of the ancestor.

V. It is claimed that the plaintiff should not recover in a Court of Equity, because he has been guilty of laches in not sooner bringing his action; that if he had, these mortgages would not have been given and the mortgagees would not have been misled by his silence. The claim of the plaintiff is a



legal demand, such as Courts of Equity always enforce and recognize. There is no presumption of payment. The interest was paid up to the date of Mrs. Raymond's death, and afterwards until a short time before action brought. These mortgagees knew that they were dealing with an heir as to the lands descended, with property of an estate which had not been settled up, and that there were bond debts of the ancestor outstanding, held by Thomas and Bristed. No devastavit has occurred by reason of the plaintiff's not bringing suit heretofore, as there was no per-

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sonal estate from which the debt of plaintiff might have been paid. This point has been decided, however, in the case of *Simons v. Bryce*, above referred to. In my opinion, therefore, the objection is not well taken. The claim of the plaintiff and other bond creditors is a plain, legal right. He was not bound to sue sooner than he did, and his debt being valid and of force, cannot be set aside on the ground of laches, and I so find.

VI. It is admitted that in contributing to the payment of the debts of the ancestor, the lands last mortgaged shall be first liable for such debts, and I so find.

I therefore respectfully report from the above findings of fact and of law, that the plaintiff, John D. Warren, and B. J. Whaley, trustee, and the defendant, W. M. Thomas, having established bond debts of the ancestor, Mary Raymond, are entitled to be paid out of the proceeds of the property set forth in the pleadings herein, and mortgaged by Henry H. Raymond, her heir, and that in the application of such proceeds the property last mortgaged be first exhausted, and so in inverse order until the said bond debts be fully paid.

The case came up before Judge Thomson, in June, 1880, on exceptions to the referee's report, and in March, 1881, his Honor filed the following decree:

The referee, in his second report states: "These are the only claims against the estate of Mary Raymond, proved before me." These are the three bonds of the plaintiff, Warren, the bond held by B. J. Whaley, trustee, and the judgment of William M. Thomas. The presumption is, that these are the only debts against her estate, and that the various bonds of H. H. Raymond, secured by mortgages, are his individual debts. That, in fact, the contracting of the debts of H. H. Raymond, was contemporaneous with the dates of the mortgages, which were all given after the death of Mary Raymond. And so of the judgments recovered against him.

A glance at this condition of the case discloses the vantage ground held by the creditors of Mary Raymond. Generosity must yield to right, and the creditors of Mary Raymond are entitled to payment from her es-

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tate before the creditors of H. \*H. Raymond,

who takes by descent, can claim any part of her property. This view must prevail, unless the creditors of Mary Raymond have, by some act of theirs, lost their rights, or the creditors of H. H. Raymond have acquired by his or their act some right which enables them to hold as valid the liens they have obtained. This they allege they have done, and claim that the mortgages to them are alienations under the Statute of William and Mary, and that they are entitled to hold the property by virtue of this law.

There is a decision of the Supreme Court in this case, which, in great part, is directory. It becomes, therefore, the duty of the Circuit Court to be guided by that decision, and ascertain what has been determined. The first, and, certainly, by far the most important point, is the question, whether a mortgage is an alienation under the Statute of William and Mary. In speaking of the mortgage to Gayer, the court says: "If, on the other hand, the mortgagor surrendered possession of the mortgaged premises to the mortgagee, then the mortgage must be regarded as an alienation. As the true issues were not presented under the view taken by the referee and the Circuit Court, it appears advisable that this question of fact should be passed upon by the Circuit Court under the view presented herein. The same question is raised as to other defendants, and is subject to the same observations, and should be disposed of in like manner."

It is obvious, then, that as to all the defendants, who are mortgagees (one excepted), a question of fact must be decided by the Circuit Court, that is, Was the mortgagor out of possession of the mortgaged premises at the time of the commencement of plaintiff's suit? to wit: Was the alienation complete, so that the mortgage deed had finished its office as a security, and had become by its tenor and the act of the parties, a simple conveyance? In other words, the condition of the mortgage deed must, by the acts or agreement of the parties, become satisfied or extinguished, and leave the conveyance to have its full effect, according to its terms. A surrender of possession to complete an alienation can only be by act of the mortgagor, who declares thereby that the

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condition of the mortgage shall \*be regarded extinct, and the conveyance absolute. The referee in his report enumerates the several mortgages given by H. H. Raymond, and finds as a fact that the mortgagor was in possession of all the realty included in them.

Two of these mortgages, however, are affected by facts which are not found in connection with the others. In the case of the mortgage to W. J. Gayer, it is said that the mortgagor "in order to secure the mortgage given by H. H. Raymond to W. J. Gayer, required the tenants of the property covered by the said mortgage to pay over the rents

thereof to the said W. J. Gayer." So far from there being a surrender of possession with a view to terminate the mortgage, the intent of the parties was by paying the profits of the property to the mortgagee to make the security more ample. This surely was no surrender of the possession.

As to all these mortgages, including that to executors of Poincignon and excepting that of A. G. Rice, the court concurs in the findings of the Referee, that the mortgagor was in possession of the property mortgaged.

The mortgage to A. G. Rice stands upon a different ground from that of the others. The question of possession by the mortgagor in relation to the other mortgages, was sent back to the Circuit Court, that certain issues of fact might be considered by the court. As to this mortgage, the Supreme Court declares that "the findings of fact of the referee are sufficiently full to present the question." The court says, it is clear "that the mortgagor was out of possession \* \* \* at the time of the commencement of the present suit." The court then proceeds to state that where a power of entry is given upon condition broken, to take and hold possession with the rents and profits, the mortgagor, this power being exercised, is "clearly out of possession by his own act," and in such case the mortgage has the effect of one at common law, and constitutes an alienation under the Statute of 3d and 4th William and Mary. "As to such alienated premises, the plaintiff cannot follow the land." This language is plain enough to show that the Supreme Court decided the case as to the mortgage of A. G. Rice. And their explicit language that the

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findings of fact by the referee—not \*excepted to—must stand as final, with their conclusions of law, must be obligatory upon the Circuit Court.

The claim of W. M. Thomas originated in a note under seal given by Mary Raymond for \$7000, dated August 26th, 1863, and to secure it she gave a mortgage of same date. Much dispute had arisen touching this debt as to its character—whether a judgment with a lien or without, and how it should rank with other debts. The Supreme Court, after discussing the character of the claim, says: "That at all events the decree of Chancellor Carroll must be regarded as liquidating the debt in favor of W. M. Thomas against Mary Raymond during her lifetime." So that if the debt by specialty is not merged in a judgment, the sum is ascertained upon the basis of the original contract. This places the debt in the same rank as the debts of the plaintiff and Whaley.

But it is claimed that the debt is due in judgment, and should rank as such with the rights of a judgment. Is it a debt by judgment, and was there a judgment in the lifetime of Mary Raymond? The Supreme Court declines to give it the rank of a judgment,

and whilst refraining to pronounce it no judgment, as a subject not properly to be considered by the court, by its reasoning manifestly leads to such conclusion. As between creditors in a creditors' suit, questions as to the rank of the several debts presented may be made. Manifestly, whilst abstaining from an opinion that the debt of W. M. Thomas is not in judgment, the court refuses to assign it this rank, but places it as a liquidated debt by specialty. The dissenting opinion or note of Mr. Justice Haskell is full of meaning, evidently implying that the matter had been considered by the court, and that he was of opinion the debt should rank as a judgment. It is enough that the opinion of the Supreme Court has been expressed with sufficient clearness for the referee and Circuit Court to conform to such view.

The main question in this case is, Shall the debts of Mary Raymond, as proved before the referee, be paid in full before the creditors of H. H. Raymond receive any part of theirs from the estate which passed to him by descent? This is the view of the referee, and, with the exception of the property

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\*mortgaged to A. G. Rice, the Circuit Court concurs in that result. As to the judgments against H. H. Raymond, all obtained, as appears, after his mother's death, they never could be more than a lien upon his interest in the property formerly his mother's. The reality whilst in his possession was held in trust for her creditors, if needed for payment of debts. The questions made in favor of the mortgagees as alienees could not be made for them.

In the present condition of this case, the court has no information which would enable it to order a sale or disposition of the property for the payment of the debts of plaintiff, of B. J. Whaley, and of W. M. Thomas. This much, however, may be declared, that these debts stand in the same rank and are to be paid in full from the property of Mary Raymond, of which she was the owner at her death—or pro rata, if there be not property enough to pay them in full.

An attempt to declare the rights of the creditors of H. H. Raymond by mortgages and judgments would certainly be premature. The conduct of the case in these and other particulars must be governed by orders hereafter obtained.

It is ordered, adjudged, and decreed, that the exceptions of the several parties to the second report of the referee be overruled, and the said report be made the judgment of the court in all particulars, except that part relating to the debt or mortgage of A. G. Rice. The objection that this question has been decided by the Supreme Court is sustained, and the report of the referee upon this point overruled.

The exceptions to this decree are too voluminous (sixteen pages) for insertion, and the



points raised by them are clearly stated in the opinion.

[For subsequent opinions, see 19 S. C. 605.]

Mr. A. T. Smythe, for plaintiff.

Messrs. Campbell & Whaley, for Whaley, trustee.

Mr. W. M. Thomas, for himself.

Mr. J. B. Cohen, for executors of Otjen.

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\*Messrs. DeSaussure & Son, for executors of Poincignon and Nisbit, guardian.

Mr. A. D. Cohen, for Anna D. Fleming.

Messrs. Simonton & Barker, for Rice, and Barker, trustee.

April 28, 1882.—The opinion of the court was delivered by

Mr. Justice McGOWAN. Mrs. Mary Raymond died intestate in February, 1869, possessed of a considerable estate, consisting for the most part of valuable improved lots in the city of Charleston. She had little personal property, and at first there was no administration on her estate. She left one son, her only child and heir, Henry H. Raymond, who, upon the death of his mother, took possession of all her estate, without paying her debts. He was himself largely indebted, and to secure his creditors, from June, 1870, to July, 1875, he executed sundry mortgages upon the real estate of which his mother died seized; and the numerous complications of the case have arisen in different ways out of the struggle whether the real estate which belonged to Mary Raymond at her death, and went into the possession of H. H. Raymond as her heir, shall go to the payment of the debts proper of the mother or the son, of the ancestor or the heir.

On January 17, 1876, John D. Warren, as owner of certain joint and several bonds of Mary Raymond, and H. H. Raymond, commenced this action against H. H. Raymond, there being at that time no administration upon the estate of Mary Raymond, alleging that Mary Raymond died seized of considerable real estate, which went into the possession of H. H. Raymond, who executed sundry mortgages of the said real estate, to secure his creditors, leaving his mother's debts unpaid; that a number of these mortgages had instituted foreclosure suits, and that separate sales of the mortgaged property would result in its sacrifice; that there were also a number of judgment creditors of H. H. Raymond, some of whom were seeking by separate proceedings to sell the property above described; that debts due the plaintiff, and other creditors of Mary Ray-

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mond should be paid from her estate, in preference to any due by H. H. Raymond by judgment, mortgage, or otherwise. Plaintiff prayed judgment for the debt due him, that the creditors of Mary Raymond should be

called in; that the property should be sold, receiver appointed, etc.

William M. Thomas, among others, was made a defendant and answered, claiming that he had recovered judgment against Mary Raymond in her lifetime for \$3265.62, which was duly enrolled January 30, 1868; that execution thereon was lodged in the sheriff's office of Charleston, December 16, 1868, and that after a credit, the balance of said judgment was still due. The other defendants holding mortgages of H. H. Raymond, with more or less of difference in their respective claims, insisted that the debts of Mary Raymond should not be paid in preference to those of H. H. Raymond, out of the real estate of which she died seized, which, by operation of law, descended at her death to H. H. Raymond, her heir; that he bona fide aliened the same by way of mortgage to them respectively before action brought against him for the debts of his mother Mary, and that they were purchasers for valuable consideration without notice. They denied the validity of the judgment of William M. Thomas, and alleged that it belonged to A. Blythe, as assignee in bankruptcy.

On May 8, 1876, a motion for preliminary injunction was made and failed, but the court granted to the plaintiff leave to amend his complaint charging the insolvency of H. H. Raymond, and appointed George D. Bryan, Esq., special referee, with instructions to call in by advertisement the creditors of Mary Raymond.

Henry H. Raymond died testate May 31, 1876, and on February 20, 1877, Samuel Lord, Jr., qualified as his executor, and answered for his only child and infant heir, Rosalie C. White, nee Raymond, and administered on the estate of Mary Raymond. These new parties having been made, the proceedings assumed substantially the double aspect of an action in the nature of a bill to marshal the assets of Mary Raymond, and to make land in the possession of the heir liable for the debts of the ancestor.

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\*On February 3, 1877, the defendant, Thomas, was enjoined from proceeding with the sale of the Waverly House, then advertised for sale under levy of his execution, and on February 21, 1877, a decretal order was passed by consent enjoining all creditors of H. H. Raymond, ordering them to be called in, directing all the mortgaged property not already in the court for foreclosure to be sold, and the proceeds of sale instead of the lands to await the event of the litigation.

The referee then called in by publication the creditors of both Mary Raymond and H. H. Raymond to present and prove their demands. The following were presented against the estate of Mary Raymond:

First. John D. Warren, the plaintiff, being the claim on joint and several bonds of Mary

Raymond and H. H. Raymond, on which the action was founded.

Second, W. M. Thomas, claim of judgment before referred to, as to which, being made a defendant he had answered asking affirmative relief. It seems that this alleged judgment against Mary Raymond was rendered at Greenville by Chancellor Carroll, in a suit to foreclose a mortgage January 22, 1868. The decree ordered that if the amount found due by the commissioner in equity was not paid before salesday in March, 1868, that the lands should be then sold, the purchase money credited, and the decree enrolled for the balance. The decree purports to have been enrolled January 30, 1868, before the day of sale, and the land having been sold in December, 1868, execution thereon was issued subject to the credit for the purchase money of the land, and lodged with the sheriff of Charleston, December 14, 1868.

This case went to the old Appeal Court, 15 Rich. 86. It appeared from the record in the case that the decree was upon a sealed note or bond of Mary Raymond, secured by the mortgage aforesaid upon a house and lot in Greenville, and that after the death of Mary Raymond, H. H. Raymond was made a party defendant, under the supposition that he was the executor of his mother, and various proceedings were had against him, and finally, September 20, 1872, Judge Orr rendered judgment against him as executor de

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son tort of Mary Ray\*mond, from which there was an appeal to the State Supreme Court, which was dismissed. 4 S. C. 352. From this decision an appeal was taken to the Supreme Court of the United States, and the case is reported in 91 U. S. 712 [23 L. Ed. 434]. Judgment against H. H. Raymond was entered at Greenville November 17, 1873, pending the appeal to the Supreme Court of the United States, and a transcript lodged in Charleston November 29, 1873, and execution issued and levied on the Waverly House as the property of H. H. Raymond.

Third. B. J. Whaley's claim as substituted trustee under marriage settlement of H. H. Raymond and his wife, on joint and several bond of Mary Raymond and H. H. Raymond, June 1, 1859, payable in July, 1864. This bond was in the possession of H. H. Raymond from 1864 to 1875, placed there by the trustee for safe keeping. The trustee was not a party to the proceedings, and had made no effort to collect the same, and the claim did not appear until it was presented under the call by advertisement in the case. No payments were credited, but the interest is only claimed since the death of H. H. Raymond. The precise day on which it was presented and proved did not appear, but the referee reported the claim as proved in his report of December 7, 1877.

It seems that the claim of the executors of Charles Astor Bristed against Mary Ray-

mond had been paid by foreclosure of mortgage given by Mary Raymond, and there was no claim for any deficiency.

The following claims were presented against the estate of H. H. Raymond:

1. Ellen Barker, trustee, debt secured by mortgage bearing date June 28, 1870; 2. Maria S. Hopkins, debt secured by mortgage bearing date Nov. 25, 1870; 3. Albert Bischoff, as surviving executor of John C. Otjen, debt secured by mortgage bearing date Jan. 15, 1872; 4. Douglas Nisbit, guardian, debt secured by mortgage bearing date July 15, 1872; 5. Anna Dora Fleming, debt secured by mortgage bearing date July 1, 1873; 6. Executors of E. Poincignon, debt secured by mortgage bearing date August 14, 1873; 7. Wm. M. Thomas, judgment before referred

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to as recovered at Greenville against \*H. H. Raymond as executor de son tort of Mary Raymond. This judgment, as stated, was entered at Greenville, Nov. 17, 1873, pending appeal to the Supreme Court of the United States, and what purported to be a transcript of the judgment was lodged in Charleston county Nov. 29, 1873, and levied on the Waverly House. 8. A. G. Rice, debt secured by mortgage bearing date June 1, 1875; 9. W. J. Gayer, debt secured by mortgage bearing date July 21, 1875; 10. John Fisher, trustee, two judgments on demands against H. H. Raymond alone and not secured by mortgage June 8, 1874; these judgments were assigned to Samuel Lord, Jr.; 11. People's Bank of South Carolina, judgment April 6, 1875. These three last judgments were released by Mr. Lord, and the bank respectively in favor of A. G. Rice at the time of the execution of the mortgage to him by H. H. Raymond. There were other claims which need not be specially referred to.

The referee, December 7, 1877, made a report stating the facts very fully, and deciding that the Thomas judgment was a lien on all the property of Mary Raymond in Charleston and had priority over all the claims now before the court, and that the different mortgages, at their respective dates and in regard to the lands covered by them, were bona-fide alienations of H. H. Raymond before action brought against him. Exceptions were filed and the case was heard by Judge Wallace, who confirmed substantially the referee's report. From this decree there was an appeal to this court, which on the main point reversed the decree below holding that a mortgage of the heir-at-law of land inherited is not such an alienation within the meaning of 3 & 4 W. & M., 2 Stat., 533, as will defeat the claims of decedent's creditors so long as the mortgagor retains possession; but when upon condition broken, the mortgagee takes possession of the land under a power given in the mortgage, or the mortgagor is otherwise out of possession, the mortgage thereupon operates as an aliena-



tion. 12 S. C. 9. The court then remanded the case for further proof saying: "In consequence of the conclusion of the referee and the circuit judge just referred to, it became unnecessary for them to decide whether the

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mortgages set up by way of defence to \*sustain the plea of bona-fide alienation as against the rights of the creditors of the ancestor commenced to operate by way of transferring the legal title of the mortgagor to the mortgagees, by reason of the mortgagor being out of possession, at any time prior to the commencement of this action. There are, therefore, no such findings of fact and conclusions of law on that point as to bring the case before us for a final decree. \* \* \* We can, therefore, do no more than to lay down the principles that should govern such findings, so far as we are enabled to state them from the facts before us."

Accordingly, the case went back to the Circuit Court, and by order was referred again to the same referee, who, under the direction of the judgment of the Supreme Court, took testimony upon the question of fact referred back and made a second very full report February 12, 1880, giving all the testimony and holding that as matter of fact the mortgagor, H. H. Raymond, was not out of possession of the premises mortgaged as to any of the mortgages, including that of A. G. Rice, and that Warren, Whaley, and Thomas were bond creditors of Mary Raymond, and as such entitled to the proceeds of all the lands of which Mary Raymond died seized and which were mortgaged by H. H. Raymond; the proceeds of the lands to be appropriated in the inverse order of the dates of the mortgages covering the same, and applied equally to the said claims until paid, and if not enough to pay them in full, then to be applied pro rata as in due course of administration.

Exceptions were filed to the report and the case came on to be heard by Judge Thomson, who overruled all the exceptions to the report, except that which assigned error in opening the judgment of the Supreme Court in regard to the mortgage of A. G. Rice, as to which he held that it was finally adjudicated by the Supreme Court. From this decree all parties appealed to this court. The exceptions are numerous and voluminous, and in some instances the same points are made by different parties, so that we will not attempt to follow them seriatim, but endeavor to consider them all in connection with the different claims.

All the property involved in this contro-

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versy belonged to \*Mary Raymond and at her death descended to her heir, H. H. Raymond, who mortgaged it in different parcels to secure his own creditors; and now the question is whether it is liable for his or her debts. It is certainly the law that the property of a debtor shall go to the payment of

his own debts in preference to those of any other, and the case of ancestor and heir is no exception. The creditor of the ancestor without judgment or mortgage has no lien upon the property either before or after the descent cast; but the heir is bound as of his own obligation for the debts of his ancestor. While the heir is not a technical trustee for the creditors of the ancestor as to the property cast upon him by descent, that property itself is liable for the ancestor's debts while it remains in his possession, and at least until it loses by partition or otherwise the character of assets to be administered, may be actually levied and sold under executions against the personal representative of the ancestor. If however, the heir, before action brought against him for the debt of the ancestor bona-fide aliene the land, his own personal liability to the extent of assets descended still remains; but the land itself cannot be followed by the creditor of the ancestor into the hands of the innocent alienee. It thus appears that the important point is whether there has been bona-fide alienation by the heir before action brought. The former judgment in this case, following decisions previously made, decided that a mortgage alone, which under our law is generally a mere security for a debt, is not such alienation as is contemplated by the Statute of 3 & 4 W. & M., 2 Stat. 533.

To constitute such an alienation it is necessary that the mortgagor should be out of possession, and as the Circuit Court had not considered most of the mortgages in that aspect, the case was remanded that testimony might be taken and the judgment of the Circuit Court rendered upon that subject. "As the true issue was not presented under the view taken by the referee and Circuit judge, it seems advisable that the question of fact should be passed upon by the Circuit Court under the views presented herein. \* \* There should be an inquiry as to the various matters of fact opened hereby

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and \*the decree modified to conform to the principles already laid down. The decree of the Circuit Court should be set aside where inconsistent herewith, and opened in other respects, or to the extent necessary to modify it in accordance with the foregoing."

The first general question is as to what was decided by the former judgment, for we cannot reconsider what was there decided. The principle of *res adjudicata* is one of the most important in the administration of justice; for the peace and order of society require that there should be an end of litigation. As was said by a distinguished English judge: "Human life is not long enough to allow matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that when a matter has once become *res adjudicata*, there shall be an end of all ques-

tion about it." The principle is that the decision of a court of competent jurisdiction upon a point which was considered or should have been considered as necessarily involved, is final and conclusive. All the questions made were decided by the former judgment, except only those which are expressly left open, and such as necessarily arise out of them.

It must be considered as decided by the former judgment that the plaintiff John D. Warren, and B. J. Whaley, trustee, are bond creditors of Mrs. Mary Raymond, not barred by laches, lapse of time, or the statute of limitations, and that action was brought by Warren and Thomas against the heir, H. H. Raymond, on January 17, 1876, and that their claims being legal demands both against Mary Raymond, the debtor, and H. H. Raymond, the heir, to the extent of assets descended, are not affected by the equitable defence of purchaser for valuable consideration without notice. Although the judgment does not so declare in express terms, we think that what it did expressly decide necessarily included also the question reargued at the bar with so much zeal and learning, namely, that inasmuch as a mortgage was an alienation in 1712, when the statute of W. and M. was made of force here, it necessarily retained, so far as the construction of that statute is concerned, the same character as an alien-

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ation down to the formal repeal \*and re-enactment of that statute by the general statutes in 1872. The statute of W. and M. made no reference to a mortgage as being or not being an alienation. The words used were "sell, alien, or make over," and a mortgage was at that time an alienation, for the reason that it was in effect a conveyance, and the title after condition broken was in the mortgagee. Because it happened that at that time the nature of a mortgage was such as to fall within the terms of the statute and work an alienation, it does not follow that the character of a mortgage must remain the same and that the legislature could not change it. As soon as the lawmakers saw fit to change the nature of a mortgage, as our legislature did in 1791, the question whether in its new form it fulfilled the requirements of the statute was a new question, to be decided not by what a mortgage was in 1712, but by its character as then existing.

We do not understand that Judge McIver announced a contrary doctrine in *Simons v. Bryce*, 10 S. C. 354. In answering this very argument he said: "It is argued that as a mortgage was undoubtedly an alienation at the time of the adoption of the statute of W. and M. (1712), that statute ought now, notwithstanding the subsequent changes in the nature of a mortgage, still to be construed as embracing a mortgage. There might be some force in this argument but for the fact that this statute has been re-enacted in the General Statutes, and the same terms, so far

as the question under consideration is concerned, are retained, although the phraseology in other respects is changed." Judge McIver meant no more than to say that the argument could have no application to that case.

It must also be considered that the former judgment decided, Judge Haskell dissenting, that the decree of William M. Thomas against Mary Raymond, at Greenville, never was enrolled as a final judgment, so as to give a lien upon her property in Charleston. One of the elements of confusion in the case has been the anomaly of two judgments claimed to exist against different persons originating in the same demand. When Wm. M. Thomas obtained his decree against Mary Raymond in Greenville, in 1868, if it had been legally enrolled as a final judgment, notwithstanding the military orders, and execution

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\*lodged in Charleston, any of the property of Mary Raymond might have been sold under it, whether before or after her death, in the possession of H. H. Raymond or any one else. It is not perceived why it was thought necessary to amend the proceedings after decree, by making H. H. Raymond a party, under the mistake that he was the executor of his mother. Such proceedings were, however, instituted, and after much litigation and several military orders and injunctions, judgment was finally recovered before Judge Orr, September 20, 1872, against H. H. Raymond as executor de son tort of Mary Raymond, and after appeal to the Supreme Court of the state, entered November 17, 1873, pending appeal to the Supreme Court of the United States. It happens that H. H. Raymond was the heir of Mary Raymond, but it does not seem to us that such an unusual proceeding against him as executor de son tort can be regarded as the formal action against the heir for the debt of the ancestor, contemplated by the statute of W. and M.

This judgment also failed to acquire a lien upon the property in Charleston. It was finally entered in Greenville November 17, 1873, when, by law, a judgment did not of itself constitute a lien upon real estate. Such lien could only have been acquired at that time under the code of procedure by a levy under an execution issued to enforce the judgment, and by filing a certified copy of the execution with proper certificate thereon in the office of the Register of Mesne Conveyance of the county. That was not done in Greenville. Without stopping now to consider several alleged irregularities therein, a transcript of the judgment was filed in Charleston on November 29, 1873, and execution issued and levied on the Waverly House. But still the requirements of the code necessary to give a lien were not then complied with.

It is said that the code was amended so as to make a judgment a lien November 25, 1873, and a transcript being lodged after that



date, viz., November 29, 1873, became a lien without the formalities as to recording levy required by the code. The words of the amendment are, "Final judgments hereafter entered," etc.; that is to say, not the tran-

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script of the judgment but the judgment itself, which in this case was entered at Greenville before the ratification of the amendment, and therefore was not covered by it. Since that amendment, the only way in which a lien can be acquired upon a judgment rendered after March 1, 1870, and before November 25, 1873, is in the manner pointed out by that amendment, viz., by requiring the defendant to show cause "why the judgment should not be, and have a lien in accordance with its provisions." Lynch's Code, 120, *Adickes v. Lowry*, 12 S. C. 106, and *Carroll v. Tompkins*, 14 S. C. 223. Besides this judgment was against H. H. Raymond as executor de son tort, and could not be levied on lands of the intestate. As was said in *Mitchell v. Lunt*, 4 Mass. 657, "Such an executor having no character by which he can obtain license to sell lands for the payment of debts, the lands cannot in legal construction be the estate of the deceased in his hands, and that to admit the lands to be taken to satisfy a judgment recovered against him would be extremely mischievous, as no action for waste for not collecting the personal estate and paying the debts will lie against him for a devisee or heir, etc." It follows that the judgment never acquired a lien upon the property of H. H. Raymond in his lifetime, and that the Waverly House could not be legally sold under the levy made thereon.

The judgments against H. H. Raymond, including that of Thomas, were not alienations by him, and must yield priority first to the claims against Mary Raymond and then to the mortgages executed by H. H. Raymond, and as all the lands were mortgaged by H. H. Raymond, leaving no interest in him which would be liable to judgments, they practically go out of the case. It is contended that the original sealed note which was secured by mortgage of Mary Raymond to Thomas, was merged and extinguished in the decree of foreclosure rendered at Greenville against Mary Raymond by Chancellor Carroll; and that said decree being the basis of the supplemental proceedings against H. H. Raymond as executor, became in turn merged in the judgment against him as executor de son tort, and as Thomas has no lien upon the property he has no claim at all. We cannot

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accept this view, which would make the \*long judicial proceedings ineffectual for all purposes, except the destruction of the cause of action they were instituted to enforce. The decree of foreclosure against Mary Raymond failed as a final judgment only for the reason that it was not legally enrolled. The subsequent irregular proceedings against H. H. Raymond as executor did not extinguish it.

"Those proceedings," as stated by Judge Willard, "cannot be regarded as affecting the decree of Chancellor Carroll. They grew out of an attempt to destroy the force and effect of the decree itself, and must be regarded as extensive to it." The proceedings against H. H. Raymond as executor, so far as to make the lands of Mary Raymond liable, were misconceived, and for that reason could not merge in them the decree of foreclosure against Mary Raymond. The latter judgment against H. H. Raymond as executor de son tort might possibly be conclusive as to all personal property with which he had intermeddled, but not so as to the real estate of Mary Raymond. *Mitchell v. Lunt*, 4 Mass. 654; *Freem. Judg.* § 265. The claim of Wm. M. Thomas, as liquidated by the decree of foreclosure at Greenville, is entitled to stand with those of Warren and Whaley, trustee as a bond debt of Mary Raymond.

A. G. Rice was one of the mortgagees of H. H. Raymond, and claimed that before action brought against Raymond as heir he was out of possession as mortgagor, and therefore the mortgage to Rice operated as an alienation. It was claimed on the second reference that when the case was remanded by this court this claim was excepted from the provisions of that order and was not again before the referee, for the reason that it had been finally adjudicated here. The referee did not take that view, but being of opinion that although the question of alienation had been passed upon, "it remained to be decided whether it was such an alienation under the statute as to defeat the creditors of the ancestor." He reconsidered the case of Rice along with those of the other mortgagees, and held that the alienation to Rice was not bona fide, because he knew of the Thomas debt when the mortgage was taken (June, 1875), and the purpose with which he took possession in January, 1876, was to defeat the Warren debt which was then about to be

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\*sued. Rice excepted, on the ground that the Supreme Court had decided "that the plaintiff could not follow the lands covered by his mortgage, which, with the proceedings had under it, alienated the lands before action brought." The Circuit judge sustained this exception, and the matter is before this court upon exceptions to his judgment.

Did the former judgment finally decide Rice's claim? In order to have a clear view of what was decided it is necessary to know what was before the court. The referee and Circuit judge had decided that all mortgages per se were alienations, and therefore in most of the cases the evidence had not been taken as to whether the mortgagor was or was not out of possession. The Supreme Court held that a mortgage was an alienation only when the mortgagor was out of possession, and under this view it was necessary to remand all the claims on the part of mortgagees in which such evidence had not been taken. It

happened, however, that in the case of Rice such evidence had been taken and was then before the court.

The referee's report stated as follows: "On June 1st, 1875, the said Raymond made to A. G. Rice his bond conditioned for the payment of \$9337 on June 1st, 1876, and to secure the same executed and delivered to the said A. G. Rice his mortgage of the premises known as Nos. 252, 254, 256, and 258 King street, this mortgage being a third one on the stores Nos. 252 and 254, the first and second having been executed to the executors of Poincignon. In addition to the usual covenants this mortgage contained the following, viz.: 'And it is agreed by and between the said parties that in case default shall be made in the payment of the principal or interest of the bond hereby secured, or in the payment of the principal and interest of the bonds or either of them, executed by the said H. H. Raymond to W. G. DeSaussure, Julius Trouche, Florence T. Downey, and Lawrence A. Duval, executors of Poincignon, on August 14th, 1873, and secured by a prior mortgage of a part of the premises hereinbefore described, etc., \* \* or in case default shall happen to be made in the performance of any of the covenants or condition herein contained, etc., etc., that the said A. G. Rice, his

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heirs, executors, administrators, or assigns, shall and may peaceably enter into, have, hold and occupy, possess and enjoy the premises above mentioned, and collect all rents, issues, and profits of the same, and every part thereof, etc. etc.' There was due on this bond March 20th, 1877, the sum of \$11,022.76. Under the power contained in the said mortgage the said A. G. Rice entered and took possession of the said premises on January 14, 1876, the said H. H. Raymond having failed to perform the covenants contained in the said mortgage, etc."

With these facts before it the court decided as follows: "There are therefore no such findings of fact and conclusions of law on that point as to bring the case before us for a final decree. \* \* We can therefore do no more than lay down the principles which should govern such findings, so far as we are enabled to state them from the facts before us.

"As it regards the claim under the mortgage of H. H. Raymond to A. G. Rice, the finding of fact of the referee appears sufficiently full to present the question, whether such mortgage, in virtue of the proceedings had under it, operated as an alienation of the land descended under the statute of 3 and 4 W. and M. These findings do not appear to have been excepted to, and must stand as final. It appears that the mortgage contained a clause that in certain contingencies, among others that of default of payment of principal or interest on the bond which such mortgage was given to secure, the

mortgagee, Rice, shall and may peaceably enter into, have, hold, use, occupy, possess, and enjoy the said premises above mentioned, and collect all rents, issues, and profits of the same, and every part thereof. Directions were then given as to the application of the money arising therefrom, among other purposes to that of the payment of principal and interest due on the said bond and mortgage. It appears by the findings of the referee, that under this power the mortgagee, A. G. Rice, entered and took possession of the mortgaged premises on January 14, 1876, prior to the commencement of this suit, as upon condition broken. It is clear that the mortgagor was out of possession as it regarded such mortgaged premises at the time of the commencement of the present suit. Under such circum-

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stances \*the decision in the case of Simons v. Bryce is inapplicable, as it regards the lands so mortgaged and out of the possession of the mortgagor. The statute of 1791 only operates to prevent the mortgage from having its due effect at common law while the mortgagor is in possession. The moment that possession passes out of him, in the sense of the statute, title passes through the mortgage under the operation of the statute, and the mortgagor occupies the same position he would have occupied had the statute never been passed. Under such circumstances this mortgage would be competent to work an alienation under the statute of 3 and 4 W. and M. It is claimed here that in order to establish possession out of the mortgagor, it is necessary to show that he has conveyed the mortgaged premises by an absolute deed to a third person, who is in possession under such deed. We have been referred to several cases in this state as supporting such proposition. None of the cases cited either directly or indirectly sanction such a conclusion. In Laffan v. Kennedy, 15 Rich. 246, it was held that the mortgagor was not to be considered out of possession so long as the premises were in the possession of a tenant holding under him. This case rests on the familiar principle that the possession of the tenant is the possession of the landlord. Where the mortgage contains authority for the mortgagee to enter upon condition broken, and take and hold possession with the rents and profits, and after condition broken is let into such possession by the mortgagor, the latter is clearly out of possession through his own act and deed in the sense of the statute. As to such alienated premises the plaintiff cannot follow the land, etc."

It seems to us that it was the intention of the Supreme Court to make an exception of the case of Rice, and to decide it finally. It is stated that the findings of facts "are sufficiently full to present the question" which was considered and decided. It is true that Judge Willard was in error when, in delivering the judgment of the court, he stated



"that the findings had not been excepted to;" but, after hearing the testimony upon which the report was based, and full argument thereon, the judgment of the court surely

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cannot be impaired \*by the fact that the then chief justice who prepared the judgment had in such voluminous brief overlooked the fact that the findings had been excepted to by the plaintiff, but not by the co-defendants of Rice!

The facts considered by the Supreme Court have not been shown to be incorrect, but it is simply claimed that the alienation which was declared was "not a bona-fide alienation, and that the mortgagor was not out of possession so as to defeat the claims of creditors of the ancestor." As it seems to be admitted that the court passed upon the question of alienation, the circumstances of the case show, and the judgment expressly declares, that the alienation spoken of could be no other than that contemplated by the statute. The judgment that the mortgage, in connection with what was done under it, worked an alienation under the statute of 3 and 4 W. and M., was in effect a judgment, also, that such alienation was bona fide. There could be no alienation under the statute except a bona-fide alienation, which placed the land beyond the reach of the creditors of the ancestor.

It must be kept in mind that the mortgage of Rice contained an unusual covenant allowing the mortgagee, upon default, to take possession. It was very nearly an absolute conveyance at first. That covenant was made when the mortgage was executed in 1875, and not on January, 1876, when it was known that Warren was about to sue and he took possession. In 1875, when the mortgage was executed, Rice had the right to exact his own terms as the condition upon which he would loan his money. The covenant in the mortgage expressed these terms. If he had then taken an absolute conveyance, would it not have been a bona-fide alienation? The fact that at that time he had notice of the claim of Thomas was not enough to make the alienation mala fide.

The question as to the bona fides under the statute is not identical with that of the equitable plea of purchaser for value without notice.

This court, following the English cases, has held in *Smith v. Grant*, 15 S. C. 136, that mere notice of debts against the ancestor is not of itself sufficient to make an

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alienation by an \*heir or devisee mala fide under the statute. In that case the alienation was made through a bankrupt court by a devisee, who was at the time also executor of the ancestor, and had been actually sued as such, but not as heir. The alienation in *Richardson v. Chappell*, was also made by those who were the executors of the ancestor,

and had notice of the debt. There is no analogy between this case and *Lowry v. Pinson*, 2 Bail, 324 [23 Am. Dec. 140], cited by the referee. In that case Pinson purchased and paid for the land of his brother, in order to enable him to run away, and thereby evade an action which was about to be brought against him for a breach of promise to marry. In this case the facts show no such combination on the part of Rice and Raymond to defraud the creditors. What Rice did in January, 1876, was not done in combination with Raymond, but was his own act in enforcing rights acquired previously. Rice did no more than an honest creditor had the right to do—that is to say, acting upon rights previously secured, to take possession, and thus save himself from impending ruin. We agree with the Circuit judge, that the claim of A. G. Rice was conclusively determined by the judgment of this court.

The mortgagor, H. H. Raymond, being out of possession of the lands covered by Rice's mortgage, the mortgages covering the same lands to the executors of Poincignon operate also as an alienation.

The only remaining question is that which was "opened" by the decree, and referred back by this court, whether the mortgagor, H. H. Raymond, was, as to any of the other mortgages, out of possession before action brought against him as heir, January 17, 1876. The referee reports that, as matter of fact, he was not out of possession as to any of the mortgagees, and the Circuit judge concurs with him as to all of these except Rice, whose case has been disposed of. In the case of such concurrence this court, as a rule, will not disturb the finding, so far as it is based upon a question of fact.

It is contended, however, that H. H. Raymond was out of possession as mortgagor by operation of law, as to the parcels of land, of which he executed two mortgages, viz., lot No. 262 King street, first mortgaged to Ellen

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Barker, trustee, June 28, \*1870, and afterwards July 1, 1873, to Anna Dora Fleming; and lots No. 342 and 344 King street, first mortgaged to executors of J. C. Otjen, January 15, 1872, and afterwards July 27, 1875, to W. J. Gayer.

This is certainly a question of novel impression. If the view suggested should prevail, the mortgagor might be held to be legally out of possession, whilst he was in fact in possession. The act of 1698, "To prevent deceits by double mortgages" (2 Stat. 137), provided: "If it so happens there be more than one mortgage at the same time by any person of the same lands and tenements, the second mortgagees which have not registered or recorded their mortgages \* \* \* shall have power to redeem, etc. And any person or persons which shall mortgage the same lands \* \* \* a second time, a former mortgage being in force and not discharged,

shall have no power or liberty of redemption in equity or otherwise." The act of 4 and 5 W. and M. (2 Stat. 534, 1712) provided: "And if the said mortgagor shall mortgage again the same land, and shall not discover to the said second or other mortgagee in writing under his or their hand, that then and in that case the said mortgagor shall have no relief or equity of redemption against the said second or other mortgagee \* \* \* and shall hold and enjoy the premises freed from the equity of redemption \* \* \* as fully as if the same had been an absolute purchase."

The act of 1791 (5 Stat. 169) changed entirely the character of a mortgage, making it merely a security for a debt instead of a conveyance on condition, declaring that the legal title should remain in the mortgagor, and then provided that "when the same lands are mortgaged at divers times, the debts meant to be secured by such mortgages shall be paid in the order the same are recorded, etc."

The law stood in this way until our General Statutes were adopted in 1872. It does not appear that there ever was an express repeal of the provision of the act of 1698, which imposed a forfeiture of the right to claim the equity of redemption for giving a second mortgage, but the subsequent acts giving the mortgagor the legal title, declaring a

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mortgage a security for a debt, and in case of double mortgages directing that the debts shall be paid in the order in which the mortgages are recorded, were manifestly inconsistent with that provision, which was thereby superseded and rendered obsolete, if not repealed by implication. This view is confirmed by the fact, that no trace whatever of the doctrine can be found in the reports since 1791, now nearly a century, although in that time many cases were before the courts in which two mortgages on the same property had been executed. In 1806, *Duncan v. Fisher*, 2 DeS. 369; in 1852, *Matthews v. Preston*, 6 Rich. Eq. 307, note; in 1854, *Boyce v. Boyce*, Id. 304; *Reeder & Davis v. Dargan*, 15 S. C. 175; *Gibbes v. Greenville and Columbia R. R.*, 13 S. C. 228, and in 1878, *Simons v. Bryce*, 10 S. C. 363; and in this last case both mortgages were executed after the General Statutes were adopted in 1872.

It said, however, that the General Statutes (1872) repealed all these old statutes, and re-enacted only that part of the act of 1798, which declared "every person or persons who shall mortgage the same lands and tenements a second time, the former mortgage being in force and not discharged, shall have no power or liberty of redemption in equity or otherwise" (Gen. Stat. 424); and it is ingeniously argued, that as the second mortgages in this case were executed after the adoption of the General Statutes, this pro-

vision therein revived cannot now be said to be antiquated or to have gone into the General Statutes by accident or mistake, and is applicable to them. It is true the provision was re-enacted, and on the statute-book from 1872 to 1878, and must be considered; but the General Statutes at the same time re-enacted the act of 1791, which has long been regarded as the settled law of the state, and with its whole intent and scope the provision aforesaid was inconsistent and repugnant, and therefore inoperative, and was expressly repealed in 1878 (16 Stat. 335).

It was further contended that Raymond was out of possession in fact as to the lands mortgaged to W. J. Gayer, because Raymond had assigned the rents to Gayer. It does not appear that this mortgage had any covenant as in that of Rice, authorizing the mortgagee

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to take possession. The effect of the assignment of the rent was considered by the Supreme Court, which held that "in order to determine whether that transaction was of such a nature as to amount to a surrender of possession by the mortgagor to the mortgagee there should have been a finding of fact whether such was the act and intent of the parties." And accordingly the matter being thus "opened," the referee reconsidered it and reported as follows: "The whole testimony shows that Mr. Gayer did just what under the assignment he had a right to do, to collect and secure the rents from the King street property, and it shows nothing more. He employed an agent, and the payment of the rent to him, if known to Raymond, was only what was contemplated by the assignment. There is no allegation or proof that Gayer or King, his agent, was acting adversely to Raymond, or that Raymond ever contemplated or agreed to anything more than the collection of the rents and the retaining of the same by Gayer. In my opinion, there is no testimony, even admitting that of Mr. Gayer, to prove that the mortgagor, Raymond, surrendered possession of the mortgaged premises to the mortgagee Gayer, or that it was the act and intent of Raymond so to do, and I so find, etc." In this finding, the Circuit judge concurred, and we cannot say that it was error.

It was also contended that Raymond was out of possession as to the lands mortgaged to Douglas Nisbit, guardian. Upon this mortgage an action of foreclosure had been commenced in September, 1875, against H. H. Raymond, and William M. Thomas made a party. He urged as a defence against foreclosure the Carroll decree of 1868, at Greenville, and that an execution had been lodged in Charleston. The issues were referred to W. P. DeSaussure, Esq., who, among other things, reported "that as between the parties to the original suit, it (the Carroll decree) may constitute a general lien upon the property formerly of Mary Raymond, but



which cannot be enforced to the prejudice of subsequent lien creditors or purchasers without notice." Judge Reed confirmed the report, and adjudged that "the exceptions filed by the defendant William M. Thomas, and overruled by the referee, be overruled by this court, and it is adjudged, ordered,

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and decreed \*that the defendant, William M. Thomas, having failed to produce any evidence of an enrolled decree pursuant to the act of 1840, has failed to show a judgment which could constitute a lien upon the mortgaged property as against the plaintiff a third party, and that his claim to hold such lien be subordinated and postponed to the mortgaged lien held by the plaintiff." There was no appeal from this decree, but we do not consider that it adjudged the question now before the court. The decree was rendered December 4, 1875, before Warren had brought his action against H. H. Raymond, as heir in possession. Considering the property as belonging to H. H. Raymond, which they had a right to assume until action brought, it was simply a decision as to priority of liens as against him, and we have hereinbefore announced the same proposition, that all the judgments against H. H. Raymond, including that of Thomas without lien, must yield priority to the mortgages, but that is very different from the question now made by the creditors of Mary Raymond against H. H. Raymond as heir in possession of her property. The point now in issue was not decided. *Hart v. Bates*, ante, p. 35.

The sale was ordered January 6th, before, but was not actually made until after Warren had brought his action and made Nisbit a party. "There can be no doubt that when property descended is mortgaged by the heir, and such mortgage is foreclosed and the property actually sold under a decree of foreclosure, it is an alienation." But the title of the mortgagor is not divested until the sale is actually made. The referee finds that "no sale was made until June 6, 1876, with full notice of this action then pending, and to which Nisbit was in fact a party. The property was bid in at the sale by Nisbit, the mortgagee. I find as to this mortgage, the mortgagor was not out of possession prior to the commencement of this action," and the Circuit judge concurred in this finding.

But it is urged, that while the sale made under the decree of foreclosure June 6, 1876, may not have been an effective alienation as to Warren and Thomas, it was as to B. J. Whaley, trustee, who did not appear in the case as creditor of the ancestor until after the sale. It is true, that the question as to

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\*the effect of alienation depends upon the time when the creditor brings his action against the heir. The words of the statute are "before action brought." In order to determine whether a transaction was an ef-

fectual alienation as to him it is necessary to inquire when B. J. Whaley brought his action against H. H. Raymond. Warren and Thomas were parties to the original bill, but Whaley was not. The first appearance of his claim in the case was in the report of the referee, December 7, 1877. The referee in his second report, February 12, 1880, says: "Some questions have been made as to the time when this bond was proved before the referee. I do not see that it is material. Mr. Whaley was examined on May 4, 1877, as a witness, but not to prove the bond. No exception up to this time has been taken as to the time when the bond was proved in the case, and I report as a finding of fact, that it was properly and duly proved in the cause before me." The first report held all the mortgages to be alienations, and there was then no occasion to except.

The view of the referee as to the immateriality of the time the bond was proved most probably was, that the suit of Warren was in effect also that of Whaley. The complaint did state that it was "in behalf of himself and all other creditors of Mary Raymond, deceased, who should come in and contribute to the expenses of the action." But this action as originally brought cannot be considered as in the nature of a creditor's bill to marshal the assets of Mary Raymond, upon whose estate there was at that time no administration. It could be nothing more than an action against the heir H. H. Raymond then living, to make him liable for the debt of his ancestor. Each creditor of Mary Raymond had the same right, but we cannot see that in such action the interest of creditors was in common in such sense as to bring them within the principle of the rule that allows one of a numerous class of creditors jointly interested to sue for himself and others. There was no common fund which belonged to all equally. As in the lifetime of Mary Raymond, each was entitled to have his debt paid according to the diligence he might exhibit in obtaining priority.

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\*In this view Warren's action was his own, and not that of any other creditor, whom he did not expressly make a party. As was said by Chancellor Johnston, in the case of *Johnston v. S. W. R. R. Bank*, 3 Strob. Eq. 336: "There is a difference among cases arising from their very nature which must govern the court in its rules of practice. There are cases where the very right under which the plaintiff claims implies that he is entitled to its enjoyment only in conjunction with other persons. There are cases where no such implication necessarily arises from the nature of the right, but yet it may be shown by the pleadings or proofs that other persons have in fact a community of interest with the plaintiff. There are other cases still in which the claim set up by the plaintiff is in its nature exclusive of

of the latter class there are numberless instances, such as mortgagees or others holding a lien or suing to establish some peculiar interest, or seeking a priority of right. In such cases it would be error in the plaintiff to conjoin other creditors with him in the bill, or to sue in behalf of himself and other creditors. \* \* \* He who comes to assert a peculiar or distinct claim cannot sue in conjunction with other persons. \* \* \* At law, certainly every creditor must sue for himself, and cannot join the case of any other creditor." The action of the plaintiff, Warren, was under the statute against the heir then living, and could not be united with another creditor entitled to a similar action.

This was the state of the pleadings certainly up to the death of H. H. Raymond, and the grant of administration upon the estate of Mary Raymond, February 20, 1877. After this change in the condition of things it seems that the complaint was amended and other parties brought in so as to make it substantially an action to marshal assets, call in creditors, and enjoin them from suing, etc. The claim of B. J. Whaley, trustee, was presented under the call for creditors. It does not appear at what precise time he proved his claim, and thereby brought this action, but it must have been after June, 1876, when the Nisbit sale in foreclosure was completed, and therefore operated as an alienation before action brought as to Whaley. The sale to Wilson of part of the premises thus

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sold \*was after the purchase by Nisbit, and the agreement to litigate for the proceeds instead of the land, made in order to quiet the title of the purchaser, cannot alter the case.

The same principle must be applied to the proceeds of the premises mortgaged to Mrs. Maria S. Hopkins. Her mortgage contained a power to sell and convey, yet she instituted suit against H. H. Raymond to foreclose her mortgage, and as early as June, 1875, obtained a decree of foreclosure and sale. The order authorized H. H. Raymond to sell the premises, and he offered them for sale in December, 1875, but the purchaser failing to comply with the terms of sale, Mrs. Hopkins was authorized by order of court, January 14, 1876, to take the premises at the price bid for them, and under this order titles were executed to her on January 17, 1876, the very day on which Warren commenced his action. In the order directing titles to be made to Mrs. Hopkins this paragraph was inserted: "And it being reported to the court that John D. Warren, a creditor of Mary Raymond, through whom it was alleged that the defendant, H. H. Raymond, has derived said property, may seek to subject the premises ordered to be conveyed to the payment of her debts, and that he is not a party to these proceedings, it is adjudged that said conveyance be without prejudice to

his rights, and that the premises so ordered to be sold shall as to him be subject to the same rule which would have been applicable thereto in the hands of H. H. Raymond, the mortgagor."

This order saved the rights of Warren to proceed as if no sale had been made, but we do not see how it can have that effect as to B. J. Whaley, trustee, who had not appeared in the case, who was not named as a creditor, and did not present his claim until long after. By a subsequent arrangement with Thomas his rights against the alienation were also secured. We cannot discover, however, that any such arrangement was ever made with B. J. Whaley, trustee, and, as in this action the arrangement with Warren could not enure to his benefit in the matter of time, the conveyance to Mrs. Hopkins was as to Whaley an alienation "before action brought."

We conclude, therefore, that the proceeds

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of all the property \*of which Mary Raymond died seized and possessed, except that which was alienated to A. G. Rice, by H. H. Raymond, must be applied, if so much be necessary, in payment of her debts, as established herein, viz.: John D. Warren, B. J. Whaley, trustee, and William M. Thomas, according to the principles herein announced. That is to say, the proceeds of all the remaining parcels, except those covered by the mortgages of Nisbit and Hopkins, in payment of all the three creditors in proportion to the amount of their claims, and the proceeds of the last-mentioned lots mortgaged to Nisbit and Hopkins in payment of the claims of Warren and Thomas.

It was stated at the bar that these claims would exhaust the whole proceeds of sale subject to their payment. If so, the order in which the proceeds should be applied is not important. We recognize the rule to be as stated in the case of the Savings Bank v. Creswell, 100 U. S. 638, where Mr. Justice Miller says: "The court granted such relief as is authorized by the principle that where real estate is subjected to a lien in the hands of its owner, and he sells or mortgages separate parcels of that property subsequently to different persons and at different times, these parcels shall be subjected to payment of the lien in the inverse order of their alienation." See *Bank of Hamburg v. Howard and Garmany*, 1 Strob. Eq. 178.

If Mary Raymond, the owner of this property, had executed these mortgages, that would certainly have been the rule, for the reason that each successive mortgagee would have had the right to throw subsequent mortgagees upon the property of the mortgagor not encumbered. The mortgagor would certainly have been liable in that order, and each mortgagee "sits in the seat of his mortgagor." The matter is not so clear however where the mortgagor was not the owner



of the property except sub modo, subject to the debts of the ancestor. As against these all mere encumbrances by the heir were simply void. Nothing could affect them short of alienation under the statute. But as the heir had a possible interest in the property which might remain after satisfying the debts of the ancestor, we think it safer that the proceeds of sale of the different parcels of the property should be

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applied in the inverse order, \*the last first, of the dates of the mortgages covering them respectively.

The judgment of this court is, that the judgment of the Circuit Court, subject to the modifications herein directed, be affirmed.

### 17 S. C. 207

Ex parte KNOX. In re COTHRAN v. KNOX.

(November Term, 1881.)

#### [1. Appeal and Error ⇐1202.]

After judgment of the Supreme Court affirming or modifying a Circuit decree, and remittitur issued, the Circuit Court has no power to grant a rehearing of the cause for errors apparent on the face of the decree, or for newly-discovered evidence, or upon any other ground.

[Ed. Note.—Cited in *Hand v. Savannah & C. R. Co.*, 17 S. C. 264; *Hubbard v. Camperdown Mills*, 26 S. C. 589, 2 S. E. 576; *State v. Turner*, 39 S. C. 425, 17 S. E. 885; *McKenzie v. Sifford*, 52 S. C. 395, 29 S. E. 811; *Carpenter v. Lewis*, 65 S. C. 404, 43 S. E. 881; *Jones v. Charleston & W. C. Ry. Co.*, 65 S. C. 418, 43 S. E. 884.

For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. ⇐1202.]

2. Ex parte Dunovant, 16 S. C. 299, explained.

#### [3. Courts ⇐244.]

The powers of the Supreme Court, derived as they are from the constitution and statutes, may not be in all cases identical with the powers formerly exercised by the Appeal Court prior to 1868.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 733, 734, 737-740; Dec. Dig. ⇐244.]

#### [4. Appeal and Error ⇐1197.]

The effect of a judgment of this court upon a judgment of the Circuit Court stated. Where the judgment below is modified by the judgment on appeal, the latter becomes the final judgment in the case, and is remitted to the court below only to be enforced.

[Ed. Note.—Cited in *State v. Turner*, 39 S. C. 427, 17 S. E. 885.

For other cases, see Appeal and Error, Cent. Dig. §§ 4666, 4667, 4669-4671; Dec. Dig. ⇐1197.]

Before Kershaw, J., Abbeville, February, 1881.

Mr. Justice MCGOWAN, formerly of counsel in the cause, did not sit at the hearing of this appeal. The Hon. T. B. FRASER, of the Third Circuit, sat in his stead.

This was a petition by John Knox for a rehearing of the cause of Cothran v. Knox, which will be found reported in 13 S. C., 496.

The affidavit upon which the motion is based alleges the discovery of a "cotton book" and papers since the last trial, which due diligence would not have enabled him sooner to discover, and from which information was derived pointing out the books of New York customers that also furnished material evidence; that this evidence brought before the referee would make a difference in the report in petitioner's favor of about \$10,000.

The decree of the Circuit judge was as follows:

The principal cause was commenced by a

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complaint filed by \*James S. Cothran, executor of J. J. Cunningham, deceased, against John Knox, the defendant, to recover judgment against him for certain moneys alleged to be due him upon a sealed note given by defendant to the plaintiff. The defendant, by his answers, set up a settlement or award of referee or arbitration, various moneys paid by him at the request of the plaintiff, and a counter-claim for said payments, offering judgment for \$512 and costs.

Subsequently, by leave of the court, plaintiff filed an amended complaint, converting the cause into a demand for an account against the defendant individually, and for alleged transactions between plaintiff's intestate and defendant as co-partners in business as merchants and hotel-keepers. The defendant, in his answer to the amended complaint, admitted the co-partnership, and submitted to account for the remaining "unaccounted-for assets of the late firm of J. Knox & Co.," and set up the alleged settlement or award, and other matters tending to discharge him from liability. The cause was referred to a referee to state the accounts between John Knox and J. J. Cunningham in his lifetime, including the co-partnership, etc. There was a report of the referee, to which exceptions were taken; a hearing of the exceptions; a decree thereon of the Circuit Court; an appeal to the Supreme Court; and a decree of that court. This decree concurred in that of the Circuit Court in all particulars but one, and in that agreed with the referee.

A petition is now filed on behalf of the defendant Knox, asking that the judgment rendered in the cause, which has been remanded here and made the judgment of the court, "may be opened and reheard: 1st. For error apparent on the face of the decree. 2d. Because of newly-discovered evidence materially varying the facts." The plaintiff has answered the petition, contesting the demand on various grounds. The cause was fully and ably argued before me, and has received more than usual consideration on account of its importance, not only to the parties concerned, but to the public, on account of the principles involved.

Upon the first ground—error apparent on

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the face of the \*decree—it appears to me the petitioner is concluded by the principles decided in *Carr v. Green* (Rich. Eq. Cas. 407), where the court considered the question: “Whether the court will grant a rehearing, or bill of review, when a case has been heard and decided upon its merits by the Court of Appeals, upon any other ground than newly-discovered evidence since the trial?” After a review of all the cases prior to that, the court determined the question in the negative. “A decision of the highest tribunal of the country,” says the court, “must necessarily constitute the law of the case.”

The first of the cases referred to was *Burn v. Poaug*, 3 DeS. 596. There it is said the court has had occasion to consider these applications for rehearing, and it has formed an opinion that it is not at liberty under the present organization, after a full and final decree, to open cases for rehearing, though it has in a few instances corrected palpable errors arising from misstatements, oversight, or misapprehension. This case was followed in *Haskell v. Raoul*, 2 Tread. 896; and in same case upon a new application to the Court of Appeals, 1 McCord, Eq. 22; in *Perkins v. Lang*, reported in a note at p. 31; in *Blair v. Farr*, MSS. Dec., 1824. In *Manigault v. Deas*, Bail. Eq. 296, this point was regarded as settled and that “both policy and the safety of suitors require that it should not be open for argument.”

Although these cases are based mainly on the terms of the statutes establishing the courts which declare that their decrees shall be final, yet in principle they would seem to apply as well to the courts as at present constituted. The decrees of our present Supreme Court are as final as were those then existing. Moreover, this practice is said in *Carr v. Green* to be conformable with that of all the courts in England and the United States, the organization of which bears analogy to ours, which dictum is sustained by authorities both English and American.

2. There is no doubt that, upon a proper case made, a rehearing will be granted on the ground of newly-discovered evidence. All the cases cited evinced this: “The party must show some tangible and substantial

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fact constituting of itself a \*defence, of which the evidence had come to his knowledge since the trial, not particles of testimony, as they are called, or cumulative testimony. \* \* \* To this must be added, that the party had no means of discovering the fact by the exercise of close diligence.”

The petitioner here has brought himself fully within the rule as thus laid down, if we accept the reasoning of the court in *Vandermissen's case*, 5 Rich. Eq. 519 [60 Am. Dec. 102], which is fully justified by the authorities there cited. In that case the papers,

whose discovery was made the ground of the application for leave to file a bill of review, had been in the possession of counsel for this petitioner during and before the trial, but, being in the French language, folded and not endorsed, had been overlooked and not discovered until after the original cause had been determined. It was contended that this could not be considered newly-discovered evidence; but Judge Colcock, delivering the opinion of the court, said: “I think neither the rule nor the reason of the rule go so far. A man may have possession of a paper and not know it; and the affidavits are satisfactory to that point. In the most guarded exercise of the power of reviewing cases, it is only necessary to ascertain that no imposition is attempted to be practised on the court as to the knowledge of the existence of the evidence offered. If the paper was not examined (or was not seen, being among others not thought to be important), it is a case of newly-discovered evidence. \* \* \* It is a case I conceive, too, differing widely from those cases which speak of one having possession of a paper not being entitled afterwards to use it. There are cases where the person having the possession also had a full knowledge of its contents, and through culpable negligence or forgetfulness failed to produce it.”

I think, therefore, that the proofs presented are such as to entitle the petitioner to the rehearing sought, if the application be properly made to this court.

This brings me to a very important question, Can a single judge, sitting in the Circuit Court, open a decree of the Supreme Court and grant a rehearing of the matters determined by it? In *Simpson v. Downs* (5

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Rich. Eq. 425) it is said of \*the late Court of Appeals in equity that it only entertained appellate jurisdiction; no case could come before it except upon appeal; that the court was concluded by its organization from entertaining a petition for leave to file a bill of review, because that would be to assume original jurisdiction, and the court accordingly dismissed the petition.

It is contended for the petitioner that the Supreme Court, too, has only appellate jurisdiction, and that an application there would only result in a dismissal of the petition for the want of jurisdiction. If this is correct, it would follow that this court is the proper forum for the exercise of this extraordinary power. In *Simpson v. Downs* there had never been any decision by the Supreme Court, and the application was only to reconsider a Circuit decree.

There can be no question, therefore, that it should have been read to the Circuit Court, and the petition was rightly dismissed by the Court of Appeals. But the ground of the decision, if applied to cases which had been heard and decided in the Supreme Court,



would exclude that court from the power to correct any errors in their decisions after they had been rendered, and to confer that necessary jurisdiction upon a single Circuit judge. This would be a manifest inconsistency, and most dangerous in practice. While the Supreme Court may have no original jurisdiction of this sort, it must have all the powers necessary and proper to protect it in the exercise and administration of its appellate jurisdiction. Independently of the grant of supervisory powers over other courts contained in the constitution, it would, as an incident to its character as a court of final appeals, have the power to compel subordinate courts to execute its mandates in appeal cases. In order to maintain its jurisdiction when it has once attached, it must have the power to follow its judgments to the court below, and to secure to litigants their rights thereunder. One of those rights is, upon presentation of a proper case to have the judgment opened and the matters therein decided reviewed.

Where shall the application for this purpose be made? The judgment to be opened is that of the Supreme Court, over which the Circuit Courts can exercise no power but to

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enforce \*it (code, § 12). It is remitted to them only for that purpose; it is not their judgment, but that of the Supreme Court, whose mandate in regard thereto they must obey. They may open their own judgments, in proper cases; but those of the Supreme Court they must enforce as directed. It would seem to follow, beyond a doubt, that if the judgment of the Supreme Court is to be opened at all, and the matters concluded thereby be again litigated, it must be done upon leave granted by the Supreme Court.

In the Supreme Court of the United States, a court of precisely analogous powers and constitution as ours in relation to this subject, having appellate jurisdiction only, it has been held that after an appeal a bill of review does not lie for any cause without leave of the Appellate Court. *Southard v. Russell*, 16 How. 547 [14 L. Ed. 1052]. There is no distinction in this respect between an application to file a bill of review when necessary, and for a rehearing, when the case is in such a condition as to make the latter a proper application. This question has never been expressly decided or considered by the courts of this state.

I can find no instance in which a Circuit Court has exercised the power of opening a judgment after the decision of an appeal. Petitions of this character have sometimes been filed in the Appellate Court, and sometimes in the Circuit Court, since the establishment of a separate Court of Equity Appeals in 1808. Of the cases filed in the Appellate Courts may be cited *Haskell v. Raoul*, 2 Tread. 894; the same case, 1 McC. Eq. 22; *Ex parte Terry*, *Rice's Eq.* 1; *Johnson v.*

*Lewis*, 1 Rich. Eq. 390; *Hunt v. Smith*, 3 Rich. Eq. 540. In not one of these was the objection suggested that the petitions had been filed in the wrong court. To this may be added *Carr v. Green*, above cited. On the other hand, in *Hinson v. Pickett*, 2 Hill Eq. 351, and *Vandermissen's Case*, 5 Rich. Eq. 519 [60 Am. Dec. 102], this petition was filed in the Circuit Court after an appeal, and without an objection on that ground. *Simpson v. Downs* has been decided since these cases, and has been followed in the later cases, in none of which, however, had there been a decision in the Appellate Court before application made.

In *Tomlinson v. Tomlinson*, 10 Rich. Eq.

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300, an appeal \*was taken by the plaintiff, and also a petition filed for a rehearing of the Circuit decree. They then moved the Appeal Court to stay the argument of the appeal until they could present their petition in Circuit. In granting the order the court said: "If the appeal be heard it will preclude the consideration of the petition upon Circuit." Upon this ground, therefore, the motion was granted. This would seem to imply that in the opinion of that court the Circuit Court could not entertain a petition of that character after the decision of the case by the Appeal Court. I am unwilling, unless I could find express authority controlling me, to assume the responsibility of opening a case already determined by the Supreme Court, without a reference to that tribunal. I find no such authority, but the reverse. The case of *Southard v. Russell* was considered by a court of the highest authority, and ought to govern here, unless we had some decision directly upon the point opposed to it.

That case refers to *Stafford v. Bryan*, 1 Hen. & Munn, 46, which held on the authority of *Barbon v. Searle*, 1 Vernon, 416, that the court cannot entertain a bill of review, after a final decree of the court, for the correction of errors. And counsel in this case have furnished me a reference to a case noticed in the Reporter as having been decided in the United States Circuit Court for the Southern District of New York during the present year—*Hancock Ins. Co. v. Manning*, where it was held, "that after decision of the case by the Supreme Court the Circuit Court cannot grant a motion for a new trial on the ground of newly-discovered evidence, but must execute the mandate of the Supreme Court."

I do not consider the cases of *Pringle v. Sizer*, 7 S. C. 131; *Knox & Gill v. S. C. R. Co.*, 5 S. C. 73, and *Whaley v. Bank of Charleston*, Id. 262, as affecting the question. They decide that after the remittitur of a case to the Circuit Court the Supreme Court loses jurisdiction, so that it cannot grant a rehearing in that court. This very rule consists with the view presented, that though the rehearing of the review cannot be

had in the Court of Appeals, in fact can only be had in the Circuit Court, yet leave to

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open a judgment for a review or \*rehearing must first be had in the Supreme Court, when the judgment has been rendered by that court.

In *Pringle v. Sizer* the court says: "Strictly speaking, after a cause has been once remitted, this court loses all jurisdiction over it. \* \* \* The Circuit Court, on the remittance of a case, is bound to follow the directions of the Appellate Court; it cannot change, alter, or modify them, or allow new issues." The application there was for a re-argument on the ground of error in the judgment of the Supreme Court.

In *Whaley v. Bank of Charleston*, a petition was filed in the Supreme Court, asking leave to file a bill of review or a bill in the nature of a bill of review, after a judgment had been rendered by the Supreme Court and remitted to the Circuit Court. The language of the court is guarded: "Even assuming our right to control the judgments of the court, so as to subject them to our review and reversal, we see nothing in the matter before us to require our interference. We take occasion here to refer to what was said in *Knox & Gill v. S. C. R. Co.*

Here is what was said in that case, which was an application to the Supreme Court for a rehearing by that court of a judgment already rendered but not remitted: "It is not our purpose now to prescribe any rule for the re-examination, on the mere petition of parties, of a final judgment duly pronounced and filed. Whatever may be our views in regard to any control which we may be authorized to exercise over the judgments and decrees of the court, or how far *ex mero motu* we are to reconsider them, we will announce when a proper case may so require." This language is adopted by the Supreme Court in the case of *Whaley v. Bank of Charleston*, and is the last utterance of the court on the subject which has come to my knowledge. It is, therefore, evident that the rule has not yet been established.

This case will furnish the opportunity. It is evident that the power must rest somewhere. I cannot suppose, in a case like this, it lies with the Circuit Court, whose duty it is to obey the mandates of the Supreme Court, not to review or reverse them. Such a ruling, in the language of Chancellor Gail-

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lard \*in *Lang v. Perkins*, involves this inconsistency: "That after a case has been solemnly determined by this (appeal) court in the last resort, a single judge in the Circuit Court might cause the decision to be again brought into question. This cannot be." The petition cannot be entertained without leave of the Supreme Court first had. Ordered, that the petition herein be dismissed.

The opinion states the grounds of appeal.

Mr. W. S. Monteith, for appellant.

Messrs. W. H. Parker, L. W. Perrin, contra.

May 12, 1882. The opinion of the court was delivered by

Mr. Justice FRASER. This was a petition in the Circuit Court, to reopen and rehear a judgment or decree of the Circuit Court modified by the Supreme Court. The original cause in which the petition was filed was heard on circuit at Abbeville, in April, 1879, on the report of a special referee and exceptions. The decree of the Circuit judge was filed December 18, 1879, and both parties appealed to the Supreme Court. The case was heard in the Supreme Court, and the judgment of the Supreme Court was filed, July 30, 1880, by which the Circuit decree was modified. The remittitur was filed in the Circuit Court August 31, 1880. This petition for a rehearing was filed in the Circuit Court September 14, 1880.

The grounds on which the petition is based are: 1. For error apparent on the face of the judgment: 2. Because of newly-discovered evidence materially varying the facts; and the petition prays that the original cause may be recommitted to the referee, to restate the accounts with instructions to inquire as follows to wit, into certain items of the account as to which it was alleged that there was error in the report as confirmed by the decree. The Circuit judge held that after there had been an appeal in the cause, and after a hearing, a judgment rendered thereon, and the remittitur filed in the Circuit Court, there could be no rehearing of the cause, or permission given to file a bill of review except for newly-discovered evidence; and that under such circumstances

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the Circuit \*Court had no jurisdiction to make an order for a rehearing, or for leave to file a bill of review, even for after or newly-discovered evidence; that the judgment of the Supreme Court, the highest appellate tribunal, was final and conclusive on the Circuit Court.

From this judgment on the petition an appeal has been taken to this court: 1. Because it is respectfully submitted, that his Honor erred when he held that he did not have the jurisdiction to grant the relief sought. 2. Because it is respectfully submitted that his Honor erred when he held that the petition sought to alter and review a decree of the Supreme Court; whereas the case only went to that court in its appellate jurisdiction, and it having sent down the remittitur, the jurisdiction ended, and the decree was the decree of the Circuit Court.

In the argument before this court it was strenuously urged that the judgment or decree of the Circuit Court in the original cause which was modified by the judgment of the



Supreme Court was not final, and was only interlocutory, and that the accounting between the plaintiff and defendant has been left open by it. It is sufficient to say, that no such question has been raised by the grounds of appeal, and it is not proper for this court to express any opinion as to the proper construction of the judgment which has been rendered. If, however, this be the correct view, it is not easy to see why this petition for a rehearing is necessary, or why all the questions which petitioner, the defendant in the original cause, desires to make cannot be raised in the ordinary way in the carriage of the original cause in the various stages of preparation and trial.

The grounds of appeal do not raise the question as to the right of the Circuit Court to order a judgment or decree to be reopened and reheard for error on the face of the decree, or for newly-discovered evidence where there has been only a Circuit decree which has not been affirmed or modified by the Supreme Court. The right of the Circuit Court to order a decree to be reopened and reheard for newly-discovered evidence in a case where there had been no appeal has been recently affirmed in the case of *Durant v. Philpot*, 16 S. C. 116. The only question

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in the case now before the court is \*whether the Circuit Court has such jurisdiction in a case where the decree of the Circuit Court has been affirmed or modified by the Supreme Court on appeal.

In *Ex parte Dunovant*, 16 S. C. 299, this court holds the following language: "If, therefore, after a trial in the Circuit Court a party wishes to avail himself of the benefit of after-discovered evidence, his application should be made in the first instance to that court, as we have no jurisdiction to consider the question until after it has been passed upon by the Circuit Court." In *Ex parte Dunovant* there had been an appeal to the Supreme Court, the appeal heard, and the judgment of the Supreme Court rendered, and the remittitur sent down to the Circuit Court. While this court holds in the latter case cited that applications for a rehearing should be made originally to the Circuit Court, it does not hold that in that particular case it could have been granted there. The court did say that if heard in the Circuit Court, there were only such grounds alleged as were proper for an appeal and not for a rehearing, and might have assigned in that particular case another reason if it had been deemed necessary. The court did say what was sufficient for the purpose, and it amounted to this—that when a proper case arose the application for a rehearing should be made in the first instance to the Circuit Court.

The authorities have been so carefully and clearly stated by the Circuit judge in the judgment from which this appeal is taken,

that this court does not deem it necessary to add much to what has been said by him. It is by no means safe to hold that because the old courts of law and equity, and of appeals, exercised certain powers, that the same powers can in all cases be exercised by the courts of the present day which have succeeded them. The present courts have been created by a new constitution, and are governed by new statutes which in many respects modify their powers. The code, § 12, provides that "the Supreme Court may reverse, affirm, or modify the judgment, decree, or order appealed from in whole or in part and as to any or all of the parties; and its judgment shall be remitted to the court below to be enforced according to law."

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\*When the judgment of the Circuit Court is simply affirmed it may seem that the judgment in the cause in which it is rendered is only a judgment of the Circuit Court unrevoked; to reverse a judgment of the Circuit Court may perhaps mean something more than merely to annul or set it aside; but when a judgment of the Circuit Court is modified by the Supreme Court it is certainly a new judgment with different provisions from the Circuit judgment. While such a judgment is the final judgment in the cause, it is difficult to see how it is merely the judgment of the Circuit Court. It is made, as in the case now under consideration, in the Supreme Court, and is made by an authority paramount to and which overrides the Circuit Court. This judgment of the Supreme Court is remitted, not to be reheard in, but to be enforced by, the Circuit Court according to law.

When a cause is heard only in the Circuit Court, that court has power in proper cases to reopen and rehear it. When a cause is heard in the Supreme Court, and before its jurisdiction ends by remitting its judgment to the Circuit Court the cause may be reheard in a proper case in this tribunal. But when its judgment is remitted to the court below, the Supreme Court loses control of the cause and the Circuit Court can only enforce it. There must be some end of litigation.

It may seem to be a hardship that in a case in which the Circuit judge thought there was a proper case for a rehearing, this court can give no relief. It must be remembered, however, that this court can only construe the law, and that it should be especially careful not to extend its control beyond the clear limits of its jurisdiction as prescribed by law. It is better that there should be cases of individual hardship than that the courts shall arbitrarily extend their jurisdiction to meet supposed necessities which may arise, if indeed this is such a case.

It is therefore ordered and adjudged that the judgment of the Circuit Court be affirmed and the appeal dismissed.

## 17 S. C. \*219

\*HAND v. SAVANNAH AND CHARLESTON RAILROAD COMPANY. THE STATE, Ex relatione THE ATTORNEY GENERAL, v. SAME. Ex parte CUTTINGS, Executors, in re THE SAME.

(November Term, 1881.)

[1. *Railroads* ⇨153.]

The decision of this court in *Hand v. Savannah and Charleston Railroad Company*, 12 S. C. 314, declared and explained, so far as it determined the respective priorities of the bonds of the defendant corporation, and held persons funding coupons under the act of 1869 estopped from claiming a prior lien under the act of 1856 for the bonds and other coupons owned by them at the time of such funding.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 471; Dec. Dig. ⇨153.]

[2. *Estoppel* ⇨119; *Railroads* ⇨171.]

Under an issue of estoppel from the assertion of a preferred statutory lien, the question whether the holder of bonds and coupons secured by such lien has accepted, in payment of his past-due coupons, bonds issued under a later statute postponing such lien, is one of fact, with the burden of proof resting upon him who asserts the estoppel.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 309; Dec. Dig. ⇨119; *Railroads*, Cent. Dig. § 576; Dec. Dig. ⇨171.]

[3. *Evidence* ⇨352.]

On such question, arising eleven years afterwards, entries in the handwriting of a deceased treasurer in the regularly-kept books of a railroad company are competent evidence to show who funded coupons and received in exchange therefor bonds under the later statute.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1398; Dec. Dig. ⇨352.]

[4. *Railroads* ⇨153.]

And such persons, or their representatives, having failed, after opportunity offered, to show that they were not at that time owners of the bonds and coupons (then immature) of the first lien, now produced by them, such evidence will be accepted as proof that they were such owners at the time of the funding by them of coupons, then past due, of first lien bonds,—the company being in possession of coupons from those bonds, although it cannot be shown that they are the identical coupons funded by these persons.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 467-471; Dec. Dig. ⇨153.]

[5. *Railroads* ⇨153.]

But the mere fact that coupons of the bonds now presented were funded in 1869 do not furnish that full and clear proof essential in estoppels, to establish the ownership of these bonds at that time by the same parties who did the funding.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 467-471; Dec. Dig. ⇨153.]

[6. *Railroads* ⇨153.]

The present owners of bonds may have acquired them prior to 1869 without the coupons, but if afterwards, the act of that year did not charge them with notice that the coupons cut off had been funded by parties then owning the bonds from which cut.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 467-471; Dec. Dig. ⇨153.]

[7. *Railroads* ⇨153.]

The fact that some coupons of first-lien bonds were paid in state guaranteed bonds under the act of 1869 raises no equity for the pay-

ment of the unfunded coupons of the same class and dates in preference to the bonds and later coupons. Such unfunded coupons are entitled to take only their pro rata with other bonds and coupons of the first lien not postponed by settlement or the estoppel of their owners.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 467-471; Dec. Dig. ⇨153.]

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[8. *Corporations* ⇨473; *Railroads* ⇨171.]

\*The holders of first-lien bonds retaining that rank are exclusively entitled to the benefit of the first lien, and cannot be required to share that benefit with the second statute lien to the extent of the quantity of the first lien removed by the estoppel of parties holding under it. This was in effect held in the former judgment, 12 S. C. 314.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1852; Dec. Dig. ⇨473; *Railroads*, Cent. Dig. §§ 573, 576; Dec. Dig. ⇨171.]

[9. *Railroads* ⇨171.]

Nor (as also ruled in the former appeal) are the interest fund bonds, guaranteed by the state, issued under the act of 1869 in payment for the coupons of the first-lien bonds, entitled to the rank held by the coupons which these bonds satisfied.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 573; Dec. Dig. ⇨171.]

[10. *Appeal and Error* ⇨1195.]

A referee having reported a schedule of coupons proved before him, and the report in this particular having been confirmed, without exception, on Circuit, and then on appeal, it is too late afterwards to raise the point on Circuit that certain coupons included in such report had been before that time paid by the debtor corporation—that matter being necessarily involved in the proof of the coupons. The rule is not varied where other issues involved in the litigation are still undecided.

[Ed. Note.—Cited in *Hubbard v. Camperdown Mills*, 26 S. C. 588, 2 S. E. 576.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇨1195.]

[11. *Reference* ⇨101.]

The application for a recommittal cannot be sustained under the act to vacate erroneous judgments, because not made within two years; nor under Section 197 of the code; nor as for a new trial on after-discovered evidence, for the reason that the remittitur of the Supreme Court had been issued.

[Ed. Note.—Cited in *Bleckley, Brown & Fretwell v. Branyan*, 28 S. C. 451, 6 S. E. 291.

For other cases, see *Reference*, Cent. Dig. §§ 169-180; Dec. Dig. ⇨101.]

[12. *Subrogation* ⇨23.]

Uncancelled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purpose—although marked paid in the company's books—these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The recognition of this equity may be required at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 60; Dec. Dig. ⇨23.]

[13. *Receivers* ⇨155.]

Claims against the receiver of an insolvent railroad corporation for moneys, services, supplies, damages, and necessary expenses of the management, cannot be paid out of the proceeds of the mortgaged property, which were insuffi-



cient to pay the mortgage debt. Unless specially authorized by the court to contract debts on the faith of the property, a receiver is restricted to the income and profits of the road.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 283; Dec. Dig. ⚡155.]

[14. *Railroads* ⚡197.]

The receiver was authorized by a consent order, without a reference, to construct an extension of the railroad at a cost not to exceed an amount stated, to be paid for out of surplus income, and the extension to stand pledged for such payment. The extension was built at a greater cost and then sold as a part of the entire road. *Held*, that the receiver acted only as agent of the consenting bondholders, but that the extension was covered by a lien, superior to existing liens, in favor of those who furnished the money to buy it, and that they were entitled to such ratable proportion of the proceeds of sale as the value of the extension bore to the value of the entire road, considered only in reference to the purchase money of the whole.

[Ed. Note.—Cited in *Buck, Hefflebower & Neer v. Martin*, 21 S. C. 594, 53 Am. Rep. 702.

For other cases, see *Railroads*, Cent. Dig. § 662; Dec. Dig. ⚡197.]

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[15. *Railroads* ⚡197; *Receivers* ⚡155.]

\*But a bondholder refusing to consent to the extension, and whose interest was expressly excepted in the consent order, is entitled to his full share of the whole proceeds of sale.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 662; Dec. Dig. ⚡197; *Receivers*, Cent. Dig. § 284; Dec. Dig. ⚡155.]

[16. *Costs* ⚡172, 197.]

Counsel fees and costs should be adjusted on Circuit. The costs and fees of all the attorneys, properly chargeable for successful services, should be paid out of the common fund.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 665-687, 752-755; Dec. Dig. ⚡172, 197.]

[17. *Appeal and Error* ⚡1099.]

It being impossible to say with judicial certainty what was adjudged in the former judgment of this court (12 S. C. 314), upon the matter of the liability of the railroad for taxes, the question treated as still undetermined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4370-4379; Dec. Dig. ⚡1099.]

[18. *Taxation* ⚡210.]

A railroad company was chartered with an exemption from taxation, and bonds were issued having a first statutory lien on the property of the corporation. Subsequently the general assembly passed an act undertaking to postpone the first lien in favor of a second issue of bonds by that act authorized, upon condition that the corporation would release its exemption from taxation—which was done. The postponement of the lien being unconstitutional, *held*, that as to bondholders under the first lien, who did not assent to the terms of the second act, the property of the corporation in the hands of the original company and also in the hands of its successor, a new company, was exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 335; Dec. Dig. ⚡210.]

[This case is also cited in *Park v. Funderburk*, 87 S. C. 79, 68 S. E. 963, and *Citizens' Trust & Savings Bank v. Stackhouse*, 91 S. C. 461, 74 S. E. 977, 40 L. R. A. (N. S.) 454, on right of bona fide purchaser to recover on negotiable instrument originally infirm.]

Before Mackey, J., Charleston, March, 1881.

For the previous history of these cases in this court, see, in the following order, 5 S. C. 182, 8 Id. 207, 6 Id. 307, 10 Id. 406, 12 Id. 83, 314, 13 Id. 467; but most particularly, 12 S. C. 314, to the opinion in which case frequent reference is here made.

Upon the return of the case to the Circuit Court, Judge Aldrich passed the order of reference stated in the opinion of this court. It is contained in his decree of sale, set out in full in 13 S. C. 467. The referee reported as follows:

It will be necessary, in the first place, to determine what are the principles settled by the Supreme Court. On page 350 [of 12 S. C.] the court, after discussing the subject, sums up its conclusion in these words: "It would follow that one funding coupons under that act (1869) must be regarded as bound by its terms, as it regards any bonds or coupons held by him at the time of funding of the same class, at least with the coupons funded."

This seems precise and definite. In the next subsequent paragraph of the decision the court designates this as "this principle," and as "the conclusions just stated," and as

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"the \*principle laid down." It would not be within the province of a mere referee to extend the application of this precise rule and direction beyond its express terms, by any analogies or arguments drawn from the reasoning by which the court has reached the above conclusion. My interpretation of this conclusion is that that bondholder only who has funded the coupons from the bonds which he held at the time of the funding must be regarded as bound by the terms of the act of 1869, as it regards any bonds or coupons held by him at the time of funding of the same class, at least with the coupons funded. And that if any estoppel arises, it arises from the personal act of the party funding, and not from the character of the instrument.

The following is a summary of the evidence which has been submitted in the case:

First. The coupons either funded or paid, in the possession of the Savannah and Charleston Railroad Company. These coupons are contained in nine books, embracing the years 1861 to 1869, both inclusive. The coupons in these books are variously marked, some of them are punched and others are marked with a cross. The evidence of Messrs. Isaacs, Blacklock and Lee, which accompanies this report, will explain the circumstances and conditions of these coupons. I submit with this report a tabular statement, marked Appendix A, of all the six per cent bonds which have been issued under the act of 1856, for the above period, together with the names of those persons who have proved them either at the reference held under the present order, or at the references hitherto held, together with the statement of the con-

dition of all the coupons on those bonds as far as such condition has been ascertained by the proof submitted. This statement shows what coupons are in the possession of the Savannah and Charleston Railroad Company and are presumed to be either funded or paid, and what coupons are held by different holders and are neither funded nor paid.

There is nothing upon the face of the coupons in these nine books to show by whom any of the funded coupons have been funded, nor to whom payment has been made for

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any of the \*paid coupons. The fact of the possession of these coupons by the company is proof simply that such coupons have been either funded or paid by the company. It has been argued that the fact of the possession by the company of a coupon of any particular bond is presumptive that the coupon was funded by the holder of the bond, and that the burden of proof is upon him to show that he did not fund the coupon.

But there is better and more conclusive evidence as to who funded the coupons than is furnished by any presumption arising from the mere possession by the company of the coupons. The books of the company, if they are to be received as evidence, furnish precise and accurate evidence, as to who did actually fund the coupons and receive the bonds for which such funded coupons were issued.

These books, two in number, are marked as follows: "Statement of coupons from state guaranteed six per cent bonds, funded in state guaranteed seven per cent bonds, S. & C. R. R. Co.;" and "Bonds issued for funded interest. State guarantee." S. & C. R. R. Co." The entries contained in them are printed with the evidence filed with this report.

They are in the handwriting of Mr. S. W. Fisher, the treasurer of the company, at the time of the funding, and were contemporaneously prepared by him in the course of his employment, to serve, as is shown by the titles printed on them, as the official register and record of the funding, and with such accuracy and care as to leave but little, if any, room for discredit or doubt. Mr. Fisher is dead, and the books come fairly within the rule as laid down by Mr. Wharton in his "Treatise on Evidence," Sec. 238.

These books contain the names of all those to whom the bonds for the funded coupons were issued, and it is impossible to avoid the conclusion that those whose names appear on them did personally fund either coupons from the bonds which they at that time personally held, or coupons which they obtained from others.

If, therefore, it is proved by any evidence submitted in this case that a person is a holder of a six per cent bond, and the name of the same person appears in the books of

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the company \*as one of those who have re-

ceived a bond for funded interest, such concurrence and coincidence would be at least presumptive that the bonds which he now holds are the bonds which he held at the time he funded the coupons, and the burden of proof is upon him to show that he did not hold the bonds which he now holds at the time of the funding.

And if it should appear that the name of a present holder of a six per cent bond does not also appear in the books of the company, such non-appearance would be presumptive, if not conclusive, that the present holder of the bond was not the holder at the time of the funding, or that the coupons of his bonds were sold and not personally funded by him; since, with the exception of twelve bonds held by Mrs. Blair's estate, there are no bonds, some of the coupons of which are not in the possession of the company, and the names of all the parties who funded appear in the books of the company. The bonds being negotiable securities are not affected by any transactions of which the present holder has had no notice, and the present possession of such a bond is at least prima-facie evidence that such possession is bona fide and without notice of any equities affecting it.

The following is a comparative table, containing the names of all the parties who have received funded interest bonds, and those who in the same or nearly the same names have proved six per cent bonds in the cause: \* \* \*

No such proof has been submitted as would show an identity in persons and interest in the following names in the above list, and, therefore, the bondholders cannot be presumed to have accepted the provisions of the act of 1869: \* \* \*

The other parties mentioned in the above comparative table who have received interest funded bonds and have proved six per cent bonds, must be presumed to have accepted the provisions of the act of 1869, so far as the six per cent bonds are concerned, which they held at the time of the funding, and the burden of proof is upon them to show what bonds they did not hold at the time of funding.

The following parties have testified as to what bonds they did not hold at the time of funding: \* \* \*

The holders of six per cent bonds who

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have not been proved \*to have funded coupons, cannot be presumed to have accepted the provisions of the act of 1869.

Besides the six per cent bonds, which have been proved before me in this case, there have also been proved a number of detached and unpaid coupons, taken from the six per cent bonds. The following is a list of these coupons and the names of the parties who have proved them: \* \* \*

None of the above parties have been proved by the books kept by Mr. Fisher, or by other



testimony, to have received any of the interest funded bonds, with the exception of Mr. J. T. Robertson and Mr. A. Isaacs.

With their exception there is nothing to raise a presumption that any of the above parties have in any way accepted the provisions of the act of 1869. Mr. Robertson and Mr. Isaacs having been proved to have received interest funded bonds, the burden of proof is on them to show that they did not hold the coupons they have proved at the time they received the interest funded bonds.

It has been argued that all the past-due coupons held by the above parties, and maturing on or prior to first September, 1869, should be paid before coupons falling due at a later date, and before the principal of any of the bonds. In support of this position, the case of *Stevens v. New York and Oswego R. R.*, 13 Blatch. 416 [Fed. Cas. No. 13,406] (Jones R. R. Sec., § 638), was relied on. This case seems directly on the point, and if its authority is to be followed, the coupons above referred to must be paid before the other coupons and the principal of the bonds.

It would be as well to state that all of the six per cent bonds issued under the act of 1856 have been proved before me, with exception of seventy-one bonds. And that all the coupons belonging to the six per cent bonds, for the nine years from 1861 to 1869, have been accounted for or proved except 564.

The following statement of the coupons will make this apparent: \* \* \*

Entire interest for the 9 years....	\$272,700 00
Accrued interest according to Mr. Fisher .....	268,470 00
Amount of interest paid, but not in Mr. Fisher's statement.....	\$4,230 00

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\*Reducing the amount of interest according to Mr. Fisher's evidence, on page 209 of the brief to coupons, the following would be a statement of the entire interest in coupons:

Whole amount of coupons (\$272,700)...	18,180
\$ 4,230 paid .....	282 coupons
\$ 20,145 paid by Mr. Fisher .....	1,343 "
\$172,800 funded by Mr. Fisher .....	11,520 "
\$ 67,065 held by Hand and others....	4,471 "
\$ 8,460 in unproved coupons .....	564 "
\$272,700	18,180

The next evidence submitted is that of Mr. Alexander Isaacs, the former president of the company. He merely corroborates the evidence of Mr. Fisher, and does not prove the funding by any one whose name is not in the books kept by Mr. Fisher.

The order of reference under which I am acting directed that I should inquire and report "what claims and demands against the Savannah and Charleston Railroad are undisputed and entitled to immediate payment." The following claims against the road have

been presented, none of which however are undisputed:

1st. The claim of Henry R. Williams for land taken by the Charleston and Savannah Railroad Company for a right of way in 1860.

2d. The claim of the state for taxes.

3d. The claim for materials, labor, and services up to the time of the sale of the road, and paid by Mr. Mitchell and the receiver.

4th. The claim of Daniel Green for a horse killed and injuries to a mule.

In reference to the claim of Henry R. Williams. \* \* \*

As to the claim of the state for taxes:

In a former report the referee reported that the claim of the state for taxes was, under the act of 1856, postponed to the lien of the bondholders under that act. To this report the attorney-general of the state filed exceptions, among which was this: "That the referee erred in not finding that the claim

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\*of the state for taxes constitutes a lien on the property of the Charleston and Savannah Railroad Company, prior to all other liens and claims on the same." The Circuit Court confirmed the report on this point, and from the decree of the Circuit Court the attorney-general appealed on the same grounds on which he excepted to the report. Subsequently the Supreme Court decided as follows: "That portion of the decree (Circuit) which sustains the imposition of the taxes should be affirmed." It would, therefore, appear that the imposition of the taxes is postponed to the lien of the bondholders under the act of 1856, as the Circuit Court confirming the report had decreed; and as the road has not been sold for a sufficient amount to pay the bondholders under the act of 1856, the claim of the state for taxes must be disallowed.

In reference to the claims due by the receiver:

The order of reference relating to these claims requires me to vouch the said claims, and to inquire and report upon what funds the same are chargeable.

I find in the order appointing the receiver, signed April 28, 1874, the following provision: "The said railroad stock, outfit, and property of the defendant company shall be held, worked, and managed by the said receiver and advisory board with the greatest possible skill and economy, and the results be reported quarterly to the court in this cause, and the net profits, after paying all necessary expenses, including such amounts, if any, as may be due the employees and officers, shall be applied quarterly to the payment" of the interest and principal of the debt of the company, in the order set down in the order appointing the receiver.

It would require a very liberal construction of this order to interpret it, as intended, that the necessary expenses, including the amounts due the employees and officers for

services, should be paid out of any other fund than the profits of the road. If the amounts now due by the receiver are at all chargeable upon the fund arising from the sale of the road, now in the hands of the court, such chargeability must arise from some other authority than that contained in the order appointing the receiver. The general accounts

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of the receiver have not yet been \*audited and vouched, nor does it appear that he has not worked and managed the road with all possible skill and economy.

In the case of *Cowdrey v. Railroad Company*, 1 Wood's Rep., 336 [Fed. Cas. No. 3,293], Mr. Justice Bradley says: "It may be laid down as a general proposition, that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion that is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands.

"And to such outlays in ordinary course may properly be referred not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court or to the master appointed in that behalf for advice and authority in any matter of importance which may involve a considerable outlay of money in lump."

There does not appear to be anything in the claims due by the receiver in these accounts, now under consideration, which may not be legitimately embraced in the principle thus laid down by Judge Bradley. There has been no considerable outlay of money in lump, and all the expenditures are of such a character as were necessary for the very continuance of the business and existence of the road, as explained in the evidence filed with this report.

In the matter of the claim of Daniel Green for a horse killed and a mule injured by the train:

I find that some time in the month of April, 1880, the horse and mule belonging to Daniel Green strayed on the track of the road, and were run over by a passing train. The horse was killed and the mule was so injured as to be entirely useless. The horse was purchased in March, 1879, for \$110, and the mule in January, 1877, for \$150.

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\*In *Davenport v. The Receivers of the Alabama and Chattanooga R. R. Co.*, 2 Wood's Rep., 519 [Fed. Cas. No. 3,588] it was decided

"that a person who has recovered judgment against the receiver of a railroad for injuries received by him while travelling as a passenger upon the road, is not entitled to payment out of the earnings of the road nor the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receiver." As there is no such provision in the order of the court which has placed the road in the hands of the present receiver, I therefore report that Daniel Green, under the principles of the above decision, is not entitled to compensation for the death of and injury to his animals out of the fund in the hands of the court.

Respectfully submitted,

W. Alston Pringle, Referee.

The facts connected with the motion to recommit for further proof of the coupons of Isaacs and others, and the application for payment of the Bee Ferry Extension, are sufficiently stated in the opinion.

The case was argued before the Circuit judge on exceptions to the referee's report. The decree was as follows:

These cases came up on the referee's report, made under the direction of the Supreme Court and exceptions thereto. The Supreme Court had established the priority of the Statutory Lien of 1856, securing the six per cent bonds, but held that that lien was displaced in behalf of the seven per cent bonds of 1869, in cases where the coupons of the sixes had been funded under the act of 1869, and the case was sent back to inquire and report upon this and other matters set forth in the decree.

As the testimony is of considerable extent, and embraces various propositions upon which exceptions are taken, it will be more convenient to take up the various cases made in their order.

1. As to Hand's coupons. These form the subject of the original suit, and have been

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duly proved. They are six per cent \*coupons matured and held by the plaintiff, Hand, before the passage of the act of 1869. The referee has found that these coupons, amounting to \$27,705, with interest from their various dates, are justly due, and stand as res judicata under previous proceedings, and the exceptions having been withdrawn, it is ordered that Daniel Hand have judgment for the said amount, with interest, to rank to be paid in like manner as bonds which have not lost priority by acceptance of the act of 1869.

2. The twelve (12) six per cent bonds proved in the name of W. C. Beaty, executor of Mrs. Nancy Blair, have not been impugned by any testimony, and it is ordered that these bonds, amounting to \$6000 with the interest accrued thereto, be also paid in like manner.

3. The one hundred six per cent bonds,



and their coupons, and the detached coupons proved by Bradley Martin, have been removed by sufficient testimony from the presumptions which affect the other six per cent bonds, and it is ordered that these bonds amounting to \$50,000, and detached coupons amounting to \$25,005, with interest accrued thereon, be also paid in like manner.

4. The whole of the remaining six per cent bonds seem to me to fall within one class. The act of 1869 requires the Savannah and Charleston Railroad Company to fund the coupons on the six per cent bonds which shall have fallen due in September, 1869, and the Supreme Court has declared that all bondholders whose coupons have been so funded have accepted the provisions of the act of 1869, one of which provisions is, that they shall be postponed to the seven per cent bonds authorized by that act.

The Supreme Court further holds that the bond and its coupons forming a single obligation are to be considered as one. The coupons and bonds were certainly one paper originally, and necessarily in the same hands. On the principle of continuity, as set forth by Mr. Wharton On Evidence, 1284, when a judicial relation is once established, it is not necessary to prove its continuance. The burden is on the adversary to prove that

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it \*has ceased. And, in accordance with this view, it has been decided that the possession of the coupon is prima-facie evidence that the holder of the coupon owns the bond from which it was taken. *McCoy v. Washington*, 3 Wall. Jr. 381 [Fed. Cas. No. 8,731]; *Moran v. County Comrs.*, 6 Ohio St. 287.

It follows in all cases where the coupons that have matured at or before September, 1869, have been funded under the act of 1869, the bond to which that coupon belongs is prima facie to be held bound by this Act of funding. The company is in possession of and had funded coupons of every bond issued except those of Mrs. Blair; and of those, the only parties who have made proof which rebuts the prima-facie evidence of acceptance is the holder of the Bradley Martin bonds, hereinbefore allowed. The result is, that all the six per cent bonds, with the foregoing exceptions, are postponed to the sevens issued under the act of 1869.

It is objected, however, that these bonds in the hands of an assignee, are protected from this infirmity of title by the Law Merchant. But it seems to me that the case of *Furman v. Nichol*, 8 Wall. 51 [19 L. Ed. 370], completely answers this objection. The public statute of 1869 required the railroad company to fund the coupons of 1869, and the court has declared the effect of that funding. The bond therefore, according to *Furman v. Nichol*, had this condition as it were written on its face, and whoever took it was affected with notice. The very absence of the coupons from the bond was absolute

knowledge to the assignee that the coupons had been funded. It would seem to me that the act of 1869 itself took the bond away from the operation of the Law Merchant.

That act proposed a great public measure and prescribed the mode of carrying it out. If any one could defeat it by the simple transfer of the bond which had been postponed it would amount to the merest trifling, and it is far more consistent with public interest and justice to hold that, so far as this act is concerned, these bonds were excepted from the operation of the Law Merchant. Upon the whole I am of opinion that all the six per cents which have not been re-

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moved as above \*set forth from the presumption created by the prima-facie proof are postponed to the sevens according to the provisions of the 6th Section of the act of 1869.

5. The question is here raised by one of the exceptions as to the relations to exist between the seven per cent bonds and those of the sixes which have not lost the benefit of the act of 1856 by acceptance of act '69. The sixes which are thus saved are only entitled to their relative share of all the sixes, and the postponement of their fellows cannot justly be made to give them any increased advantage. The sixes which are postponed in behalf of the sevens and the sevens will therefore take their place. Thus, if the sixes not postponed are equal to one fifth of all the sixes, then they will be entitled to one fifth of the fund for division until paid, and the sevens en bloc will take the four fifths till paid. It is adjudged therefore that in all cases where six per cent bonds are postponed the seven per cent bonds which are duly proved shall take their rank and place, and take a ratable share of the fund to be divided with the sixes which have been allowed.

6. All the seven per cent bonds which were issued under the mortgage to Williams, Aiken, and Robb have been duly proved by the executor of Cutting and by others, to the amount of \$499,500, one bond of \$500 short of the whole, and they, with the interest thereon, are entitled to take a ratable share of the proceeds of the sale with those six per cent bonds and coupons which have not accepted the act of 1869 to the extent of the amount set forth in the Statutory Lien of 1856; and if there be any surplus, then they would be entitled to claim that surplus to the extent of their debt.

7. The claim of Charles T. Mitchell and the several banks which advanced the money to construct the Bee's Ferry Extension and bridge. This claim has been established by the decree of Judge Pressley at \$42,941.14-100, with interest from Oct. 1st, 1877. The evidence submitted together, with the report of the master, satisfies the court that the

amount of the sale has been increased fully to that extent by this work.

The work was done by the consent of all parties except one, and as to that one he can-

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not claim a benefit from that to which \*he objected; and as to him the cost of the construction would have to be reserved from the sale, so that in any event substantial justice will be best reached by paying from the proceeds of the sale prior to all other payments the cost of construction to those who have furnished the means. And the court is bound by every principle of justice to protect its own officer who simply obeyed its mandate, and from whom he took the protection which he held under the lien created when it ordered the sale of the whole road. It is also proper that in the litigation which ensued the receiver should in like manner be allowed his fees of counsel and the cost to which he has been put.

It is therefore ordered that the sum above reported, to wit, \$42,941.14-100, with interest from Oct. 1st, 1877, be paid from the proceeds of sale to the South Carolina Loan and Trust Company, The First National Bank, and the People's National Bank, ratably and in proportion to the debts which they hold of the receiver under the lien, any surplus to be paid said receiver, C. T. Mitchell. As to the cost and expenses incurred by the receiver in defending this order of the court he ought to be fully protected, and these should therefore be paid together with the debt from the proceeds of the sale in preference to other claims.

It is therefore ordered that the master, Mr. Clancy, to whom this part of the case had been referred, do ascertain and report the cost and a reasonable fee for the receiver's counsel on this branch of the litigation, and that the same be paid with the debt from the proceeds of sale in like manner.

8. The referee has given preference to the coupons which he has allowed over the principal of the bonds, in accordance with a case from Blatchford's Reports which he cites. But the case of the Spartanburg and Union Railroad Company in 8 S. C., 129, has established a different rule, and there is no difference to be taken between the lien of the coupons and the bonds themselves. The exceptions taken to this part of the referee's report are therefore sustained and the report overruled.

9. Exceptions have been taken by McCrady and Son, which raised a question as to the

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rank of the bonds taken under the \*act of 1869, for the coupons on six per cent bonds which were funded under that act. These bonds expressly recognize the priority of the seven per cents held by Cutting and others and therefore must take rank after them.

But, in relation to the six per cent bonds, it seems to the court that they should be re-

instated to the rank which they would have held if these coupons had not been funded. When the court holds that the act of 1869 cannot be carried into effect as to these coupons, they should be restored to the holders, and these holders should be allowed to claim as for six per cent coupons under the Statutory Lien, which have been postponed to the sevens by their acquiescence in the act of 1869.

It is therefore ordered that these bonds be admitted to the same rank as the coupons on the sixes, which are to come in after the Cutting sevens.

10. The next subject to be considered is the claim of the state for taxes. It seems to the court that this point has already been decided. The original charter exempted the company from taxes. The act of 1869 made a new contract with the company, by which, in consideration of certain benefits granted by the state, the company agreed to waive its exemption.

The Supreme Court set aside the act which granted the consideration of the waiver, and the referee decided that the waiver fell with it, and held that the company was exempt from taxes. The Circuit Court sustained this report, and upon appeal the Supreme Court affirmed the decree of the Circuit Court. This seems to the court a complete adjudication of the question, and the exception taken to this portion of the report is overruled.

11. Mr. Pringle, by his former report of July 5, 1877, reported that the Hon. Thos. J. Robertson had proved 690 coupons, amounting to the sum of \$10,350. This report was confirmed, and Mr. Robertson had judgment for the same on Circuit and on Appeal.

In his recent report, the referee finds that Mr. Robertson funded other six per cent coupons under the act of 1869, and thereby accepted that act. This report was filed in No-

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vember, 1880. It does not appear that any exceptions were taken in this behalf, but afterwards, it does not appear when, Mrs. Robertson, the wife of Thos. J. Robertson, filed her petition, alleging that the coupons proved in the name of her husband were hers, and not her husband's.

On the 21st of February, 1881, an order of reference was taken to inquire into and report upon the facts stated in the petition, thus practically opening the judgment in favor of Thos. J. Robertson on these coupons. In signing the order I supposed there had been proper notice of the motion served, and that there was no objection.

Afterwards, Mr. Campbell excepted in open court that there had not been proper notice of the motion, and in fact he did not know when it was to be made, and also upon the merits, that the case stated was not sufficient to entitle the petitioner to the relief prayed for. The petition and notice appended are printed and both are without date. The attorneys for the petitioner say they "will move



thereon before the presiding judge at the next sitting of the court in this county," as soon as counsel can be heard for an order "of reference to Hon. W. A. Pringle, referee," to take testimony upon the matter set forth in the petition. No other notice appears to have been given of the motion. This notice is clearly too indefinite and insufficient.

The order is set aside for want of due notice, without reference to and without prejudice to the merits of the petitioner's case.

12. During the sitting of the court, sundry holders of six per cent bonds, namely, John M. Guerard, J. L. Lamar, and others, in behalf of themselves and all others claiming a like interest, brought their petition verified by their attorney, whereby they seek to have so much of Mr. Pringle's report of July, 1877, as relates to the coupons of the six per cent bonds of the Charleston and Savannah Railroad Co., guaranteed by the state, produced and proved before Judge Pringle in the names of James Adger & Co., Geo. N. Miller, and Alexander Isaacs, recommitted to the referee, and that he inquire and report whether the said coupons have, by reason of payment or

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from any other \*cause, lost the rank to which they would otherwise be entitled under the principles of his report, with leave to him to report any special matter. Everything stated as ground for asking this order appears in Mr. Pringle's report of July, 1877, and in the schedule appended thereto.

There is no alleged discovery of any fact which will not appear upon an examination of that report stimulated by ordinary care and vigilance. These coupons are especially brought to view in the body of his report, besides being set forth in detail in the schedule appended thereto.

Judge Pringle reports them as duly proved, and recommends their payment on the same footing as the bonds from which they were detached. No exceptions were taken to his findings and recommendations in this report, and they were confirmed by the Circuit Court. No appeal was taken as to these coupons, and the judgment of the Circuit Court was affirmed by the Supreme Court.

The purpose of this petition is to open this judgment of four years' standing, and upon the ground that it had been recently discovered that said coupons had been paid. It was not denied, but seemed to be admitted, that the bondholders who are now alleging a recent discovery did several years since receive payment for these coupons. There could not, therefore, be any recent discovery of that fact. The question which might have been made at the proper time was, whether the present holders of these coupons, having advanced their money and paid for them, were entitled as purchasers to stand in the place of the bondholders who got their money, and to claim re-payment of what they got for them. Fraud is not alleged. The opinion of the court is, that the petitioners, having neg-

lected to raise the question, are now too late. It is res adjudicata, and there is no sufficient reason for opening the judgment heretofore rendered, even if it were within the jurisdiction of this court to do so.

The motion is refused and the petition dismissed.

T. J. Mackey, Presiding Judge.

June 17th, 1881.

17 S. C. \*237

\*Supplemental Decree.

On delivering the original manuscript of my decree herein to my clerk, to be copied for signature, I inadvertently omitted the loose sheet, containing so much of my decision as relates to the claims due material men. I now transcribe the sheet thus omitted, and embody, in this form, my decision in reference to the said claims, directing that the clerk of the court shall securely attach it to the decree as filed, that it may be deemed and taken as a necessary part of the same.

The report of the referee upon the claims, "properly vouched and audited," due by the receiver to the material men, is hereby confirmed.

In deciding a similar claim, the Supreme Court of the United States said (*Myer v. Car Co.*, 102 U. S. 13 [26 L. Ed. 59]): "In other words, it is, in effect, admitted, that the use of the cars was worth, to the court, while operating the road under the trust created by the appointment of a receiver at the instance of these appellants, just what has been decreed. There can be no doubt that it is the duty of a court to pay, from the trust fund it has in its possession, all the debts it incurred in its judicial capacity while administering the trust assumed pending the litigation in behalf of the litigating parties. \* \* \* It is sufficient for our purpose, on this appeal, that an authorized officer of the court has, in a legitimate way, charged the fund in hand with the debt, the payment of which has been ordered."

Recognizing this decision of the highest judicial tribunal of the country as the settled law of the case, I hold, that these most meritorious claims must be paid; and that they are entitled to precedence over the bond debts, in the order of payment.

It is, accordingly, ordered, that the master, from any funds in his hands, shall pay the said claims of material men, with interest, to the solicitor of the petitioners.

The amounts due to employees, on the pay-rolls, have already been adjudged by me, and paid, and are, therefore, not embraced in this decretal order. The claim of Daniel Green was not argued before, and hence I have not decided it.

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\*The six per cent bond, No. 257, with coupons, from March 1, 1867, belonging to the estate of W. P. Ingraham, should rank with

the six per cent bonds which have not accepted the act of 1869. And it is now so ordered, to remedy the accidental omission.

T. J. Mackey, Presiding Judge.

June 24, 1881.

To this decree, numerous exceptions were filed, but the precise points raised are clearly stated in the opinion.

[For subsequent opinion, see 21 S. C. 162.]

The case was very fully and elaborately argued in this court by Messrs. Buist & Buist, Brawley & Barnwell, Thos. M. Hanckel, Lord & Inglesby, C. R. Miles, Mitchell & Smith, Hayne & Ficken, A. T. Smythe, John Wingate and James Conner, for holders of six per cent bonds and coupons; by Messrs. Youmans, attorney-general, and DeSaussure & Son, for the state and for the county treasurers; by Mr. J. B. Cambell, for the railroad company, and seven per cent bondholders; by Messrs. Memminger & Son, for Cuttings, executors and Mitchell; by Messrs. McCrady & Son, and A. G. Magrath, for seven per cent bondholders; by Mr. H. E. Young, for the receiver, claims against the receiver, and for Isaacs; by Mr. F. D. J. Lawrence, for Daniel Green.

August 9th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. The "Charleston and Savannah Railroad Company" was incorporated in 1853, to build a railroad from Charleston to Savannah.

In December, 1856, the Legislature of South Carolina passed an act, entitled "An act to aid in the construction of the Charleston and Savannah Railroad." (12 Stat. 543.) This act provided for the endorsement of the guarantee of the state upon the six per cent bonds of the said company to be issued, not to exceed \$5000 per mile; said bonds not to be used for any other purpose than "procuring the iron rails, chairs, spikes, and equipments, and for putting down the rails," etc., and then declared: "When the whole of

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said road shall be completed, \*the state of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, right of way, etc., \* \* \* and the whole superstructure and equipments, and all the property owned by the company, as incident to or necessary for its business, for the payment of all of said bonds endorsed as aforesaid, as provided in this act, and for the interest accruing on said bonds," etc. And the act further declared that "the said lien or mortgage of the state shall have priority over all other claims existing, or to exist, against said company," etc. Under the provisions of this act the six per cent bonds of the company, payable March 1, 1877, were endorsed by the state of South Carolina to the amount of \$505,000, and issued by the company.

On January 1, 1858, before the road was finished, the company needed more money, and conveyed to I. W. Hayne, Edward Sebring, and E. M. Beach, as trustees, all its then present and after to be acquired property, and all franchises, rights and privileges of the said company of, in, or concerning the same, in order to secure the payment of bonds to the amount of one hundred thousand dollars, a large part of which was issued. The road was completed and opened at the close of the year 1860.

The property was greatly damaged during the war. The referee reports that the company was reduced to insolvency; the road was broken up, the bridges destroyed, great part of the iron carried off, and the road as a whole no longer fit for use. Under these circumstances, the trustees under the deed of January, 1858, by virtue of the powers therein contained, proceeded to foreclose, and in December, 1866, the mortgaged premises were sold subject to the lien created by the act of 1856. At this sale the property was purchased by Geo. W. Williams and others associated with him, for the sum of \$30,000, and in December, 1866, another act was passed incorporating the purchasers as a new company under the name and style of the "Savannah and Charleston Railroad Company," and thereafter the company has been known throughout these long legal proceedings by that name. The court confirmed the sale, and the new company was duly organ-

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\*ized, took possession of the road, and endeavored to reconstruct the same.

They had no other means of repairing the road but by a loan; but that they were unable to effect as long as the lien created by the act of 1856 in favor of the state was the first lien, and, therefore, in 1869 they memorialized the Legislature upon the subject, and on March 2, 1869, an act was passed, entitled, "An act to enable the Savannah and Charleston Railroad Company to complete their road," by which the company was authorized to issue other bonds to the amount of \$500,000, bearing interest at seven per cent, the proceeds to be used in the extension, building, and outfit of the road. As they are frequently referred to in this opinion, the third, sixth, and seventh sections of this act are as follows:

Sec. 3. "That the said company is hereby authorized and required to fund and redeem the coupons for interest of the bonds of the Charleston and Savannah Railroad Company guaranteed by the state, now past due, and that may fall due on or before the first day of September, 1869, by issuing therefor an equal amount of their bonds with coupons attached for interest, payable semi-annually, at the rate of seven per cent per annum, and the principal to become due in twenty years after the date thereof. And the payment of the said bonds so to be issued in substitution for



interest coupons shall be guaranteed by the state in the same manner and as fully as the said original bonds of the Charleston and Savannah Railroad Company are now guaranteed: subject, however, to the provisions of section six of this act."

Sec. 6. "That the present lien of the state of South Carolina on said railroad shall, upon the issue of the bonds provided for in and by the first section of this act, be postponed and become a second lien, which said second lien shall extend over and cover the whole road, its outfit and real estate, as fully as is already provided for by law. The said road shall be completed by the first day of January, 1870."

Sec. 7. "This act shall not be of force until said Savannah and Charleston Railroad Company consent to the amendment of their charter, so that the property of said corpora-

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tion shall \*be subject to taxation, in conformity with Section 2 of Article XII of the constitution, and said consent be certified under the seal of said company to the comptroller-general and secretary of state. Upon the filing of said consent, the said charter shall be deemed and held to be modified in conformity with said section of the constitution: Provided, That no tax shall be assessed or levied upon said road until the same shall have been completed."

The company in form accepted this act, and in accordance with it issued bonds to the amount of \$500,000, bearing interest at seven per cent per annum, covered by a mortgage to Wm. Aiken, James Robb, and Geo. W. Williams, as trustees, which represented that the state having postponed the statutory lien, it was the first lien upon all of the property of the company. The bonds were negotiated with the contractors who rebuilt the road, and for other purposes connected with running the same.

In 1871 the stockholders of the company authorized another issue of bonds to the amount of \$300,000, at the rate of eight per cent per annum, which were covered by another mortgage of the property of the company, its rights, privileges and franchises, in this state and Georgia, executed to Andrew Simonds, H. H. DeLeon, and E. Bates, as trustees.

Much controversy has arisen under these acts and mortgages as to the rights of the different classes of creditors of the company, but it is believed that for the purpose of making intelligible the issues now involved it will not be necessary to do more than make the following brief statement:

On April 12, 1870, Daniel Hand filed his complaint of foreclosure against the Savannah and Charleston Railroad Company, D. H. Chamberlain, attorney-general of the state, and others, to enforce payment of the amount alleged to be due him on unfunded coupons issued under the act of 1856, to wit:

Principal, \$27,705, together with interest on the same. Soon after the attorney-general instituted proceedings to foreclose the statutory lien of the state, praying, among other things, that the creditors might be called in, for the appointment of a receiver, the sale of

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the property, etc. These cases, \*considered together, were argued twice before the Circuit Court, and, on appeal to this court, were dismissed, without prejudice, and the cause sent back, that the Circuit Court might decide the character of the relief to which the parties were entitled. 5 S. C. 183.

On April 28, 1874, after the case went back to the Circuit, Judge Graham, seemingly by the consent of all parties, made a decree appointing Charles T. Mitchell, Esq., receiver of the road, who, in connection with an advisory board, was to work and manage the said railroad "with the greatest possible skill and economy, and the results be reported quarterly to the court in this cause, and the net profits, after paying all necessary expenses, including such amounts, if any, as may be due the employees and officers for services, shall be applied quarterly to the payments of the debts." The order in which the debts were to be paid by the receiver was declared in the decree, and all suits against the company were enjoined, etc. Soon after, Judge Reed enlarged the powers of the receiver so as to allow him to sell the road for the sum of \$1,500,000, which, as stated, had been or would be offered for the same. About this time Solomon L. Hoge instituted proceedings to take possession of the road as comptroller-general, under the fifth section of the act of 1869, but this effort seems to have failed, and needs no further notice here. See *Ex parte Dunn*, in re *Hand v. Savannah and Charleston Railroad Company*, 8 S. C. 208.

In 1875, William Cutting and Heyward Cutting, executors of Francis H. Cutting, deceased, who held a large number of the seven per cent bonds issued under the act of 1869, made themselves parties in the cases, stating, among other things, that the income of the road under the management of the receiver and advisory board had proved insufficient to pay any of the debts set forth in the decree making the appointment, and praying a sale of the road, and that the bonds of 1869, and the state indorsed bonds of 1856, should be placed upon the same footing and the guarantee of the state entirely discharged, and accordingly on May 1, 1875, a consent decree was entered ordering the sale of the road on a credit, and

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discharging the \*state from liability on its indorsement; yet it seems for some reason or other the sale and further proceedings under the decree were suspended by an order of Chief Justice Moses in the case of *Ex parte Dunn* above stated.

On April 19, 1877, Judge Reed made an order appointing William Alston Pringle, Esq.,

special referee, to report the rank of the different claims and in the order in which they should be paid upon the foreclosure and sale of the property, and on July 5, 1877, the said referee made a full and exhaustive report, both on the main question as to the priorities of the bondholders and all the collateral questions arising in the case. He held that the lien of 1856 attached to the bonds issued under it and retained its priority, and that the state could not postpone that lien to the bonds and mortgage of 1869.

He further held that the holders of the coupons belonging to the bonds issued under the act of 1856, who received in exchange for their coupons the bonds issued under the third section of the act of 1869, thereby accepted the provisions of the act of 1869 and consented to the postponement of the lien of the act of 1856, so far as the coupons funded were concerned. "The bonds, therefore, issued under the third section of the act of 1869 have no lien on the property of the company, and will take rank after other obligations of the company which have a lien on its property," etc.

The referee, therefore, after providing for certain liens on particular property, reported the priorities of the bonds to be as follows: First. The bonds and coupons still unfunded issued under the act of 1856 to be the first lien upon all the property of the company. Second. The bonds and coupons issued under the mortgage of 1869 to be a second lien upon all the property of the company. Third. The bonds and coupons issued under the mortgage of 1871 to be the first lien on all the corporate franchises of the company and the third lien upon all its property. Fourth. The judgment held by W. C. Bee, assignee, being the next lien after the foregoing on all the property of the company. Fifth. The seven per cent interest funded bonds having no lien on the property of the company, etc.

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\*To this report exceptions were filed, and the case came on to be heard before Judge Wallace, who, in so far as it related to the priorities of the different classes of bonds, confirmed the report, and ordered it to stand as the judgment of the court, and ordered the property sold by one of the Masters of the court. Exceptions were filed, and upon appeal to this court the case was heard here at the April Term, 1870. See 12 S. C. 314. In regard to the main question as to the right of the state to postpone the lien of the bonds issued under the act of 1856 to those issued under the act of 1869, this court concurred with the judgment of the Circuit Court. It also concurred with the referee and Circuit judge that the holders of the coupons belonging to bonds issued under the act of 1856, who received in exchange for the coupons the bonds issued under the third section of the act of 1869, accepted the provi-

sions of the act of 1869, and consented, so far as the coupons were concerned, to the postponement of the lien of the act of 1856. But this court went further and held as follows:

"The referee, and the court sustaining his conclusions, held that the effect of the act of 1869 on those funding coupons thereunder was confined to the coupons so funded, and did not preclude parties having funded coupons from afterwards asserting their original rights as it regards the bond and other coupons not funded. The correctness of this conclusion will next be considered. The exact question is whether one having a bond of the class of 1856, and also coupons of the same class, whether detached or otherwise, and funding such of said coupons as were matured, under the third section of the act of 1869, can be regarded as having accepted the provisions of that act as well as it regards such bonds and immature coupons as the coupons that are matured and actually funded. The bonds and their coupons constitute a single obligation. *State v. Railroad Company*, 8 S. C. 153. The coupon merely evidences the obligation collaterally, as it regards one of its incidents. The act of 1869 operates upon the entire obligation, both principal and interest. One who accepts its provisions for one purpose, necessarily ac-

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cepts it for all purposes, for its provisions are not capable of severance. When one claiming upon an obligation for principal and interest accepts interest upon a composition in terms assuming to affect the conditions upon which the same is due, he must be regarded as accepting the terms of composition in their whole scope. This conclusion is so obvious that it does not require authority or illustration. It depends upon the principle that when the contract is one and indivisible, if it takes effect at all it must do so as to all its parts. This does not preclude the possibility of severing the terms and conditions of a contract, but that depends upon mutuality of consent, while in the present case there is no evidence that the state has assented that the act of 1869 may take effect otherwise than according to its entire scope and purpose. It would follow that one funding coupons under that act must be regarded as bound by its terms, as it regards any bonds or coupons held by him at the time of funding of the same class, at least, with the coupons funded. The case before us does not enable us to apply this principle to the facts of the case; we can, therefore, only set aside the conclusion of the Circuit Court to the extent that it conflicts with the conclusions just stated, and the exact application of the principles laid down must be made upon a further hearing in which such evidence may be introduced on that point as the nature of the case demands." 12 S. C. 350.

Accordingly the case went back, and Judge Aldrich made another order for the sale of



the property, which was affirmed on appeal. See 13 S. C. 467. The sale was made by Mr. Porter, one of the masters, for the sum of \$300,200, less than either class of the bondholders seeking payment, and was confirmed by the court, and title made to the purchasers.

The order of Judge Aldrich also directed Mr. Pringle, the referee, to inquire and report as follows: 1. "What claims and demands against the Savannah and Charleston Railroad Company are undisputed and entitled to immediate payment. 2. What bonds and coupons of said company issued under the act of 1856 are entitled to priority of payment out of the property of said company, under the principles settled by the

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\*judgment of the Supreme Court. 3. The amount of bonds issued under the act of March, 1869. 4. The amount of bonds and coupons issued under the Act of 1856, and entitled to priority of payment. 5. The bonds and coupons issued under act of 1869, indorsed by the guarantee of the state. 6. What coupons of bonds, issued under the act of 1856, have been funded under the third section of the act of 1869, the number and value of said coupons, by whom, when, and under what circumstances funded, etc."

The referee took testimony and made another report upon the point recommitment to him. He construed the opinion of the Supreme Court to mean that only the bondholders, personally, who funded coupons from bonds of 1856 must be regarded as bound by the terms of the act of 1869, so far as regards bonds and coupons held by them at the time of funding, and that those who presented six per cent. bonds, and were not found to have funded coupons, could not be presumed to have accepted the act of 1869. Considering the evidence offered with reference to this principle, he found that certain persons presenting bonds of 1856 were estopped, for the reason that it appeared from the books of the company that coupons had been funded in their names. From the identity of the names he felt authorized, nothing appearing to the contrary, to conclude that the same parties presenting the bonds had owned them at the time of funding the coupons. He furnished a list of the bondholders falling under this category, showing their names, and their bonds amounting in the aggregate to \$65,500. But as to all the other bonds and unfunded coupons issued under the act of 1856, he held that the proof necessary to bring them under the principle of estoppel had not been furnished, and that they are entitled to retain their prior statutory lien, notwithstanding the act of 1869.

To this report exceptions were filed, and the case came on to be heard by Judge Mackey, who, upon the main point as to the sufficiency of proof to estop the holders of the six per cent. bonds, reversed the report of the referee, and after excepting the coupons

of Daniel Hand as res adjudicata, and the bonds held by Beaty, as executor of Mrs.

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Nancy \*Blair, and those proved by Bradley Martin, decreed as follows: [The opinion here quotes nearly all of the sections numbered 4 and 5 of the Circuit Decree on pages 230-232 ante.]

Exceptions by the various parties and in different forms have been filed to this decree, and the question is, whether it is erroneous, and if so, wherein?

We cannot follow the exceptions seriatim, but will endeavor to consider all the points as they arise.

Most of the complications of the case originate in the fact that while the act of 1869 was unconstitutional and void so far as it undertook to postpone the lien of 1856, yet it has been held to be valid in part; that is to say, bad in the general, but binding as to certain persons and for particular purposes. The rights of the parties might have been easily determined if the act of 1869 had been legal and binding in all its parts, or if, on the other hand, it could be considered as wholly void and expunged from the statute book. But when the provision aforesaid, void in the general, has been held to take effect as to certain persons, not from its intrinsic authority as an act of the legislature, but from the conduct of the parties in accepting the benefit of some of its provisions, there necessarily springs up a new class of questions such as these, viz., who have done these alleged acts of acceptance and as to the proper effect and extent of such acts as to other persons and claims not involved in the acts themselves? In this state of the case the difficult duty is devolved upon the court of determining these vexed questions without the least assistance from, but really in seeming conflict with some of the express provisions of the act of the legislature in connection with which they arise.

The most important question in the case is that as to the priorities of the bondholders under the acts of 1856 and 1869. This court in its former judgment determined the rights of the parties. It decided that the state could not postpone the lien of the act of 1856, and that the act of 1869, purporting to do so, was unconstitutional and void; but it held at the same time that to this general conclusion there was an exception so far as concerned those who had funded coupons taken

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from bonds \*issued under the act of 1856 then owned by them, and taken in exchange bonds issued under the act of 1869. As to these it was held that they had accepted the act of 1869 quoad these coupons so funded; and further, that on the principle of estoppel "one funding coupons under that act must be regarded as bound by its terms as it regards any bonds or coupons of the same class held by him at the time of funding." In order that the principle here laid down might

be intelligibly applied, it was necessary to send the case back; and it was remanded in order to have it ascertained whether any of those who funded coupons held other bonds or coupons of the same class "at the time of funding," and if so, what bonds or coupons were so held, and by whom. As we understand it, this was simply a question of fact, and being a question of evidence must be determined precisely as other questions of that kind are determined; and it will probably assist us in reaching a satisfactory conclusion to keep constantly in view the simple character of the issue.

The doctrine declared by this court as to the effect of funding coupons, upon the holders of six per cent. bonds, does not proceed upon any supposed relation between the coupons funded and the bonds from which they were taken, but is of that class of estoppel which arises from the "conduct of parties." As it springs only from the act of the party it is purely personal, and in its effect cannot reach beyond the bonds or coupons actually held at the time by the party funding. It is true the estoppel springs from the funding of the coupon; that is to say, not from the coupon itself, but from the act of funding it; upon the principle that an admission of one as to a part of his property, may be held to affect all his other property of the same character. We think it is a misapprehension to suppose that the estoppel either arises from or rests upon a principle in the nature of a proceeding in rem, inhering in the coupon and thereby affecting the bond from which it was cut without regard to who was at the time the owner of the bond. The ownership at the time of funding is the indispensable prerequisite to the existence of the liability, and the fact that the coupon and bond were

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originally parts of the same paper can \*have no effect whatever upon the question of estoppel, except in so far as it may be considered as a circumstance of proof upon the question of ownership at the time of funding, in which view it will be considered hereafter.

Was the proof sufficient to show that any of those now presenting bonds or coupons of 1856 had funded coupons of that class in bonds of 1869, being at the time of funding the holders of the bonds now presented, and, if so, as to what bondholders and as to what bonds or coupons was such proof made?

In this issue the onus was on those who alleged the existence of facts necessary to create the estoppel. The court had settled the law that the lien under the act of 1856 was not postponed, but that practically there might be an exception to be determined by the existence or non-existence of certain facts. When a party proved that he held bonds of the issue of 1856, he was entitled to priority, unless it could be made to appear that he fell within the exception, and it was incumbent on those who affirmed that he

did to prove the fact. This is elementary. "A third rule which governs in the production of evidence is that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue. This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. It is therefore generally deemed sufficient, when the allegation is affirmative, to oppose it with a bare denial till it is established by evidence. Such is the rule of the Roman law. 'Ei incumbit probatio qui dicit, non qui negat.'" 1 Greenl. Evid. § 74.

Accordingly the six per cents, with the exception of three or four individuals, offered no proof, but stood upon the former judgment of this court that the act of 1869 did not postpone them. The seven per cents undertook to make out against them the case of estoppel authorized by the judgment, and for that purpose introduced testimony, including the books of the company, to show who had funded coupons in 1869. The books were objected to as incompetent against the sixes. The entries were made in

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the handwriting of S. W. Fisher, treasurer of the company at the date of the entries, who is now dead. The referee admitted the books "as coming within the rule laid down by Mr. Wharton (On Evidence, § 238), as memoranda or book entries of an officer, agent, or business man when in the discharge of his duties, after his decease." We cannot turn aside now to go fully into the matter, but only say that under the circumstances of the case we think the referee did right in admitting the evidence, on the ground that it was the best proof the nature of the subject admitted of, and from the necessity of the case.

As to the sufficiency of the proof made, the referee and the Circuit judge took very different views, arising principally from the force of presumptions accorded by the judge to the simple possession of the coupons funded. We think it appears that the company is in possession of coupons from all the six per cent bonds, except perhaps twelve held by Mrs. Blair's estate. It was claimed on one side, and as strongly denied on the other, that all these coupons had been funded and none were taken up by payment. The evidence on the subject was somewhat confused. Mr. Fisher, who superintended the funding and made the entries, is dead, and the other witnesses for the most part could speak only from the books. It was much easier to issue other bonds than to pay the cash, and it is reasonably certain that a large majority of coupons now in possession of the company were funded—certainly to the amount in the aggregate of \$172,800, but it is not quite clear that the company funded coupons from all



the bonds, and to the extent of that uncertainty it would be difficult to say when any particular bond was presented, whether it was one of those from which funded coupons had been taken. But this is not very important. If we assume that the company has funded coupons of all the bonds, with exceptions as stated, how does the matter stand?

I. We have the names of those who now present six per cents, and the books give us the names of those who funded coupons from sixes, and we find that in a large majority of cases the bonds are now presented by persons whose names do not appear in the fund-

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ing. As a rule those who funded and \*those who now present bonds are different persons. There are, however, some cases in which the bonds are now presented in the name or at least in the right of those who appear to have funded coupons. As to this class the referee, as we understand him, having received no explanation from the parties after opportunity given to them, held it sufficiently proved that those now presenting bonds were the holders thereof at the time they funded the coupons, and in consequence that as to these bonds they are estopped by the act of 1869.

In opposition to this view it is urged that none of these bonds are certainly shown to be the identical bonds from which their coupons were funded, and that after such a lapse of time it may be that the bonds now presented were purchased after the coupons were funded. This may be possible, but considering how easy it would have been for the parties to make such explanation if they could have done so, we concur with the referee in his conclusion, that as to this class of bondholders it was proved that they were the holders of these bonds "at the time of funding." The principal witness being dead, it was from the nature of the subject difficult to make proof of the fact of ownership at the time of funding, and as a circumstance, the coincidence of the names of those who funded and those who present the bonds is so strong that unexplained it affords reasonable proof of the ownership of the bonds at the time of funding, although that occurred as long ago as the year 1869. The referee gives a list of those whom he places in this class, with some explanation, in his second report, which upon this point is affirmed and made the judgment of the court.

II. As to all the remaining bonds and unfunded coupons issued under the act of 1856, which are now presented by parties other than those who had to do with funding coupons, the question is more difficult. As to these the referee held that "the non-appearance of the name of the present holder in the books of the company is presumptive, if not conclusive, that the present holder of the bond was not the holder at the time of the

funding, or that the coupons were sold and not personally funded by him. The bonds

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being negotiable secu\*rities are not affected by any transactions of which the present holder has had no notice, and the present possession of such a bond is at least prima-facie evidence that such possession is bona fide, and without notice of any equities affecting it," whilst the Circuit judge took a different view, and held, as previously stated, that all the sixes, no matter by whom proved, are estopped by force of the presumption that the possession of the coupon is prima-facie evidence that the holders owned the bond from which it was taken at the time of funding.

It thus appears that the whole question is made to depend on a presumption which is claimed to arise out of what is called the "juridical relation" of a coupon to the bond from which it was originally taken. It is certainly true that the parties who funded coupons had possession of them at that time, and it is claimed that possession of the coupon is prima-facie evidence that the holder was at the time the owner of the bond from which it was taken. As we understand it, this is only another mode of expressing the proposition that the original unity of the bond and its coupons creates a presumption that such relation continues until the contrary is shown. If we are correct in this, the presumption claimed is clearly not one of those presumptions of law which are conclusive, but of fact, "which are, in truth, but mere arguments, of which the major premise is not a rule of law, and ought to be judged by the common and usual tests of the truth of propositions, and the validity of arguments." Greenl. Evid., § 44. Thus considered by the usual tests of truth, can it be said that the possessor of a coupon is, as a matter of fact, so certainly and universally the owner of the bond from which it was taken that it may be affirmed, as a rule of evidence, that the possession of one at any particular time subsequent to its issue proves the ownership of the other at that time?

It is true that the bond and its coupons were originally parts of the same paper; but, in regard to the idea of "continuity," it should be borne in mind that from the first the bond and coupons were not intended to remain, and that there is nothing in the character of their connection which requires that they should remain one and indivisible.

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On the contrary, the \*coupon, as its name indicates, was made for the purpose of being cut off, and it is well settled in law that such separation makes the bond and coupons distinct evidences of debt; and it is as well settled in fact that from the convenience or necessities of parties it is matter of everyday practice to separate them. As, for example, the action in this case was founded

exclusively on coupons held by Daniel Hand, who, as far as it appears, never owned a bond of the company, but received his coupons in the course of business, without the least reference to the bonds from which they had been cut. In the case of *Hartman v. Greenhow*, 12 Otto, 684 [26 L. Ed. 271], the United States Supreme Court say: "The coupons, when severed from the bonds, are negotiable, and pass by mere delivery. They then cease to be incidents of the bond, and become in fact independent claims. They do not lose their validity if, for any cause, the bonds are cancelled or paid before maturity. \* \* \* Here, also, the coupons held by the petitioner are distinct contracts, imposing separate obligations on the state. He was not the owner of the bonds to which they were originally attached. In his hands they were as free from all liability on the bonds as though they had never been connected with them." In *Ketchum v. Duncan*, 96 U. S. 659 [24 L. Ed. 868], Mr. Justice Strong says: "Interest coupons are instruments of peculiar character. Title to them passes from hand to hand by mere delivery. A transfer of possession is presumably a transfer of title."

We cannot, therefore, certainly say that any particular bond now presented is the identical bond from which coupons were funded; or, if so, that such funding was done while the person now presenting the bond was the holder of said bond. We cannot regard the mere possession of the coupon funded as affording satisfactory proof of the ownership of the bond at that time. This would be giving to the original unity of the bonds and coupons a continuing force and effect inconsistent, it seems to us, with the usual course of business as to such papers, and most probably, at least in some instances, at variance with the truth. The evidence does not come near enough or show the necessary fact with sufficient certainty and distinctness. Proof of facts which are

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to create an estoppel should be full and clear. "Certainty is essential in all estoppels. The courts will not easily suffer a man to be deprived of his property or security when he had no intention to part with it." Big. on Est. 441.

"When the burden of proof lies upon the plaintiff there must be something more than probability or even strong probability. \* \* \* It seems to me that it would be very unsafe to say that because there is a strong probability of the existence of a state of things from which a prior authority, or subsequent ratification, might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof." *Fitzgerald v. Dressler*, 97 Eng. Com. L. Rep., 395. The case of *McCoy v. Washington County*, 3 Wall., Jun., 381 [Fed. Cas. No. 8,731] and *Moran v. County Com'rs*, 6 Ohio St. 287, cited

and relied on as announcing a different doctrine, are not analogous to this case. If these cases are examined carefully, not with reference to the doctrine and dicta of the opinions, but to the essential facts and the points decided, it will be found that neither of them holds anything inconsistent with the views here presented.

The inherent insufficiency of the proof to estop the bondholders of the class now under consideration will be more manifest when reference is made to the nature and character of the bonds as negotiable instruments. These bonds, although issued as long ago as 1856, were not due and payable until March, 1877. They were not dishonored, and passed from hand to hand by mere delivery. Whatever presumption as to the ownership of the bond at the time of funding may have arisen from the possession of the coupon at that time, is, at least, counterbalanced by that other presumption which arises from the possession of the bond itself.

"Bonds with coupons payable to bearer are negotiable securities and pass by delivery, and, in fact, have all the incidents of commercial paper. It is not necessary that the holder of coupons in order to recover on them should own the bonds from which they are detached. The coupons are drawn so that they may be separated from the bonds, and, like the bonds, are negotiable, and the owner of them can sue without the possession of the bonds to which they were origin-

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ally attached, or without being interested in them." *Thomson v. Lee County*, 3 Wall., 331 [18 L. Ed. 177], and the authorities there cited; *Langston v. S. C. R. R. Co.*, 2 S. C. 248.

But it is said that the present holders acquired their bonds after the act of 1869, and with knowledge that some of the coupons originally attached had been cut off, which itself was information that they had been funded by the owner under the act of 1869, of which they are bound to take notice; therefore, the present holders are in no better condition than those who, it is alleged, funded coupons from them while they were the holders. It will be observed that this doctrine of notice is based entirely on the assumption not only that the missing coupons were necessarily funded, but that it was done by the persons then owning the bonds, which we have endeavored to show could not be taken as universally true. Can a party be fairly fixed with notice of a fact proved only by a presumption which itself is at least uncertain?

It does not appear at what time the holders of these bonds acquired title to them, which might have been during the period from 1856 to 1869; but if we assume that it was after the act of 1869, and that that was a public act, of which every citizen was chargeable with notice, yet that act of it-



self cannot justly be considered as giving notice of anything outside of its terms. It did give notice that the company was required to fund the past-due coupons of 1856, but it gave to the public no information as to what coupons had been funded, nor by whom, nor whether those funding owned the bonds "at the time of funding." Whilst notice of the act as it was written was possibly notice of all the consequences which it involved, whether then known or unknown, yet, in considering a question which touches the "bona fides," we cannot shut our eyes to the fact that the act did not on its face declare what was subsequently developed by the courts, that the postponing provision was void, but contained in itself a latent power of restoration, as to the persons who should, even in ignorance of the true condition of things, accept some of its provisions.

For well-known reasons the doctrine of constructive notice, including the duty of inquiry, is not applied with strictness to

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\*negotiable paper, which by the Law Merchant passes by mere delivery "Possession, even without explanation, is prima-facie evidence that the holder is the proper owner or lawful possessor of the instrument, and the settled rule is that nothing short of fraud, not even gross negligence, is sufficient to overcome the presumption and invalidate the title of the holder, as inferred from his actual custody of the instrument." *Commissioners of Marion County v. Clark*, 94 U. S. 278 [24 L. Ed. 59]. "The purchaser of negotiable securities before their maturity, whatever may have been their original infirmity, can, unless he is personally chargeable with fraud in procuring them, recover against the maker the full amount of them, though he may have paid therefor less than their true value." *Cromwell v. County of Sac*, 96 U. S. 51 [24 L. Ed. 681]; *Witte v. Williams*, 8 S. C. 290 [28 Am. Rep. 294]; *McKnight v. Gordon*, 13 Rich. E. 244 [94 Am. Dec. 164]. In our own well-considered "Bond Debt Cases," 12 S. C. 272, Judge Melver, as the organ of the court, after reviewing the authorities, announces the law in these terms: "The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it under-due for a valuable consideration, and without notice of any objection to which it was liable."

The referee's report as to the class of bondholders under the act of 1856, now under consideration, is also affirmed.

In the general view taken by the Circuit judge, it was not necessary to consider special cases, and, therefore, they are not regularly before this court. The claims of Lord, as executor of Mrs. Roper, Tiedeman, and Quinby, should be recommitted to the referee to inquire and report in what class they should be placed respectively according to the principles herein indicated.

III. It is insisted that the coupons of the six per cent bonds which matured prior to September, 1869, are entitled to payment in full before distribution of the proceeds of sale among the bondholders, for the reason that all the coupons of the same class were settled, and the priority thus claimed is necessary to establish that equality which is demanded by the principles of equity. In support of this doctrine is cited the case of *Stevens v. N. J. and Oswego Midland R. R. Co.*, 13 Blatch., 412 [Fed. Cas. No. 13,406].

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\*The referee adopted this view, but the Circuit judge denied the claim, and upon this point we agree with the judge. The holders of these coupons, if they had so desired, could at any time after 1869 have funded their coupons in bonds under that act, and thus placed themselves upon an equal footing with others holding coupons of the same class. They did not do so, and as to the fund now in the hands of the court arising from the sale of the property, being in the nature of equitable assets, they are only entitled to their pro rata with the other bonds and coupons of 1856, which are not affected by estoppel. *The State v. S. and U. R. R. Co.*, 8 S. C. 129, and the authorities there cited.

IV. It is further claimed that inasmuch as some of the sixes have by their conduct accepted the act of 1869, and as a consequence taken their place in the postponed class, a corresponding number of the sevens should be advanced and allowed to take their places thus vacated in the first class; that the waiver of the lien enures to the benefit of those in whose favor it was made; that it must be held to operate as an assignment of the interest under the first lien, and that to the extent of the estoppel the parties simply change places. We do not see that the unaffected sixes would have any equity to object to such a result. They took their security knowing that it covered the whole class; so far as they are concerned it was a mere accident that some of their associates obeyed the law as it was written, and did that which postponed them. Those who did nothing have no equity to have their security increased in value, as each associate, who might have stood still, as they did, fell by his own act into another and a lower class. They have no right to complain when they get all the rights originally secured to them. If the act of 1869 were legal as a whole, or if it had been accepted by all the sixes, it is clear that by the terms of the act they (the sixes) would have been postponed, and we suppose the sevens would have become thereby "the first lien."

But in case of an acceptance only in part, can we declare the same result pro tanto as to the claims of those who are held to have accepted the act of 1869? We regret to say

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that we \*think that is beyond the power of

the court. The act proceeded on the assumption that it was to take effect as a whole, and of course it made no provision for the case which has arisen. It has been declared void, and is only revived quoad those who have accepted it, and there is still a class of sixes who stand out and insist upon their rights as having "the first lien." We see no authority which would authorize the court to declare any part of the sevens entitled to take the place of the postponed sixes, and share in that first lien. Estoppel is not declared by the act, but is the result of judicial interpretation. We cannot amend the law so as to meet an emergency which was not foreseen or provided for by those who framed it. We can do no more than simply declare the result of the estoppel as to the sixes, who have, by their own act, satisfactorily proved, lost their priority, leaving the sixes who are not estopped entitled exclusively to the first lien, as given to them by the act of 1856. This was in effect held by the former judgment.

V. It is still further contended that the interest funding bonds of 1869, which were taken in exchange for funded coupons of 1856, are entitled to rank as high as the coupons for which they were taken; that the state proposed to put these bonds exactly upon the same footing as the bonds from which they were detached, and that proposition as a whole having failed because of the unconstitutionality of the act, the holders of these bonds should not be bound by any of the provisions of the act, but be remitted to their former condition. If we could administer abstract justice, there might be force in this view. It is undoubtedly true that coupons are of the same grade as the bonds from which they are taken, and it is also true that nothing is payment but that which produces payment, or is received as payment. "To give one security for another of equal dignity, without the intention of discharging the debt, is not payment, but substitution." *Gibbes v. G. and C. R. R. Company*, 13 S. C. 228. The difficulty here, however, is that the parties funding took the bonds as payment under the act of 1869, and gave up their coupons; and there is also a further diffi-

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culty that the act of 1869, which they \*accepted by receiving bonds under it, provided no security whatever for this class of bonds, except the guarantee of the state. This question was also adjudged by the former decision in this case, which declares as follows:

"There was no error in ruling that the bonds issued under the act of 1869, for the redemption of coupons of 1856, were not entitled to any lien on the property of the company. It has already been held that the act of 1869 was, in effect, an assertion on the part of the state of exclusive control over the lien or mortgage created by the act of 1856, and that the holders of bonds and coupons who accepted the benefit of the act of

1869, assented to and are bound by this view of the act of 1856. It would follow that they can claim nothing but what the act of 1869 recognizes by way of security. In that act the state waives its lien under the act of 1856 in behalf of the holders of bonds issued under the first section of that act, which does not cover the redemption bonds. Consequently the position of the redemption bonds is this: The property of the company is liable, as far as the bonded debt is concerned, in the first instance, for the payment of the bonds and coupons of 1856, where the rights of the holders have not become subsequently impaired; secondly, to the bonds issued under the first section of the act of 1869; thirdly, to indemnify the state upon its guarantee on the bonds and coupons of 1856, and on those issued under the act of 1869, which have upon them the indorsement of the guarantee of the state. This would leave the state bound as surety on the redemption bonds, and holding a third lien wholly subject to its control for its protection from liability thereunder."

To pay the liens in the order here indicated the sale of the road was ordered, and the judgment further declared "that as to all that part of the permanent property mortgaged that lies within the state of Georgia, such sale must be made subject to such liens as have been or may hereafter be established under the laws of that state." That is to say, subject to such liens by mortgage, execution, or otherwise, as by the laws of that state exist upon the permanent property of the company within the borders of that state.

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\*The next question is as to the coupons of Alexander Isaacs, G. N. Miller and James Adger & Co. On February 19, 1877, an order was made referring the issues to Wm. Alston Pringle, Esq., as referee, to take testimony, "ascertain and settle the rank and priorities of the claims proved by the parties to the suit, and all others whose debts are secured by mortgage or other liens upon the property and franchises of the company, and to report the order and rank in which the respective claims or classes of claims proved before him were to be paid upon the foreclosure and sale of the property."

The referee took the testimony, and on July 5, 1877, reported that the bonds and coupons of 1856 proved before him were stated in "Schedule A" as part of his report, which embraced detached coupons of the years 1870, 1871 and 1872, proved by James Adger & Co. to the amount of \$14,580; by Alexander Isaacs to the amount of \$14,730; and George N. Miller to the amount of \$14,730. These items in the report were not excepted to. The Circuit Court confirmed the report April, 1878, and upon appeal to this court April, 1879, the Circuit decree was affirmed, except as to the extent of the estoppel resulting from funding coupons, as to which the court set aside the conclusions of the Circuit judge, to the extent that it con-



licts with the conclusion just stated—"subject to the modifications hereinbefore indicated, the decree of the Circuit Court should be affirmed."

The case as directed went back to the Circuit. A second reference was ordered January, 1880, "to inquire and report what bonds and coupons of said company issued under the act of 1856, are entitled to priority of payment under the principles settled by the judgment of 1879, the amount of bonds and coupons issued under the act of 1856, not entitled to priority; what coupons under the act of 1856 have been funded; the number and value of said coupons, by whom and under what circumstances they were funded," etc.

While holding the reference under this order, it is alleged that facts were "satisfactorily ascertained" by some of the counsel, before overlooked, which led them to make a motion on March 30, 1881: "That so much of

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the report of the Hon. \*Wm. A. Pringle, referee, of July, 1877, as relates to the coupons of the six per cent. bonds of the Charleston and Savannah Railroad Company guaranteed by the state, produced before him in the names of Alexander Isaacs, George N. Miller and James Adger & Co., be recommitted to the referee, and that he inquire and report whether the said coupons have, by reason of payment or from any other cause, lost the rank to which they would otherwise be entitled under the principles of his report, with leave to report any special matter."

Upon the hearing of this motion, affidavits were submitted stating in general the facts to be as follows: The company was required by the act of 1869 to pay in cash the interest due on the bonds of 1856 from and after 1870, and in default of payment the comptroller-general was authorized to take possession of the road. When the coupons of 1870, 1871, and 1872 fell due, the company was unable to pay them, and the President, Isaacs, and other friends of the road, agreed to advance the money necessary for that purpose upon condition that they should be allowed to hold the coupons so taken up as security for such advance. The company advertised as if they were about to pay, giving notice that the coupons would be paid on presentation at the First National Bank of Charleston. The parties holding coupons presented them and received the money which they called for, and the coupons were entered as if paid by the company; but, in fact, the money used belonged to the parties who advanced it.

The coupons thus apparently paid by the company, but in fact with money furnished by the parties, were delivered uncanceled to the parties, respectively, who advanced the money. When in this suit the creditors of the company were called in, the holders of the coupons thus acquired presented and proved them regular before the referee, who,

as stated, reported as far back as 1877 that they were proved. There was no exception to this part of his report, which was confirmed by the Circuit and Supreme Courts.

Under these circumstances, the Circuit judge held that "the question which might have been made at the proper time, was whether the present holders of the coupons,

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having advanced \*their money and paid for them, were entitled as purchasers to stand in the place of the bondholders who got their money? Fraud is not alleged. The opinion of the court is, that the petitioners having neglected to raise the question at the proper time are now too late. It is *res adjudicata*, and there is no sufficient reason for opening the judgment heretofore rendered, even if it were within the jurisdiction of the court. The motion is refused."

Was this ruling error? It is claimed that the matter now proposed to be referred to the referee was never in issue before him, and therefore could not have been decided by him in 1877, when he reported that these coupons were regularly proved and set down as existing demands against the company. It seems that at the time the coupons were proved no special attention was called to the circumstances under which possession of them had been acquired or the question as to their rights in terms made before the referee, but that the parties presented the coupons and proved them in the usual way without objection. The other creditors were all parties and did not suggest that these coupons had in effect been paid by the company. It may be that this omission was caused by the unusual mass of testimony and the complicated nature of the questions involved; yet it is undoubtedly the duty of a party to prove his case at the proper time or take the consequences. All matters which were then before the referee, or should have been before, or were necessarily involved in what was before him, were then in issue, and must be regarded as having been considered and decided by him.

The court cannot decide matters by halves. "If a defendant has been before a competent tribunal, which has proceeded to judgment, that decision, until reversed, is conclusive upon him in every tribunal having concurrent or other jurisdiction. It is conclusive upon him as to every matter of defence, not only presented but which could have been presented by him, and it is conclusive upon him, although the judgment be erroneous, if he acquiesce in it and does not proceed to reverse it. It is conclusive on him because a party whenever he is brought into a court is

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bound to full diligence, which, if he \*uses, he will obtain his right—if he neglects either in putting in proper pleas, or introducing all his evidence to support them, he has no one to blame but himself; nor will his neglect in one court be allowed to give him a right

to a second trial either in that court or another." *Maxwell v. Connor*, 1 Hill Eq. 22. The question of the ownership of the bonds and the right of the claimants to present them as still unpaid by the company, was necessarily involved in the proof of the coupons, which the referee reported had been made, and the judgment must be held to have embraced the very matter now proposed to be considered.

It is said, however, that even if this be so, the judgment was not final, as the cause is still in court. It is true that there has been no final judgment in the sense that the litigation has been entirely ended. The case has been before this court several times, and at different stages particular questions have been decided, and as to these the decisions were as conclusive and final as if they had been the only questions in the case, e. g.: The right of the state to postpone the lien of 1856 was decided by this court in the former judgment, and although the cause upon other points is still before the court that one cannot be again stirred. In cases involving many questions there is danger of the litigation being prolonged, and it is necessary to eliminate, in their order, those fully decided so as to be able to make progress with those still undecided.

In the case of *Boyce v. Boyce*, 6 Rich. Eq. 302, the court says: "We have numberless adjudications that where a party had an opportunity to except and has not excepted, he cannot again bring the matter either before the master (or the court) on Circuit or on appeal. The principle is essential to the due and orderly administration of justice, and must have a place in every well-constituted forum. If at law a party pleads to special points neglecting other points, he acquiesces in the pleadings of his opponent relating to the points he does not contest; and so here and so everywhere. We have other cases to the effect that if a party appeals he is concluded from considering points not covered

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by his appeal, and after the \*appellate judgment is delivered upon the points to which the appeal refers, he is not at liberty afterwards, in a future proceeding in the case, either on Circuit or in the Appellate Court, to claim a consideration of the ground he has passed over and lost. See the opinion of Chancellor Harper in *Britton v. Johnson*, Dud. Eq. 28. A party who brings up a partial appeal loses every ground of appeal then existing which he neglects and leaves behind him, and cannot afterwards stir the objections lost by his supineness or acquiescence. The court is constrained to say that this objection comes too late. The report of the commissioner was made in 1842. Many exceptions were taken, but no objection was made on this ground. So far as the exceptions made were not sustained that report became the judgment of the court. The door

of litigation must at some time be closed." *Huson v. Wallace*, 1 Rich. Eq. 1.

Considering the matter now agitated as necessarily embraced in the report of the referee, and determined by the orders therein, was it error to refuse to set aside that judgment and order it re-examined?

The application cannot be considered as made under the act now repealed, "To vacate and set aside erroneous judgments," for the reason that it was not made within two years after the judgment rendered. It cannot be considered as made under Section 197 of the code, for the reason that said section was intended only for the relief of parties who, by reason of some "mistake or inadvertence," etc., may have lost the opportunity of being present at the trial, or to be represented there, and for the additional reason that the motion was not made within one year. As an application for a new trial upon subsequently discovered evidence, the Circuit judge had no right to entertain the motion after the remittitur from the Supreme Court on the judgment, covering the point decided, had gone down to the Circuit Court. *Cothran v. Knox*, ante, p. 207.

But, finally, it is urged that this motion was an appeal to the large equity jurisdiction of the Circuit judge sitting as chancellor; that as long as the cause is still pending, and the court in possession of the fund,

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it is competent for the court \*to correct any error which may have occurred, and to make any order necessary for the correct ascertainment of the rights of the parties. There is no doubt that the Court of Equity, in the interest of justice, exercises large powers before a matter has been finally decided, as in the case of *Gist v. Gist*, Bailey's Eq. 343, but that court does not undertake to ignore the principle of adhering to former decrees. On the contrary, some of the strongest cases on the subject originated in that jurisdiction. No case has been cited where the Court of Equity, after the court of last resort had finally decided a matter, has for any reason whatever disregarded the well established principles of *res adjudicata*.

From the view which we take it is not necessary to touch the merits of the application, but we may say that where an appeal is made to the court to put forth its extraordinary chancery powers and grant equitable relief, the party may with propriety be required to submit to the rule which makes it necessary to do equity in order to get equity. In such case the appeal does not proceed upon strict right, but is addressed to the equitable conscience of the judge, which will not be exercised except for the purpose of preventing a manifest wrong. As stated in the case of *Gist v. Gist*, supra, "the court is always reluctant, where the case is in its power, to exclude any apparently just claim or defence."



In this case the Circuit judge was not impressed with the equity of the claim. Without reference to the legal defence of payment, if the company had seen fit to make it, and insist upon the transaction as it appeared on the books, and not as it really existed, we concur with the Circuit judge that the equities of the parties who made the advances to take up the coupons in this case are substantially the same as they were in *Ketchum v. Duncan*, 96 U. S. R. 659 [24 L. Ed. 868].

What Chief Justice Waite said in *Claffin v. The South Carolina Railroad Company* [C. C.] 8 Fed. Rep. 118, may not be inappropriate here: "The next question is whether, as between the bondholders and the Syndicate, the coupons were bought or paid. I shall not undertake to recapitulate the evidence on this point, but content myself with saying that

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the \*evidence, as I think, brings the case clearly within the rule laid down by the Supreme Court in *Ketchum v. Duncan*. Certainly there can be no claim of bad faith on the part of the Syndicate. \* \* \* The arrangement was in every respect fair and honorable. All the members of the association were directors and members of the finance committee of the board. They were to be paid nothing for their services or the risk they assumed. So far as it appears, they were in no condition to be personally benefited by what was done, and in all the mass of testimony not a word is to be found reflecting on their integrity in the matter. There is nothing whatever in the case to show that the transaction was anything else than a laudable effort on the part of the directors to tide the company over what was supposed to be but a temporary embarrassment, brought about by an unexpected falling off of business, with the hope that upon a revival of business a disastrous failure might be avoided. The bondholders have lost nothing. The money they got when they gave up their coupons is certainly worth as much as their security under the mortgage would be to them now."

So much of the Circuit decree as relates to the subject under consideration is affirmed.

VI. The next question is as to certain debts contracted by the receiver, and called in the Circuit decree "Claims of Material Men."

The referee reported that the accounts against the receiver were classified as follows—viz., 1. Notes payable, \$4311.62; 2. Open accounts on ledger, \$4116.97; 3. Transient creditors, \$6796.35; 4. Pay-rolls, \$2368.53; 5. Balances due connecting roads, \$5728.24; and recommended that they be paid from the proceeds of sale.

The Circuit judge confirmed the report and ordered them first paid. The fourth item, including amounts due to employees on the "Pay-rolls," was paid by consent of all parties on account of the necessities of men who earn their daily bread; but the payment of

the other claims is strenuously resisted on the ground that the functions of the receiver, Mitchell, were limited to "income," and that

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miscellaneous \*debts contracted by him are not chargeable on the corpus in preference to the mortgages, unless specially provided for in his appointment or subsequent order of the court.

The doctrines relative to the rights and duties of railroad receivers, and debts contracted by them, are comparatively new. They have grown up with the growing importance of railroads within the last few years, and even now are only in the process of development. Some principles, however, may be regarded as settled, but there are others still in controversy. It may be regarded settled that the receiver is merely the executive officer of the court; that his custody is the custody of the court, and that he has no inherent powers independently of the court expressly authorizing acts or approving them when done. We believe it to be also settled that the court, having taken possession of a railroad, has certain duties to perform, and, among others, will see to the liquidation of all proper debts contracted by its express order or authority; but we are not aware that it has been precisely settled as to what debts contracted by a receiver outside of his express authority the court will undertake to provide for, and more especially in a case where there is no "income," and the property out of which they are to be paid is already under mortgage.

In this case it is admitted that there is no "income," and it is proposed that certain debts contracted by the receiver shall be first paid—not out of any receiver's fund from profits, but out of the proceeds of sale, thus giving them an equity over the mortgage bondholders. The order appointing Mitchell receiver did not give him the right to contract debts and charge them upon the corpus. It contemplated income, and provided that "the net proceeds, after paying all necessary expenses, including such accounts, if any, that may be due the employees and officers," should be applied quarterly to the payment of certain mortgage debts. We agree with the referee that "it would require a very liberal construction of this order to interpret it as intending that the necessary expenses, including the accounts due the employees and officers for services, should be paid out of any

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other fund than the profits of the \*road. If the amounts now due by the receiver are at all chargeable upon the fund arising from the sale of the road now in the hands of the court, such chargeability must arise from some other authority than that contained in the order appointing the receiver."

This would seem to dispose of the whole matter, but it is strongly urged upon us that these are meritorious claims, and have a

special equity on account of their character; that the order appointing the receiver gave him authority "to hold, work, and manage the road with the greatest possible skill and economy," and that having done so, producing debts instead of profits, the court should take care of its own officers, and order them paid out of the property mortgaged to others. It was the duty of the receiver to keep his current expenditures within the current income, and if he could not do so he should have reported to the court, and asked leave to contract debts on the faith of the property. This would have given the parties in interest an opportunity to be heard upon the question whether a receivership should be continued which was not clearing expenses.

Many authorities have been cited as to what are proper allowances in a receiver's account, which are undoubtedly correct; but none of them, so far as we can discover, clearly mark the line which is important between "income" and "corpus." When general reference is made to the "receiver's fund," or the "trust fund" in the hands of the court, or "funds to the credit of the suit," we infer that the funds meant arose from "income," as nothing else can with any degree of appropriateness be called the "receiver's fund."

The referee rests his judgment on the case of *Cowdrey v. Railroad Company*, 1 Woods, 336 [Fed. Cas. No. 3,293] (also reported in 11 Wall. 459 [20 L. Ed. 199], and 3 Otto, 352 [23 L. Ed. 950]), and the Circuit judge relies on the authority of *Myer v. Car Company*, 102 U. S. 13 [26 L. Ed. 59]. In both these cases questions were discussed as to what expenditures should be allowed the receiver out of the "trust fund" under the control of the court, or out of "the fund to the credit of the suit;" but it does not appear whether such "trust fund" arose from "income" or

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the sale of the property. These cases \*do not decide the precise question here, and, therefore, can give us little assistance. We may concede that under the authority of these cases, and others, these claims would be allowed if there was a fund from "income" out of which to pay them; but there is no such fund, and the question recurs, Shall they be paid out of the proceeds of the mortgaged property against the protest of the mortgagees?

In this vague state of the authorities, we are obliged, though with some hesitation, to render our own unaided judgment on the subject. A mortgage has a lien upon the property itself, but, without special provision, no lien upon the income. The mortgagor is entitled to the use and rents and profits until an order of foreclosure. He may use this income in working the property, paying current expenses, or in any other way; but he has not the power to give any liens upon the corpus for any purpose whatever, even that of cultivating or operating the property it-

self, which will postpone liens already fixed upon it. Any debts he may contract must take their place behind liens already resting upon the property. There may be cases where the court will declare an equity on account of additions made to the value of the property; but such are exceptional cases, and proceed upon different principles. When the court takes the place of both the mortgagor and mortgagee, and takes possession of an insolvent railroad by appointing a receiver to preserve it and make it profitable pending litigation, it has been established as a rule to allow the receiver to pay the necessary expenses of running the road, including damage to persons and property inflicted in so doing, out of the income in his hands called the "receiver's fund." *Ex parte Brown*, in *re Gibbes v. G. and C. R. R. Co.*, 15 S. C. 518.

This is manifestly just, as the mortgage only covers the corpus, and the mortgagee has no right to the income until current expenses are paid. It would clearly be inequitable to allow the receiver to use the labor of the employees and then turn over all the fruits to the mortgagees, leaving them unpaid. In administering this equity, the courts have gone so far in providing for the payment of current expenses as even to recall any income that may have been paid to

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the mortg\*gagees, and in that way temporarily diverted from the payment of the expenses.

Chief Justice Waite, in the case of *Fosdick v. Schall*, 9 Otto, 251 [25 L. Ed. 339] thus states the doctrine: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience, of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source go to the mortgagees."

But it seems to us that as a general rule this equity must be limited to the existence of income. The very fact that it is thought necessary to invoke the doctrine of diversion, shows that in this respect there is a difference between "income" and "corpus." As the mortgagor himself could not contract debts



to displace liens upon the corpus, it is not clearly perceived how the court can give that effect to debts contracted by the receiver, who has nothing whatever to do with the finances of the company except the money which arises from the "income." Possibly the court might do so in an extraordinary case, where it clearly appeared that the debt was contracted at the instance of the mortgagees and for their benefit, but not in an ordinary case of excess of expenditures over income, without express authority to contract debts upon the faith of the property. "The extent of this power is measured by the absolute necessity of the expenditure for the protection of the property of which the court has taken charge." Jones on Railroad Securities, § 542.

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\*The possession of a railroad by a receiver changes no right of ownership; perfects title to no part of it; gives no new or additional right to any part; but is merely a holding by the same title, subject to the same contracts, limitations, and conditions under which the railroad company held the property at the time the court took possession. It is said in the case of Fosdick v. Schall, supra, that "the court will do what—if a receiver should not be appointed—the company itself ought to do." It is true that in the same case it is also said that "while ordinarily this power is confined to the application of the income of the receiver, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way," etc. What cases were here referred to we do not know; but, without going into that, it is enough to say that we see nothing in this case which takes it out of the category of ordinary cases, in which the receiver, without the express authority of the court, has contracted debts, having no income in his hands to pay them.

We have no reason to doubt that these are meritorious claims, and regret that there are no "profits" out of which they could be paid. If it were proper for the court to express a wish, it would be that they could be paid, but they are not receiver's certificates issued by the express order of the court for a particular purpose. They are simply debts contracted with the receiver, limited in authority, of an insolvent railroad, known to be covered with mortgages and not making expenses. We are not satisfied that there is any principle which would authorize the court, overlooking the terms of its previous orders, to transpose legal priorities and order these debts paid out of the proceeds of property bound by prior mortgages.

So much of the Circuit decree as orders the claims against the receiver to be paid out of the proceeds of sale in preference to the mortgage bondholders, is reversed. And this disposes of the claim of Daniel Green for damages for a horse killed and mule injured

by the train, while the railroad was under the control of the receiver. If the damage

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was negligently done, this claim ranks as high as other debts of the receiver; but it is not a lien to take priority, and there is no "receiver's fund" out of which it can be paid.

VII. The claim of Charles T. Mitchell for cost of construction of the Bee's Ferry extension. Upon application of the receiver, Charles T. Mitchell, on July 11, 1877, Judge Reed ordered: "That the said railroad company be and hereby is authorized to construct, or cause to be constructed, a new track from the John's Island Station to Bee's Ferry, and to build a suitable bridge over the Ashley river at that point, as recommended in and by the report of Mr. Gadsden, and at a cost not exceeding the estimate appended hereto (\$32,846.20). That the cost of said track and bridge be paid out of the surplus income of the road, after paying current expenses, repairs, and other charges already upon it; and the same when built and paid for at the cost of construction, shall be subject to and covered by the present liens according to their priority, etc., as shall any agreement with the Ashley River Company, or other persons for the use of their property. And until the works hereby ordered shall be paid for, in the manner provided aforesaid, they shall be and stand as a security for such persons as shall furnish material or construct them, or shall advance, or loan money, for such material and construction," etc.

Most of the attorneys representing mortgaged bondholders assented, but James Conner, owning \$11,500 of six per cent bonds, objected to this order and appealed from it. The Supreme Court stating that "the propriety of the order can only be considered as it regards parties who did not assent to it," adjudged that "the order as to the appellant must be set aside." 10 S. C. 411.

Notwithstanding the decision of the Supreme Court that the alleged authority to the receiver was without the approbation of the court, the work of constructing the new track and bridge went on, and the money used for that purpose was furnished chiefly by the South Carolina Loan and Trust Company and the First National Bank of Charleston. It was advanced on notes of the company in-

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dorsed by Mitchell individually. \*No money was paid towards the extension out of the surplus income of the road, as the order directed, but the debts remained unpaid and were growing by the accumulation of heavy interest.

On July 11, 1879, Mitchell filed a petition in the case praying for the payment of the moneys lent to him for the aforesaid purposes. The banks which had loaned the money answered the petition, putting forward their claims, and James Conner, a

bondholder, also answered, objecting. It was referred to master Clancy "to ascertain and report the amount expended for the construction authorized by the order, and what amount is due upon the lien thereby created," etc. Master Clancy reported that the cost of construction was \$42,941.14. Mitchell excepted, and Judge Pressley filed a decree fixing the amount due on "the lien claimed by the petitioner at the sum of \$42,941.14, with legal interest thereon from October 1, 1877, when the work was completed."

It seems that after having the cost ascertained as above, Mitchell proceeded no further in his effort to foreclose his lien on the extension considered as a separate piece of property. On January 9, 1880, the whole road "included in the several deeds and mortgages proved in these cases," was ordered to be sold. An appeal was taken, which was dismissed. 13 S. C. 469. On January 7, 1880, the road was sold for \$300,200. At the sale, no notice of any kind was given by the claimant, Mitchell, or any one else. It was referred to master Porter to report whether, under the sale made, the Bee's Ferry extension and bridge were sold, and what proportion of the purchase money Bee's Ferry junction and bridge bears in value to the whole road. Master Porter reported that the extension and bridge were included in the sale, and that the said branch had been in operation about two and one half years previous to the sale, and also "that upon the whole testimony his conclusion is that the extension and bridge added to the road a value equal to the cost of construction, and that the cost is the proper measure of the proportion in value it has to the purchase money of the whole road."

To this report exceptions were filed, and

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Judge Mackey \*ordered that "\$42,941.14, with interest from October 1, 1877, be paid from the proceeds of sale to the South Carolina Loan and Trust Company, the First National Bank, and The People's National Bank, in proportion to the debts which they held of the receiver under the lien, any surplus to be paid said receiver, C. T. Mitchell. As to the costs and expenses incurred by the receiver in defending this order of the court, he ought to be fully protected, and these should, therefore, be paid, together with the debt, from the proceeds of the sale, in preference to other claims," etc.

The question now is, Was this error? Under a former order of the court, Mitchell had been appointed receiver, "to hold, work, and manage the road," and after discharging current expenses, to pay "the net profits" to certain mortgage bondholders. It can hardly be necessary to say, what has been so often held, that the objects for the appointment of a receiver are temporary in their character. It is not intended that the receiver should be permanent, and like the owner of property,

look to remote advantages, or make permanent improvements; but simply preserve the property and make it profitable pending litigation. The receiver, as such, has no power or duty outside of the order of the court. See 10 S. C. 407, *supra*.

It is manifest that the order appointing Mitchell receiver did not authorize any such expenditure as that for the Bee's Ferry extension. Judge Reed's order of 1877 did in terms give such authority. That order, however, was granted, without reference, upon the consent of the counsel representing most of the bondholders, and was declared by the Supreme Court to have been improvidently granted, was set aside as to James Conner, the party contesting it, and left undisturbed as to the other parties, only for the reason, that being a consent order, it was in effect simply the agreement of the consenting parties. Mitchell, therefore, in building the Bee's Ferry extension, was not really acting as receiver, under authoritative orders of the court, but as agent of the consenting bondholders.

"When the object of a receivership has

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been accomplished, \*and the occasion for it no longer exists, but it is nevertheless continued in form and manner, by consent of the parties in interest, the managing party is not regarded as a receiver, in the sense of the law, but as having the character and office of an administrator of a trust, by agreement of the parties. Consequently, the debts contracted by such manager, although having the formal sanction of the court, cannot be established as receivership liens, but are debts which are liens upon the trust property, under the common doctrine that disbursements and expenses properly made are entitled to payment out of the trust property. A decree entered by consent after the occasion for a receivership has ended, for a new and continuing system of tenure and management, does not make the manager the officer and representative of the court, but merely the agent and representative of the parties. \* \* \* It is fundamental in every idea of receivership that the court is to have the active and responsible control of the administration. That was not so in this case; but, on the contrary, the whole course in general and in detail was devised and executed by the managers and their associates, without any supposition that the court had any real office to perform, calling into exercise judicial judgment, direction, or control." Jones on R. R. Sec., §§ 548, 549.

So we might say in this case. The Supreme Court not only set aside the order of Judge Reed, so far as it was contested, but afterwards declined to adopt the policy of endeavoring to make additions and improvements of a permanent character through the receiver, as the officer of the court. Of this all the parties had notice, and it cannot fair-



ly be claimed that the court is responsible for the result. *Ex parte Mitchell*, 12 S. C. 83.

Considering *Mitchell* as the agent of the consenting mortgagees, he failed to perform the agreement, both as to the amount of the cost and paying it "out of the surplus income of the road." There is no income, and he now asks to be paid for his entire outlay from the proceeds of the sale of the whole property. The mortgage bondholders insist that their agreement was made on conditions,

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which have not been complied with, and that *Mitchell*, having failed to perform his part of the agreement, is entitled to no compensation; that as soon as the extension was built, it became part of the road, and the old lien extended over it, and the road having been sold as a whole, he may have a claim against the company for work done, but no security therefor.

We cannot accept this view to the extent claimed. There can be but little doubt that *Mitchell* made a valuable improvement to the property, and we think that he had by this agreement of the consenting mortgagees a lien on the road he built, according to the terms of the consent order, which provided that "until the works (describing them) shall be paid for in the manner aforesaid, they shall be and stand as for a security for such persons as shall furnish material or construct them, or shall advance or loan money for such material and construction," etc. It is true, as matter of law, that the old liens stretched over the extension as part of the road; but we think it did so subject to the lien of the builder above provided for.

At the sale of the property under the order of court, *Mitchell* did not object to the extension being sold as part of the road. The whole road, including the extension, was sold, and he has an equity to share in the proceeds of the sale to the extent that the branch built by him enhanced the price which the whole road sold for. We do not mean that he is entitled to what the extension cost, for it is rare that a railroad brings at public sale half the original cost, nor that he is entitled to receive a theoretical estimate of its real abstract value; but the proportion of the purchase money which was produced by his part of the property. If the whole property unfortunately sold for less than its true value, we do not see why he should not be required to share in the sacrifice. He had a case pending in court to sell separately the branch extension, on which he had a lien. He did not, perhaps could not, insist upon a separate sale, but acquiesced in the sale of the whole, which thereby became in part his sale. It was as if the owners of two adjoining lots of land should agree to sell them together, or as if the sale had been made for partition between *Mitchell* and the consenting bondholders as

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tenants in common, having un\*equal interests—the bondholders owning the old and *Mitchell* the new road.

As was said in a former judgment of this court, in this very case, in regard to another local lien created after the mortgages, and substantially analogous to this: "It cannot be doubted that a railroad corporation may mortgage after to be acquired property. *Dunham v. Railway*, 1 Wall. 259 [17 L. Ed. 584]; *Pennock v. Coe*, 23 How. 117 [16 L. Ed. 436]; *Pierce v. Railroad*, 24 Wis. 551. \* \* \* But to hold that a railroad company may make a mortgage of land to be acquired so as to defeat a purchase money mortgage of land subsequently acquired, stands on an entirely different footing, and cannot be admitted. The Charleston and Savannah Railroad Company having given a purchase money mortgage for the land, no obligation or lien affecting that company or its property can be interposed prior to such purchase money mortgage. The mortgage of *Trenholm* and *Potter* was properly upheld by the decree as a first lien as to such mortgaged property. So far as it regards that portion of the mortgaged land that was requisite for the use of the railroad as such, the claims of the estates of *Trenholm* and of *Potter* must be confined to the fund arising from the sale of the railroad as a whole, and for that purpose there should be an inquiry to ascertain what ratable proportion of the whole fund arising from such sale would properly represent the relative value of that portion of the mortgaged land." 12 S. C. 365.

In this view there was error in the order of reference upon this question, and it should be recommitted to ascertain what ratable proportion would properly represent the relative value of the old road and the extension considered only in reference to the purchase money of the whole.

We have seen that the Bee's Ferry extension was made by agreement with certain mortgagees, acting through a consent order of court. *James Conner* gave no consent at any time, and his interest was expressly excepted in the contract with *Mitchell*. Under these circumstances the court cannot exclude him against his protest from the full share that he may be entitled to in the whole proceeds of sale.

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\*It is always embarrassing for this court to attempt to adjust costs and counsel fees, which more appropriately belong to the Circuit Court. It seems to us, however, that in this case there should be some system upon the subject, and that the costs and fees of all the attorneys properly chargeable for successful services should be paid out of the common fund, so as to make the successful litigants pay their proper proportion.

VIII. The only remaining question is that

in reference to the taxes claimed by the state.

1. The original act of incorporation of 1853 exempted the company from taxation for thirty-six years. 2. The act of 1856, which created the statutory lien to secure the bonds of that date, prohibited the old company from conveying to any person whatever any lien or incumbrance which should come in conflict with said lien. 3. The act of 1866 incorporating the new company required that it should pay the bonds of 1856, and exempted its property from taxation without limit as to time. 4. The act of 1869, purporting to postpone the lien of 1856, contained a provision that the act should not take effect until the new company consented to an amendment of its charter so that its property should be subject to taxation in conformity with the constitution. 5. This act has been declared unconstitutional, but before it was so declared the company, upon the faith of its provisions, had formally accepted it as an amendment of the charter, and that its property should be subject to taxation after January 1st, 1870, at which time the reconstruction of the road was to be finished.

The referee in his first report held that the state had no right to postpone the lien of 1856, and, therefore, no right to exact the payment of taxes, which was the condition upon which the postponement was made. The postponement being beyond the power of the legislature, the exaction of taxes is beyond its right. The Circuit judge concurred with the referee; but on appeal the Supreme Court, after discussing only the question of fact as to whether the road was really finished January 1st, 1870, held as follows: "It is evident that this arrangement [with another railroad running into Savannah] put in exercise the franchise of the defendant

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\*corporation to carry passengers and freight, for hire, to its full extent; that is, from the city of Charleston to the city of Savannah. Whether the defendant corporation chose to build and own or lease their right of approach to Savannah, is immaterial to the question of completion within the meaning of the act of 1869. Under such circumstances, the exemption claimed by the defendant corporation cannot be sustained by any reasonable construction of the act of 1869. That portion of the decree that sustains the imposition of the taxes should be affirmed."

When the case went back, the referee and Circuit judge both interpreted the opinion as being a judgment against the state as to the taxes, and upon exceptions the point comes again before this court. What is the proper construction of the judgment of the Supreme Court? It is contended on one side that the Circuit decree is in express terms "affirmed," and on the other, it is insisted as confidently that the intention was to reverse the Circuit decree. The then chief justice, to whom it

was assigned to write the opinion of the court, though generally so accurate, overlooked the character of the Circuit decree which did not sustain the imposition of the taxes, but the contrary. The reasoning, which was confined to the subject of the completion of the road, seems to indicate one view, and the conclusion another, and, inasmuch as it is impossible to say with judicial certainty what was adjudged, we will consider the question as undecided.

The act of 1853 incorporating the old company, exempted its property from taxation for thirty-six years, and expressly exempted it from the forty-first section of the act of 1841. Under this charter the bonds of 1856 were issued. If the same company had remained in possession of the property and there had been no further legislation, there can be no doubt that both the company and its mortgage creditors could have insisted on the exemption as a contract. Whether that exemption was a privilege or a franchise it was such a vested right as a subsequent legislature could not repeal. "It has been held that the legislature has the power to bind the state in relinquishing its power

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to tax a corporation. It has been \*held that such a provision in the charter of a corporation constitutes a contract which the state may not subsequently impair. These doctrines have been reiterated and reaffirmed so recently as the year 1871 in an opinion delivered by Mr. Justice Davis, in the case of the Wilmington Railroad v. Bird. They must be considered as settled in this court." *Humphrey v. Pegues*, 16 Wall. 249 [21 L. Ed. 326]. Assuming this to be settled, we think nothing has occurred sufficient to change those original rights so far as the bonds of 1856 are concerned.

But it is said that the old company to whom the exemption was given has passed away and its property gone into other hands; that the purchasers formed themselves into a new company, chartered in 1866, and that this was practically a forfeiture of the charter and ended the exemption. We do not think that a statutory exemption from taxation, under which as a contract rights have vested, is a mere personal privilege which ends with the ownership of the first taker, if the property, although in other hands, is continued in the same use on account of which the exemption was granted. Besides, in this case, the new company took the place of the old. "The company hereby formed shall assume and be liable for the payment of the six per cent. interest-bearing bonds, whenever the guarantee of the state has been indorsed, and the lien of the state is in every respect preserved and hereby reaffirmed." The charter of the new company also contained a provision exempting the property from taxation indefinitely.

It is insisted, however, that there has been still another act, that of 1869, which gave



to the new company the right to contract a new debt for \$500,000, and in order to make it the first lien, pushed back the six per cent bonds already issued, and in consideration of this great boon required the company to give up their exemption from taxation, which they did in form, and in consequence of that relinquishment their property has been legally subject to taxation since 1870. It does not seem to us that this view is sound, for several reasons. In the first place, it is more than doubtful whether the company, that is to say, the stockholders, had the power to give up the exemption without the consent

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of those who held bonds under the act of 1856, and which they had received on the faith of the provisions of that act. It would seem a remarkable instance of vested rights doubly violated, if the security afforded to the six per cent bonds by the exemption from taxation of the property mortgaged could be given up upon the consideration of a still greater wrong, the postponement of the lien itself. But, without pursuing that, the conclusive answer is that the act of 1869, which required the relinquishment, having been declared to be unconstitutional, the scheme of postponement failed. The part of the act which gave a benefit to the company as it appeared, and which induced the relinquishment under a mistake, turned out to be a nullity, and the matter remains as if the act of 1869 had never been passed. The consideration of the relinquishment having failed, the state cannot insist upon its enforcement, but must leave the matter as it stood before the act, which failed of its purpose.

It is urged, however, that the consideration of the act has not failed entirely, for the reason that it is still enforced as to some parties, and for particular purposes. No part of the act, so far as regards the provision for postponement of the bonds of 1856, has been enforced from any inherent force which it has as a legal enactment; but only from the conduct of parties in particular cases. So far as the state is concerned, the whole provision which undertook to postpone the sixes was, and is, absolutely void. If the act of 1869 was, as declared, unconstitutional, so far as it undertook, with the consent of the company, to postpone the six per cent bondholders in regard to their lien on the property, why was it not also unconstitutional so far as it undertook, with the like consent, to repeal the exemption from taxes? The bondholders had as certainly a vested right in that exemption from taxation as they had in the property itself under their lien. It was not tangible property, but it concerned the value of tangible property. It added largely to their security. The holders of these bonds purchased them upon the assurance that the property covered by the statutory lien would not be reduced in value

by the imposition of taxes on it. For this they had the plighted faith of the state, and

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they are entitled to have it \*in that condition against either an attempted relinquishment of the new company, or an effort to repeal it by the legislature.

Upon this question, the case of *Furman v. Nichol*, 8 Wall. 44 [19 L. Ed. 370], is in point. The exemption in the charter was not personal, but attached to the bonds, just as if the original charter under which they issued were printed on the back of each bond. The state cannot be sued, and on that account should be only the more prompt to do justice, and scrupulous to keep faith. We cannot see that the state has any claim for taxes on the property of the company as against bonds issued under the act of 1856, which are unaffected by estoppel.

The judgment of this court is, that the judgment of the Circuit Court be modified so as to conform to the conclusions herein announced.

## 17 S. C. 282

PARIS v. DU PRE.

(November Term, 1881.)

[1. *Fraudulent Conveyances* ¶222, 269; *Replevin* ¶12; *Sheriffs and Constables* ¶137.]

Under a general denial of a complaint which alleged plaintiff's lawful possession of personal property taken from him by defendant and demanded its recovery and damages, the defendant, after proof of his seizure, as sheriff, of such property under attachment against one W, and that W had been the owner, may offer evidence to show a want of bona-fide consideration in the transfer from W to plaintiff, although the answer alleged neither fraud nor facts tending to show fraud.

[Ed. Note.—Cited in *Archer v. Long*, 38 S. C. 276, 16 S. E. 998.]

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 652, 794; Dec. Dig. ¶222, 269; *Replevin*, Cent. Dig. § 101; Dec. Dig. ¶12; *Sheriffs and Constables*, Cent. Dig. § 289; Dec. Dig. ¶137.]

[2. *Evidence* ¶231.]

After evidence of collusion between a debtor and the purchaser of his property to defraud creditors, the declarations of the debtor, both before and after the transfer, may be given in evidence against the purchaser.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 835-839, 852-859; Dec. Dig. ¶231; *Fraudulent Conveyances*, Cent. Dig. § 828.]

[3. *Trial* ¶345.]

"Because the verdict and judgment are in all respects contrary to the law and evidence," is too general an exception to require any judgment of this court upon it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 820; Dec. Dig. ¶345.]

[4. *Fraudulent Conveyances* ¶230.]

It has been the practice in this state for a creditor to levy his execution upon personal property fraudulently disposed of, before obtaining a return of nulla bona on his execution.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 660; Dec. Dig. ¶230.]

Before Kershaw, J., Abbeville, January, 1881.

Hon. THOMAS B. FRASER, of the Third Circuit, sat in the place of Mr. Justice McGOWAN, who had been of counsel in the cause.

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\*Action by Reuben J. Paris against J. F. C. DuPre, as sheriff of Abbeville county, commenced January 31, 1879. The complaint was as follows:

The complaint of the above-named plaintiff respectfully shows to this court:

I. That at the time hereinafter mentioned the plaintiff was lawfully possessed of the property described in Exhibit "A" herewith attached, and which the plaintiff prays may be taken as a part of this complaint, of the value of about nine hundred dollars, then and ever since his property.

II. That on the 7th day of January, 1879, at Ninety-Six in the county and state aforesaid, the defendant wrongfully took said goods and chattels from the possession of this plaintiff, and still unjustly detains the same to the damage of this plaintiff five thousand dollars.

Wherefore the plaintiff demands judgment against Julius F. C. DuPre, as sheriff, of the county and state aforesaid, the aforesaid defendant, for the recovery of possession of said goods and chattels, or for the sum of nine hundred dollars, the value thereof, in case a delivery cannot be had; together with five thousand dollars, his damages and for his cost.

J. A. Richardson and Eugene B. Gary,  
Plaintiff's Attorneys.

The answer was as follows:

The defendant J. F. C. DuPre, by McGowan & Parker, his attorneys, answering the complaint above, alleges:

1st. This defendant denies each and every allegation of the first and second paragraphs of the complaint.

2d. For a further defence.

This defendant alleges that he did as sheriff, on 7th day of January, 1879, by virtue of a warrant of attachment to him directed, in the case of Clayton & Webb, plaintiffs against Wm. E. Walker, defendant, seize and attach in the possession and under the control of said defendant, the goods and chattels mentioned in the complaint, amounting in value to the sum of six hundred and forty-five  $\frac{90}{100}$  dollars as aforesaid, as the property of said Wm. E. Walker, the debtor,

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under the instructions \*received from the plaintiffs and their attorneys, the ownership the plaintiff in this case being denied, and he insists that the said plaintiff is not entitled to the recovery of the goods and chattels or damages.

Wherefore the defendant demands judgment against the plaintiff for his costs.

McGowan & Parker.

Defendant's Attorneys.

Plaintiff proved the bill of sale made by William E. Walker to him on December 10, 1878, and the subsequent seizure of the property by the defendant, as sheriff, under warrant of attachment issued at the suit of Clayton & Webb against said Walker. He also proved that his attorney at the time of the seizure had stated to the sheriff that plaintiff would proceed against him for damages, and the plaintiff also proved the value of the goods and the amount of damages sustained by him. Defendant by several witnesses proved declarations of Walker that Paris was only his clerk, and had no interest in any of the goods at Ninety-Six; that Walker purchased goods from several parties and ordered them shipped to Spartanburg, from which point he reshipped them to several parties at different places, some of them to Paris at Ninety-Six; that when arrested for selling liquors to Paris without a license, he testified before the U. S. Commissioner that he had not sold to Paris, but only shipped to him.

In the bill of sale, it is stated that Walker owned a two-thirds interest in the business at Ninety-Six, and Paris one-third; that Paris purchased Walker's interest at and for the price of \$607 to be paid "at once." There was also evidence that Paris was a man of no means.

The presiding judge charged the jury as follows:

That this was a question of fact for the consideration of the jury. That the question was as to the ownership of the goods seized by the sheriff, as the property of William E. Walker, under attachment at the suit of Clayton & Webb, in the possession of R. J. Paris, plaintiff; and was the sale made, as alleged, by Walker to Paris on

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10th Dec., 1878, before the \*attachment of his interest in the stock of goods at Ninety-Six, in good faith, or was it sham and pretensive? that the jury were to take into consideration all the facts of the case as appeared from the evidence, and if they came to the conclusion that the goods were the property of R. J. Paris, plaintiff, then their verdict should be for plaintiff; otherwise then for defendant.

His Honor also states in his report of the case as follows:

The plaintiff's attorney excepted to the admission of all the testimony tending to show the pecuniary condition of Walker at the time of the alleged sale. Also, to the admissibility of the testimony of the plaintiff herein, as to what he testified in the case of Kennesaw Mills Co. v. William E. Walker, supplementary proceedings. Also, to the admissibility of parol testimony as to what W. E. Walker testified on his preliminary examination before United States Commissioner. Also, to the testimony of W. Y. Holland and others taken by commission as to the declaration of W. E. Walker, and generally to the



proof of all those circumstances tending to show that William E. Walker had probably transferred the property in question to the plaintiff in order to defeat the claims of his creditors.

I overruled these objections on the ground that these circumstances bore upon the question submitted to the jury as to whether the alleged sale was real or only pretensive.

J. B. Kershaw, Presiding Judge.

April 22, 1881.

Verdict was for defendant, and plaintiff appealed upon the following exceptions:

Take notice that the plaintiff Reuben J. Paris excepts to the rulings of the presiding judge, and will appeal to the Supreme Court from the verdict and judgment herein rendered, at the January term, 1881, of the Court of Common Pleas for Abbeville county, and move to reverse the same, and for a new trial, on the following grounds:

1. Because the presiding judge erred in ruling that the defendant could prove fraud when neither fraud nor facts tending to show fraud were alleged in defendant's answer.

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\*2. Because the presiding judge erred in allowing evidence of facts tending to show fraud when the answer of defendant contained only a general denial of plaintiff's title and right of possession of the personal property in dispute, and an allegation that defendant seized said goods, as sheriff, by virtue of a warrant of attachment against William E. Walker.

3. Because the presiding judge erred in allowing the declarations of William E. Walker, not made in the presence of the plaintiff Reuben J. Paris, to be offered in evidence.

4. Because the presiding judge erred in allowing the defendant to offer any evidence except such as tended to prove the allegations of the answer.

5. Because the verdict and judgment are in all respects contrary to the law and evidence.

Eugene B. Gary and Orville T. Calhoun,  
Plaintiff's Attorneys.

Mr. Eugene B. Gary, for appellant.  
Messrs. Parker & McGowan, contra.

May 12, 1882. The opinion of the court was delivered by

Mr. Justice FRASER. This was an action for the delivery of certain goods and chattels and for damages for the wrongful taking and detention of the same, the plaintiff alleging lawful possession in himself, and the defendant, after denying each and every allegation of the complaint, setting up a levy under an attachment and an execution in favor of Clayton & Webb v. Wm. E. Walker, under whom plaintiff claimed. Under the instructions of the presiding judge as to the law the jury found a verdict for the defendant, and from the judgment entered upon this verdict

an appeal has been taken to this court. Several questions were raised on the Circuit, and have been discussed in the argument before this court, which do not arise on the exceptions and cannot be considered.

The 1st, 2d, and 4th exceptions are substantially the same: that, neither fraud nor facts tending to show fraud in the plaintiff's title from Wm. E. Walker having been alleg-

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ed by defendant, it was not competent to introduce evidence to show it. The complaint in this case alleges title in the usual way, that the plaintiff was "lawfully possessed" of the property in dispute; and the general denial puts in issue every fact which goes to make up that title—the execution, the consideration, and good faith of the transfer of the property to him. A defence which admits the plaintiff's claim and seeks to avoid it must be set up in the answer distinctly and with due particularity, but this is not necessary where the defence denies in toto the plaintiff's claim.

The plaintiff in opening his case was bound only to show that the property was taken from his possession by the defendant, its value, and damages, if any. The burden of proof was then on the defendant, but as soon as he showed that he had seized the property by virtue of process against W. E. Walker, at the suit of a creditor, and that W. E. Walker had purchased and been the owner of it, the burden was again thrown on the plaintiff to show a valid transfer to himself. At this point, upon whomsoever may have been the burden of proof as to bona-fide consideration, it was a mere question of evidence as to the validity of the transfer from Walker to plaintiff, R. J. Paris. See *Lyles v. Bolles*, 8 S. C. 263. This court, therefore, holds that the evidence in the case, which tended to show that the transfer of the property from Walker to plaintiff was fraudulent, was properly admitted.

The 3d exception is as follows: "Because the presiding judge erred in allowing the declarations of Wm. E. Walker not made in the presence of plaintiff Reuben J. Paris to be offered in evidence."

In this case there was evidence "that Wm. E. Walker arrived at Ninety-Six on the railroad train about 12 o'clock December 10, 1878, that said Walker and Paris went to the house of Richardson (an attorney-at-law) after supper at night to get him to prepare a bill of sale from Walker to Paris of his interest in the goods; that no money passed on the occasion, and that Walker left Ninety-Six on a freight train, as plaintiff testified, about 8 o'clock p. m." The deed of assignment bears this date and recites payment in

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full of \$607 at and before the \*delivery of the deed. It is also in proof that certain barrels of whiskey, in which it seems these parties were dealing, had been shipped to Walker at

Spartanburg, and, without being taken from the depot, were reshipped to Ninety-Six to Paris, and that many of the barrels and packages seized by the defendant had the mark "Walker" erased and Paris put on them. Plaintiff claims that they were partners.

Where a consideration between the assignor and assignee, with a view to perpetuate a fraud on creditors by means of the assignment (which fraud has not then been perfected), is previously established, the declarations of the assignor will be evidence against the assignee to the fullest extent, though made after the assignment. *Cuyler v. McCartney*, 33 Barb. 165. There was at least sufficient evidence of collusion between Walker and Paris to allow these statements, whether before or after the date of the assignment, to go to the jury.

The only statement of Walker after the assignment was one made before C. P. Wafford, referee in another cause, and seems to have been in presence of Paris, and if it were not so, is of such a character as would not have prejudiced the plaintiff; and for this reason its admission would be no ground for a new trial.

The 5th exception is too general to require any judgment of this court upon it.

The necessity for a return of nulla bona on an execution before proceeding against personal property fraudulently disposed of by a debtor has not been presented by the exceptions in this case. It seems, however, to have been the practice in this state in such case to levy and sell as though no such sale had been made. *Motte v. Aiken*, 2 Speers, 115; *De Millen v. McAlliley*, 2 McM. 499; *Ford v. Aiken*, 4 Rich. 133.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

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\*DICKERSON v. SMITH.

(November Term, 1881.)

[1. *Appeal and Error* ⚭1011.]

Findings of fact by a circuit judge from conflicting testimony, partly oral and partly written, reversed—the circumstances surrounding the transactions constraining this court to different conclusions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983–3989; Dec. Dig. ⚭1011.]

[2. *Executors and Administrators* ⚭516.]

The statute of limitations does not run against legatees as to matters embraced in a partial settlement made with them by the executors in the Ordinary's office, the estate not being wholly administered, and the office of executors continuing to exist.

[Ed. Note.—Cited in *Graveley v. Graveley*, 25 S. C. 18, 60 Am. Rep. 478; *Fricks v. Lewis*, 26 S. C. 239, 1 S. E. 884; *Montgomery v.*

*Cloud*, 27 S. C. 192, 3 S. E. 196; *Ariail v. Ariail*, 29 S. C. 94, 7 S. E. 35.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2222; Dec. Dig. ⚭1010.]

[3. *Compromise and Settlement* ⚭8, 19.]

Where executors of full age induce their sister, a legatee, who has just passed her majority, to enter into a pretensive settlement of the estate, made with a view of throwing difficulties in the way of a creditor, such legatee is not in pari delicto with the executors, and may afterwards have the settlement reopened for the purposes of a full accounting by them.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 23, 73; Dec. Dig. ⚭8, 19.]

[4. *Executors and Administrators* ⚭515.]

A settlement made by a life tenant with the executors, reopened in behalf of herself and her children (the remaindermen), such settlement having been pretensive merely, and without full knowledge by her; and hence, any consent on her part to be charged in such settlement with amounts for which she was not properly chargeable, would not bind her in a subsequent accounting.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2293–2296; Dec. Dig. ⚭515.]

[5. *Executors and Administrators* ⚭103.]

This Court would hesitate to sanction an investment in Confederate bonds made in January, 1864. Where the funds so invested were realized from the sale of real estate made during that month for cash, in violation of the express directions of the will, and then set apart by the executors to one of themselves as trustee for a beneficiary under the will, such appropriation was disallowed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 421; Dec. Dig. ⚭103.]

[6. *Trusts* ⚭166.]

A trustee, who had resisted the proper demands of his cestui que trust, and acted adversely to their interests, removed from his office and another trustee appointed in his place.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 218; Dec. Dig. ⚭166.]

Before Wallace, J., Laurens, May, 1880.

Hons. J. H. HUDSON and T. B. FRASER sat in the place of the CHIEF JUSTICE, and Mr. Justice MCGOWAN, who had been of counsel in the cause.

This action was commenced in 1872 by W. F. A. Dickerson and Lucy W., his wife, and the minor children of the latter, against William T. Smith and John R. Smith, executors, and Joel F. Smith, James Smith, Mary Smith, Basil H. Smith and Charles L. Smith.

The opinion makes a statement of the case.

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The testimony of the two adult plaintiffs and of Basil H. Smith, in behalf of the plaintiffs was taken before the clerk and read at the trial. The witnesses W. F. A. Dickerson, B. H. Smith and C. P. Sullivan, produced by plaintiffs, were sworn in open court before the presiding judge, as also were the witnesses for the defendant, W. F., Joel F., John R. and Charles L. Smith, and others. The substance of their testimony is stated in the opinion. It related principally to the



issue, whether the settlement of 1866 was real or pretensive. The circuit decree was as follows:

To the complaint in this action the defendants demur upon the grounds of improper joinder of parties and improper joinder of actions. The controversy relates to the estate of John Smith, deceased, in which all the defendants claim an interest, and the complaint seeks, together with other things, to impeach an alleged settlement of the estate, to which all of the defendants were parties. The code, in providing who shall be parties, declares in section 141, "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." The defendants therefore, all legatees under the will of John Smith, are properly before the Court, and being before the Court, all questions between the parties arising out of the main subject of controversy are properly cognizable in the same action as, for instance, where an executor is also appointed by the will a trustee, whether he accepted the trust, and if so whether he has discharged any part of his liabilities as executor, by receiving or applying any of the funds of the estate as trustee, or whether he should be prevented from receiving any part of such funds as trustee, &c.

Besides, the defendants have answered the whole complaint. The defendants can demur to the whole complaint or answer the whole complaint, or demur to part and answer part, but not answer and demur to the whole complaint or answer and demur to the same parts of the complaint. The demurrer therefore is overruled.

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\*It appears that John Smith died in March, 1861, leaving his last will and testament in full force and effect, and leaving his widow Mary and seven children surviving him. His will provided that his whole estate should be sold, and the proceeds divided into eight equal parts, one of which he gave to the widow, and one to each of his several children, all the legatees except Charles and Basil, and his only daughter, the plaintiff in this action, to account for certain advancements made to them by the testator in his lifetime; and the defendants W. T. Smith and John R. Smith were appointed executors upon condition of giving bond and lawful security for the faithful performance of their duties. Of the share of Lucy, the will gives to W. T. Smith \$30,000 in trust for Lucy during her natural life, and at her death over to her issue.

The executors named in the will executed the required bond, qualified as executors, and entered upon the administration of the estate. According to the directions of the will they proceeded to sell the real and per-

sonal property of the estate, and sold during the year 1861, and the year 1864, the whole estate, except the stocks and notes held by the testator at his death. All the lands and negroes, except some town lots at Laurens and Abbeville, were sold in the year 1861, on a credit of one and two years, as the will directed. The lands and negroes then sold were purchased by members of the family, except the Kinman lands, which were purchased by Waddy T. Irby, who, in the life time of testator and after the execution of the will, had intermarried with the plaintiff Lucy, and who subsequently fell in battle during the late war.

The purchasers, including Waddy T. Irby, executed notes to the executors for the purchase money. Lucy herself made no purchases. The executors proceeded to collect funds due the estate upon personal notes and from dividends upon stock, and to pay out upon liabilities and advance to distributees, until during the year 1863, they found themselves in possession of a large amount of Confederate currency. There is no allegation

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or proof that any part of this money \*was improperly received. The executors allege that of this money W. T. Smith invested \$13,400 in Confederate bonds as trustee for Lucy, and produce bonds in Court with the words "Bonded for Lucy Irby, February 20th, 1863," indorsed upon each bond. During the year large amounts were advanced to the other legatees in Confederate currency.

The aggregate of these advancements, added to the amount alleged to have been invested for Lucy, make a larger sum than the executors had in their hands in the year 1863, according to their returns to the Ordinary. It is argued, therefore, by plaintiff's attorney, that the investment for Lucy could not have been made as alleged. While an investment of their own funds in Confederate bonds for Lucy's benefit might not, under the circumstances be sustained, yet payments to legatees who were sui juris at their request or with their consent, was certainly legitimate, although made with the private funds of the executors, and if advances were kept within the amount of the respective shares of the legatees, the executors would be entitled to be credited therefor. The executors had in their hands during the year 1863, funds of the estate to an amount largely in excess of the sum alleged to have been invested for Lucy's benefit. They are entitled to the presumption that they invested these funds of the estate for Lucy, until the contrary appears, and a breach of trust will not be presumed where fidelity is consistent with the facts that appear. I therefore find, as matter of fact that the funds invested that year for Lucy, were funds of the estate of John Smith.

In January, 1864, at the request of some of the legatees, the remaining unsold real

property of the estate, consisting of town lots at Laurens and Abbeville, was sold. The purchaser of the Abbeville town lots paid his bid in Confederate bonds. \$14,900 of these bonds were appropriated by W. T. Smith, as he testified, for the trust estate of Lucy, and the bonds were produced in Court, indorsed as the other bonds previously referred to. W. T. Smith also produces two receipts which were signed by his cestui que trust Lucy.

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\*For the purposes of this decree it will be necessary to copy one only, to wit: "Received of W. T. Smith, my trustee, 115.72, it being a portion of interest due on trust funds in my hands, with commissions added. Feb. 18, 1864. Lucy Irby."

In August, 1866, by agreement all the legatees met and made a settlement of the estate among themselves, which settlement was subsequently affirmed by all of the parties before the Ordinary and made of record. It is alleged in the complaint that this was sham and not intended to be binding upon the parties, and as to this point much testimony has been submitted. I am satisfied from the testimony that this settlement was intended to be final and conclusive as to all the matters embraced in it. The whole estate, except the stocks, had been sold, and most of it purchased by several of the legatees. Many of the notes held by the testator in his life time were produced at this settlement, and the liabilities of each legatee on account of advances made by the testator in his lifetime, and by the executors afterwards, and an account of the purchases at the sale of the estate were ascertained. The executors still held the stocks and a number of the notes. The stocks were then divided according to their full value, by agreement; each legatee receiving in stocks such an amount which, added to what each had previously received, made all equal.

As previously stated, W. T. Irby, then the husband of Lucy, had, at the sale in 1861, bid off the Kinman land, and had, for the amount of this bid and for some other property of the estate bought by him, executed his note to the executors, with his mother as surety. Waddy Irby had died during the war, and by an arrangement between his mother and the executors, his note was cancelled and given up and the land given up to the executors. At the settlement above referred to this land was assigned to C. L. Smith, one of the legatees.

Before this settlement the parties in interest had become aware of a large outstanding

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liability of the estate. The testator in his lifetime had signed a note as surety to one Dullas, a resident of Philadelphia, upon which action was about to be brought and the chief burden of the payment of which would probably fall upon the estate of testator, and upon which judgment was subse-

quently recovered for about \$125,000. The settlement above referred to was hastened and had, with the understanding among the legatees, and for the avowed purpose of throwing difficulties in the way of the collection of the liability, that a compromise of it might be more easily effected.

At the time of said settlement, a number of personal notes were left in the hands of executors, the proceeds of which were to be applied to the Dullas claim, and to the other liabilities of the estate, and the balance if any, to be divided among the legatees. The Dullas claim has been compromised for a comparatively small sum and extinguished by the executors. For the notes left in the hands of the executors they have not accounted.

At what is called the settlement, \$1,700 face value in Ga. R. R. stock was added to the \$28,300 previously invested for Lucy, making the \$30,000 full value, provided by the will as a trust fund for the benefit of Lucy. Lucy was also charged with the amount of the purchases of her husband, W. T. Irby, at the sale, except the Kinman land, and charged also with advances made to her by the testator in his life time, and after the execution of the will. The defendants' attorneys allege that these charges were made with the consent of Lucy, and I find as matter of fact that she did consent.

The foregoing statement I find to be the facts in this case.

The first question of law arising on the facts, relates to the investment in Confederate States bonds by W. T. Smith for Lucy. W. T. Smith was appointed by the will trustee for Lucy, and one of the executors. He qualified as executor and there is no question that he accepted the office of trustee. It is not alleged or proved that the Confederate States currency came to his hands im-

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properly, for there is nothing to show that existing, and secure investments were called in, but, on the contrary, it is to be collected from the evidence in the case that these funds were realized from personal notes due the testator, and sale notes past due, which it was the duty of executors to collect, and for which they would have been responsible if lost through their negligence; and if it was their duty to collect these demands, it is a historical fact that the only currency in which they could be paid was Confederate States currency.

It has been repeatedly held by the Supreme Court of this State, that it is not a breach of trust for a fiduciary to invest Confederate States currency that he has received in Confederate States bonds. (West v. Cauthen, 9 S. C. 45.) If such investment is not in itself a breach of trust, does the fact that it was made for Lucy at the time it was made it so? This question must be considered from the point of view of the trustees at the



time, and in connection with the circumstances existing at the time. How much wiser we often are after the event. Several of the legatees had bought largely at the sales and given their notes. They naturally expected these purchases to be set off against their distributive shares of the estate. Large sums in Confederate States currency were being paid by the executors to the distributees at their request, which, of course, would be set off also. Lucy had bought nothing, therefore had received no Confederate States currency. The will required that \$30,000 be invested for her, and this was the only investment they were required by the will to make. (Story's Eq. § 90, cited in Lay v. Lay, 10 S. C. 215.)

The Confederate currency was as good as any assets they had, for all the notes they had could have been paid in that currency. They were executing the will. The circumstances of the estate justified the appropriation of that amount to that object, and the cestui que trust subsequently received part of the interest on the investment. It will be observed that there was no change of investment by the trustee, but when in funds as executors of an estate out of which a trust fund was to be raised, he invested funds of

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\*the estate for the benefit of the trust estate, and thereby and then changed his relations to the funds so invested, ceasing as to that investment his functions as executor and becoming trustee. And the cestui que trust being sui juris, having acquiesced in the investment by receiving interest, and by lapse of time, can no more charge him with the loss of the investment on the ground that the investment was made before the settlement of the estate, than other distributees could charge him for advances made to them in Confederate States currency, before the final settlement of the estate.

I therefore find as a matter of law that W. T. Smith is not responsible for the loss of the funds invested in Confederate States bonds for the trust estate of the plaintiff Lucy. (See West v. Cauthen, supra.)

I have already found as matter of fact that the settlement of 1866 was intended by the parties to be final and conclusive as to all the matters covered by it. It follows that it is binding upon the plaintiff, unless it can be impeached for fraud. It is competent also to show a mistake in the calculation. The allegation that the settlement was sham, and that the plaintiff Lucy was imposed upon by false representations to that effect, is not sustained by the proof. The plaintiff herself acted under it and disposed of a part of the property assigned to her then, as if she knew that her title to it was absolute. It will be remembered that the shares of the distributees were then made equal, or nearly so, by adding to what each legatee had received

such an amount in stocks as would produce that result. Except the assignment of the Kinman land, under the circumstances previously stated, to C. L. Smith, only stocks were divided at that settlement. And these were estimated at their face value because, as was testified by several of the parties at the hearing, they were utterly ignorant at the time of their value.

So none of the parties were in a condition to withhold any knowledge or practice any concealment in regard to these securities, or knowingly exercise any influence hurtful to others or advantageous to themselves. (Hill

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Trust, 161 \*et seq.) They all stood upon the same plane, one with as much knowledge as another. There was, therefore, no room or ground for the inference of fraud from the relations of the parties. If the division subsequently turned out more disastrously for some than for others, it was a misfortune, and does not affect the character of the transaction. That must be determined by the circumstances and facts that attend the transaction itself. When Lucy agreed to the settlement, it may be observed that she was dealing not only with the executors as such, but with all the parties in interest, and it certainly was competent for her to bind herself to all the settlement embraced in the absence of fraud, and no fraud is shown.

Although the settlement was spoken of and called a final settlement, in point of fact it was not so, for a large number of notes, assets of the estate, were left in the hands of the executors to be administered. The statute of limitations does not begin to run in favor of executors from each transaction, although that transaction may be considered as final to all matters embraced in it, but only from a settlement or accounting embracing all matters relating to the trust. This settlement, by the admission of all parties, contemplated a future and further accounting by the executors, which has not been had, and the statute, therefore, has not yet begun to run in favor of these executors. The settlement, then, is yet open for the correction of error of calculation.

It is therefore ordered and adjudged that neither the executors nor W. T. Smith are liable for losses on account of the investment of Confederate States currency in Confederate States bonds, for the benefit of the plaintiff, Lucy Dickerson. That the settlement in 1866 between all the parties was a valid and binding settlement, and only open for errors of calculation. That the executors do account for the remainder of the estate of John Smith, unaccounted for, before the Master of Laurens County. That the parties have leave to apply at the foot of this decree for such orders as may be necessary to complete the settlement of the estate.

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\*From this decree both parties appealed.

The exceptions raise the points considered in the opinion of this Court.

[For subsequent opinions see *Ex parte Johnson*, 25 S. C. 106; *Ex parte Smith*, 25 S. C. 108.]

Messrs. George Westmoreland, W. H. Parker, Thomas Westmoreland and James Farrow, for the plaintiffs.

Messrs. Holmes & Simpson, Y. J. Pope and B. W. Ball, for defendants.

April 19, 1882. The opinion of the Court was delivered by

Mr. Justice HUDSON. On the first day of January, A. D. 1856, John Smith, late of the County of Laurens, State of South Carolina, duly executed his last will and testament, wherein he bequeathed to his wife, Mary, in lieu of dower, the one-eighth part of the proceeds of his estate (which was directed to be sold by his executors on a credit of one and two years), and to each of his seven children the one-eighth part of the proceeds of the estate when sold as directed. All the children were required by the testator to account for certain specific sums of money advanced to them previously by him, except Basil H. Smith and Lucy W. Smith, who are excused by the testator from accounting for any advancements previously made to them by him. In the copy of the will contained in the brief the testator is silent as to his son, Charles L. Smith, whose name is not mentioned, nor is any disposition made of the one-eighth which was evidently intended for him—clearly a *casus omissus*.

Of the share of Lucy the testator thus disposes: "The remaining one-eighth part of my estate, it is my will be disposed of as follows, to wit: I give to my son, Wm. T. Smith, thirty thousand dollars thereof to be held by him as trustee for the sole and separate use of my daughter, Lucy W. Smith, during her natural life, neither the principal sum nor the income thereof to be subject to the debts or contracts of any husband she may hereafter have, and after her death the same to go to such children as she may have, if any, discharged of all trusts. But should my said daughter die leaving no issue surviving her then the said funds to be distrib-

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uted among her next of kin \*as in cases of intestacy. The remaining portion of said one-eighth part of my estate I give to my said daughter, Lucy W. Smith, absolutely, she not to account for advancements heretofore made by me."

Wm. T. Smith and John R. Smith were nominated as executors of the will, and were required by the testator to give well secured bonds for the faithful discharge of their duties.

In March, A. D. 1861, the testator died, leaving this will of full force, and leaving an estate estimated to be worth five hundred thousand (\$500,000.00) dollars. He left sur-

viving him his widow, Mary Smith, and seven children, Wm. T., John R., Joel F., and James, children of his first wife; and Lucy W., Basil H. and Charles L., children by his surviving widow. The executors nominated in the will had the same duly admitted to probate, and took upon themselves the administration, by qualifying and giving bond, as required by the testator.

In 1861 they made several sales of property, real and personal, one on April 11, one on April 16, one on November 19; and again in January, 1864, two separate sales, mostly of real estate in the towns of Laurens and Abbeville. At these sales the four elder brothers, sons of the first marriage, purchased largely of land, negroes, and other personalty; the widow bought a part of the realty, but Basil H. and Charles L., who were minors, and Lucy W., who had been married to Waddy T. Irby, purchased nothing. W. T. Irby, her husband, however, did buy freely of the personalty, and also purchased the Kinman tract of land for \$17,000, for all of which he gave his notes to the executors. The result of all the sales was that the bulk of the real and personal estate sold was bought by the executors and their two full brothers, Joel F. Smith, and James Smith, the widow getting but a small part, and her three children nothing by purchase. Besides the land and negroes, the estate consisted of various choses-in-action, and a large amount of stock of railway companies and banks.

The war closed before there was any settlement of the estate, and indeed it was not in a condition to be settled. All the property had not been sold, the choses-in-action

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remained \*uncollected, and the debts of the estate were not all paid. Such was the condition of things when in 1866 it became known to the executors that one Mr. Dullas of Philadelphia held a bond against Augustus M. Smith of Abbeville for the purchase money of negro slaves for about one hundred thousand (\$100,000) dollars, upon which John Smith, the testator, was a surety. This information was communicated to the family, and very naturally created uneasiness and alarm. The condition of the estate of the principal debtor, and the circumstances of the co-sureties were such as to excite a fear that the burden of this claim, if enforced, would fall heavily upon the estate of John Smith, and probably prove disastrous.

The validity of such debts was at that time seriously questioned, and compromises were being very generally made in consequence of their doubtful character. Eminent lawyers were consulted by the executors as to the best course to be pursued. All united in counseling the executors to hasten the settlement of the estate, with a view of enabling them to obtain of Mr. Dullas as liberal terms in settling this debt as possible. Impressed with this view of expediency and policy, they



hastened to take the necessary steps to carry it into effect. Although the estate was in no condition to be partitioned and settled, yet family meetings and consultations were speedily had, at which the executors advocated the urgent necessity of dividing the estate, because of the danger impending from the large claim of Dullas.

Accordingly, the legatees held their first meeting at the house of W. T. Smith for the purpose of carrying out this scheme of a settlement, but Lucy W., who was then a young widow, her husband having been killed in battle, not being present, the meeting was adjourned to be held at a future day at the residence of the testator's widow, and Lucy was sent for. Pursuant to adjournment all parties met at Mrs. Mary Smith's on August 21st, 1866, and after a full explanation by the executors of the nature of the crisis, a family settlement and partition of the estate was effected, and receipts for their respective shares were passed by the parties to the executors. A notice was then published in a

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newspaper of the county to the effect that the executors would, by permission of the Ordinary, settle the estate of the testator before that officer on September 25th then next ensuing, and calling upon creditors to present their demands on or before that day.

On the day appointed all parties in interest met at the office of the Ordinary for the County of Laurens, and there, with slight and unimportant alteration, had the partition and settlement of the previous meeting confirmed by a decree of that officer, and new receipts passed. This was accomplished on September 27th, that being the day on which the adjustment of the accounts, begun on the 25th, was brought to a close, but by some discrepancy which the Ordinary himself cannot explain, his decree bore date November 2d, 1867.

In order to give the settlement thus effected the appearance at least of being full and final, the legatees signed and delivered to the executors a paper purporting to be a transfer and assignment to the said executors of a large number of uncollected choses-in-action belonging to the estate, but which were not embraced in the division and settlement. In this transfer to the executors they pretend to make the said executors their agents to collect these assets, and with the proceeds to pay the debts outstanding against the estate, and to divide the surplus among the legatees.

In the discharge of this duty, they proceeded to institute suit upon some of these choses-in-action, and to collect others without suit, and, in so doing, they styled themselves executors, and suits were instituted against them as such—notably the suit of Mr. Dullas, in which he recovered judgment against them as executors for the sum of one hundred and twenty-five thousand (\$125,-

000.00) dollars. In the year 1870, they compromised this judgment debt by paying as the share of John Smith's liability thereon, the sum of five thousand dollars, a like sum being paid by each of the other obligors.

This large and only debt having been paid, the plaintiff, Lucy W., (who had removed to Georgia and intermarried with F. A. Dickerson), applied to the executors to have a final and bona fide settlement, alleging that the only obstacles to a settlement, to wit: the Dullas debt, had been removed by the

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\*compromise effected. Failing to induce the executors to consent to a settlement, she, her husband, and her children, in March, 1872, began this suit, the object of which is to compel the executors to account, to have the true amount of her one-eighth part of the estate ascertained and paid over to her, and the trust portion thereof delivered into the hands of a trustee other than W. F. Smith. In her complaint she alludes to the settlement of August 21, 1866, at Mrs. Mary Smith's, which was afterwards confirmed in the office of the Ordinary, Sept. 27, 1866, as one made at the instance of the executors, and elder legatees only as a temporary expedient to enable them to deal more advantageously with Mr. Dullas, whose claim was frightfully large. Plaintiffs charge that the said settlement was therefore merely pretensive, and so understood by all; that it is fraught with gross errors, that the accounts and partitions were stated and arranged by the executors and elder brothers without any explanation to herself and younger brothers, with the express understanding and promise that a final and correct settlement should be made so soon as the Dullas debt could be arranged. Under such representations and promises, she signed the receipt without understanding or deeming it necessary to understand the statement of the accounts and partitions, the result of which is, that she has received of her fictitious share the merest pittance.

The executors and their co-defendants demur to the complaint for multifariousness, in that several causes of action are joined improperly, and because, as to some causes of actions, the complaint does not state facts sufficient to constitute such.

The defendants answer to so much of the complaint as demands an accounting, and interpose as a bar thereto the settlement of Sept. 27, 1866, under the decree of the Ordinary, which they allege was well understood, was full, fair, correct and bona fide, made and intended as a finality; that the executors were thereby discharged from further liability by the Ordinary, and the plaintiffs are consequently estopped by the decree in the suit to which Mrs. Dickerson was a party. They also interpose the plea of the statute of limitations as a bar to the action. In behalf of W. T. Smith, as trustee of Lucy

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\*W. Dickerson, the special defense is set up, that during the war he invested of her trust estate twenty-eight thousand three hundred (\$28,300.00) dollars, in Confederate States bonds, and seventeen hundred dollars in Georgia Railroad and Banking Co. stock.

In 1881, at the February Term of the Court of Common Pleas for the County of Laurens, this cause was heard by Judge W. H. Wallace. A great deal of testimony, oral and written, was submitted, and the brief brought up to this court is necessarily voluminous, because the questions upon which the issues turn are really more of fact than of law. The presiding Judge overruled the demurrers to the complaint, as we think very properly, because there is no misjoinder of causes of action in violation of the provisions of the statute, nor can it be correctly alleged that, as to any branch of the case, there is a failure to state facts sufficient to constitute a cause of action.

Proceeding then to determine the cause upon the issues raised by the complaint and answer, the presiding Judge finds as matters of fact: 1st. That W. T. Smith, as trustee for Lucy W. Dickerson, did, in the years 1863 and 1864, invest of the funds of the estate of John Smith twenty-eight thousand and three hundred (\$28,300.00) dollars in bonds of the Confederate States, and seventeen hundred (\$1,700) dollars, in stock of the Ga. R. R. and Banking Co. 2. That the settlement of Sept. 27, 1866, confirmed by a decree of the Ordinary was intended to be final and conclusive as to all matters embraced in it. 3. That it was, however, only a partial settlement, and left undivided a large number of choses in action of the estate in the hands of the executors, to be collected and applied to the payment of the Dullas claim, and other liabilities of the estate. Wherefore the fiduciary relation of the executors to the legatees and creditors was not terminated by this settlement, which he finds "was hastened, and had with the understanding among the legatees, and with the avowed purpose of throwing difficulties in the way of the collection of the liabilities (the Dullas debt), that a compromise of it might be more easily effected." 4. That at the said settlement Lucy W.

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\*was charged with the purchases made by her husband, W. T. Irby, at the sale, except the Kinman land; and also with all advancements made to her by her father in his lifetime: but that this was done with her consent. As matters of law he concludes, First, That the investments made by W. T. Smith in Confederate Bonds were properly made. Second, That when made, there was nothing in the course of the administration to prevent W. T. Smith from receiving this fund from the executors for his *cestui que trust*, and that the said Smith, as trustee, is not chargeable with the loss of the investment.

Third, That the settlement of Sept. 27, 1866, being intended to be final *pro tanto*, cannot be impeached except for fraud, but may be corrected for errors in calculation. That the attempt to impeach it for fraud having failed, it must stand, except as to errors in calculation. Fourth, That the settlement, however, was not of such a character as to give currency to the statute of limitations pleaded by the executors as a bar to an accounting, because it was not an act showing an intention on their part to divest themselves of the trust which their office imposed. A large part of the estate still remained in their hands, for which they have not accounted, but for which they are liable to account. Judgment is accordingly entered against the executors for this further accounting alone, and the investments by W. T. Smith are sustained.

From this judgment both plaintiffs and defendants have appealed to this court, the defendants from the decree of the Judge on the question of the bar of the statute of limitations, and the plaintiffs from so much of the decree as determines questions of law and of fact against them.

It is with hesitation and reluctance that this court will reverse findings of fact by the court below. The Circuit Judge possesses a fairer opportunity to weigh testimony, especially that taken in open court, than is or can be enjoyed by this court. The testimony, however, in this case comes to us so fully reported, and is of such a character as to enable us to weigh it satisfactorily. The case has been fully and ably argued on both sides on the questions of fact as well as of

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law \*and we have carefully reviewed and considered the whole case as presented, feeling a lively sense of the interesting nature of the questions involved, and the grave consequences of the issues to the parties litigant.

We concur with the Circuit Judge in holding that the statute of limitations is not a bar to this action. We do not perceive in the proceedings in the Ordinary's office, Sept. 27, 1866, as explained by the testimony of the witnesses, and by the subsequent conduct of the executors, an intention on their part to divest themselves of their trust. It was at most only a partial settlement and partition of the estate, and left in the hands of the executors a large amount of assets for future administration. The whole record of the proceedings, when examined, reveals this fact, and the testimony of witnesses confirms it. Neither the language of the decree (if it can be properly so called) of the Ordinary, nor the terms of the written instrument in which the legatees feign to re-transfer to the executors the uncollected assets, but which forms no part of that record, can prevail over the real facts of the case, so as to give currency to the statute of limitations as if



it were a final laying aside of their trust by the executors. It in fact was not such an act, was not intended to be such an act, nor could it have been such in the condition in which the estate then was, and necessarily the trust must have for a season continued.

It is only when a fiduciary really lays aside his trust, or does some act manifesting clearly his intention to do so, that the statute begins to run against the trustee of an express trust. "It commences to run when it appears that the administrator has done some act brought to the notice of the parties affected by it, equivalent to an abandonment of such office, although such act may be in itself wrongful." Such is the language of the court in *Renwick v. Smith*, 11 S. C. 305, and this is in harmony with *Miller v. Alexander*, 1 Hill Eq. 25, *Long v. Cason*, 4 Rich. Eq. 60, *Sollee v. Croft*, 7 Rich. Eq. 34. Beyond this wholesome rule we are not prepared to so extend the rule as to apply the statute to acts of intermediate administration. If each separate act of an executor constitut-

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ed an event in his office from which the statute, as to that special transaction would take currency, manifold would be the risks and hazards encountered by distributees, legatees and cestui que trusts generally. This plea of the defendants must fail, and the liability of the executors to account for their entire administration is unaffected by it.

We cannot concur, however, with the circuit judge in the view he has taken of the settlement of September 27, 1866. The testimony upon this issue is very conflicting and irreconcilable. Mrs. Dickerson, her husband, W. F. A. Dickerson, and her brother Basil H. Smith most positively state—especially the sister and brother—that it was not designed to be correct or binding; that it was merely pretensive and a sham, intended only as an expedient to enable the executors to obtain liberal terms of Dullas. They say that the scheme originated with the executors under legal advice, and was by them and their full brothers advocated and urged upon the younger children by the second wife, to whom they represented that a future second settlement would be had so soon as the Dullas debt could be arranged; and that all matters would then be fairly and equally adjusted, without regard to the then temporary statement of the accounts. Though advised against signing any papers by her counsel, Mrs. Dickerson says that she, relying upon the solemn assurances of the executors and their brothers, that it would not bind her, yielded to their importunities, and without examination into the correctness of the statement of the accounts, believing that she would be fairly dealt with, signed the receipts. Her brother, Basil H., corroborates her fully; but the executors and their full brothers, and also Charles L. Smith strongly deny their version of the case, and asseverate

that the settlement was bona fide and binding, and so intended. We must therefore look to the record and the surrounding facts and circumstances to ascertain, if possible, which of this array of opposing and highly respectable witnesses are most strongly corroborated.

In the first place, the entire estate real and personal at that time (except perhaps some unsold fragment) had been, under direction of the testator, converted into choses-in-ac-

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tion; and the stocks of banks and railway companies left by testator composed, with these choses-in-action, the whole estate or assets in the hands of the executors. We cannot think that these intelligent executors would so stultify themselves, nor that learned counsel would advise them to do so imprudent an act, as to eagerly parcel and partition out to the legatees the only means possessed by them to pay debts, to wit, personal assets, which the legatees in turn could easily place beyond the reach of creditors, and thus greatly accelerate the ruin of the executors. Such a proposition bears incredibility on its face; whilst it is consistent with the prevailing conduct of people in that day and time, when debts for slaves were rarely paid except by compromise, that these executors should have urged upon their co-legatees just some such a fictitious settlement as Mrs. Dickerson says this was intended to be; and furthermore that it should have been made of record in court, with a view to impress a creditor with an enlarged idea of the difficulties lying in his way of collection, and thus to induce him to compromise. We are now dealing solely with the fact; of the morals of the act we will speak hereafter.

Again, we are loth to believe that these brothers and trustees would wilfully and deliberately so settle with an only sister, then a widow with two infants, as to deprive her of her whole patrimony; and that to effect so great a wrong, they would commit so gross an error as to charge her with her husband's purchases, and with those advancements which her father declared in his will she should not account for. Were the trustee who would do such a thing a stranger in blood to his cestui que trust, it would not be tolerated in a court of justice; but when the trustees, as in this case, are brothers of age and experience, and the cestui que trust is an only sister, just past her majority, and the widowed mother of two infants, charity to our fellowmen constrains us to think that such a settlement was not designed to be permanent and binding, but only pretensive and temporary. That the partial division of September 27, 1866, was intended merely as a stroke of policy, and to be temporary and subsequently corrected after the debt of Dullas was arranged, can be reconciled to an in-

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stinctive desire to save as much as possible

of an estate from a security debt. It is palliated by views of supposed business shrewdness and tact. But that a settlement so ruinous to a weak and helpless sister was designed by her trustees, who are her brothers, to be binding, is almost incredible.

When we come to consider the crisis of the estate, the material of which it was composed, the motive for the appearance, but not reality of a settlement; the time, place, and circumstances under which it was made; the haste that attended it, the form in which the accounts are stated and the papers drawn; the gross error and wrong apparent in ascertaining the share of Lucy W., and the subsequent course of conduct of all the parties, we are constrained to the conclusion that, at the time the parties did not intend that this partial distribution and settlement should be binding; and that their real intention was to use the exhibit or record of it as an expedient to accelerate the settlement of a heavy debt.

This, however, say the counsel for defendants, stamps the transaction with immorality, and fraud towards creditors, and that Lucy W., who knew of the motive, is particeps criminis, and is now estopped on that ground from disturbing the partition. We do not regard her as in pari delicto. She was not a trustee for creditors, had no duty to perform towards them as did the executors. They are the custodians of the estate, and trustees both for creditors and legatees. She did not stand on the same plane with her trustees. The scheme was of their own conception, and into it she was by them urged as the only means to save herself and others from ruin. That faith, confidence and trust which they inspired in her, they cannot now be allowed to reward by pleading this settlement in bar of a fair, full and correct accounting.

Such being our view of the facts touching the partial distribution of September 27, 1866, we are brought to an examination of its correctness and fairness, so far as the plaintiff Lucy W. is concerned. It is very evident that it cannot stand the test of scrutiny, and in the interest of the remaindermen, her children, as well as of herself, must be reopened. She is charged with over forty-

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one thousand (\$41,000) dollars of notes and accounts of her former husband, for which she is not liable, but we are told by witnesses that this amount really includes advancements with interest made by the testator, and for which she was not to account, which amounted to over thirteen thousand (\$13,000) dollars; and this testimony is verified by a statement which appears to have been made first in the figures before the Ordinary. Whether she consented to this or not, does not affect the case provided the accounts were made up, as we have concluded, with the understanding that in a subsequent accounting all errors should be corrected, and

a fair distribution made; and this we think equity and good conscience require to be done. But Mrs. Dickerson states that she was not informed as to how the account against her was made up, but left the whole matter to the executors, confiding in their assurances that the statement should not be binding. In this she is powerfully corroborated by the testimony and facts and circumstances above noted.

It remains only to consider the defence of Wm. T. Smith to Lucy W.'s claim to an account of the trust fund alleged to be in his hands. He says that he invested twenty-eight thousand and three hundred dollars (\$28,300) of this in Confederate States bonds, about \$13,400 in July, 1863, and \$14,900 in January, 1864, and seventeen hundred (\$1700) dollars in Ga. R. R. & Banking Co. stock; and the circuit Judge has found the fact so to be, and has sanctioned the investment. Could we agree with the circuit Judge in his finding of fact, we would hesitate to sanction the investment in Confederate bonds (\$14,900) made in January, 1864.

On January 4, 1864, the executors sold for cash in Confederate currency, real estate in the town of Laurens, to the amount of twenty-eight thousand and four hundred dollars (\$28,400.00) all of which, except to the amount of four thousand and three hundred dollars (\$4300) was purchased by themselves. On the 11th day of the same month they sold real estate in the town of Abbeville for the sum of fourteen thousand and six hundred (\$14,600) dollars cash in Confederate currency. This was in direct violation of the direction of the testator, who enjoined upon them to sell on a credit of one and two

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years, the \*purchase money to be secured by bond with ample security. To make such sales, at such a time and for cash in a currency vastly depreciated and rapidly becoming worthless, was in violation of the letter of this authority, and against every dictate of prudence. The case appears still more unfavorable to them in becoming the purchasers at their own rash sale at Laurens, and selling to their full brother Joel F. Smith the property at Abbeville, and then claiming to set apart to the trust estate of their only sister, a widow with children, fourteen thousand and nine hundred dollars (\$14,900) of this almost worthless paper at par value. This Court has gone as far as equity and justice will countenance in sustaining investments in Confederate funds by fiduciaries, but we are not aware of any case that goes to the extent of sustaining a transaction similar to this.

But we are constrained to reverse the Court below in finding as a fact that W. T. Smith as trustee made any investment of trust funds in Confederate bonds. That he and his co-executor may have intended to set apart Confederate bonds for this trust



estate, and that the matter was talked of is perhaps true; but that this was ever done in a legal manner and in due form, we have not been able to discover satisfactory proof from the evidence in the brief. In fact, that evidence upon which most reliance is to be placed, satisfies us that the trustee is mistaken in saying that he made the investment. If it be true, as he says, that he regarded the settlement of Aug. 21, 1866, confirmed by the judgment of Sept. 27, 1866, as bona fide and correct, and final and binding as to all matters embraced in it, then truly was it a matter of vital importance that his double duty as executor and as trustee of Lucy should have been rigidly and faithfully discharged on so serious an occasion. If he had invested in good faith the trust estate almost entirely in these bonds, then was the time to have made the fact clearly known and plainly to appear. If he on the contrary held no such investment in hand, then his plain and sacred duty was to have stepped forward and protected her interest and not to have permitted that which had no value to have been set down to the account of her trust estate, as we will see was done.

Take either horn of the dilemma, and it

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will be seen that he utterly failed to discharge his duty both to himself and to her. Her share, trust and absolute, of the estate was made up in that family settlement as follows, viz.:

Lucy W. Irby, notes and accounts of	
W. T. Irby, .....	\$41,012.94
417 Shares Commercial Bank, at	
\$25 per share, .....	10,425.00
6 Shares S. W. R. R. Bank, at \$125	
per share, .....	750.00
101 Shares G. & C. R. R. Stock, at	
\$20 per share, .....	2,020.00
4 Shares Newberry Bank, at \$25	
per share, .....	100.00
August 21, 1866, .....	\$54,307.94

Below this statement appears her receipt for all the above except thirty thousand dollars, to wit,—\$24,307.94, showing that the balance of the aforesaid assets must be looked to out of which to find her trust estate. As was said above, the confirmation in the Ordinary's office changed the amount but slightly, but the above is the first and only detailed statement of the mode in which Lucy's share of the estate is ascertained. It is silent on the subject of Confederate bonds. They are entirely ignored, and the above assets are made to foot up her entire one-eighth of the estate. It is furthermore a noteworthy fact, although it appears in testimony that the Kinman land was taken from her, and allotted to Charles L., yet she stands charged here with so large an amount of notes and accounts of her husband, W. T. Irby, that she is either charged with the note for that land, or else Irby must have bought enormously of the personal property. It is further to be noted that in neither the set-

tlement at Mrs. Mary Smith's, nor at the office of the Ordinary, nor at any other period of the administration, do we find, or hear, of any receipt given by W. T. Smith as trustee to the executors for this trust estate of Lucy, nor any part thereof, whilst receipts are given by every other legatee.

From a review of all the evidence we are forced to the conclusion that Wm. T. Smith, as trustee, not only did not invest funds in Confederate bonds as claimed, but that the executors have not as yet turned over and delivered to him any part of the said trust estate except the seventeen hundred dollars in Ga. R. R. shares; and to the trustee of Lucy W. these executors are still liable to account.

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\*In reaching this conclusion we are influenced also by the fact that at the time the first investment in Confederate bonds is claimed to have been made, to wit, in 1863, the accounts of the executors do not show in their hands funds sufficient to make the investment, and we also give due weight to the fact that at no period when these investments are claimed to have been made was the estate in a condition to enable the executors to consent to this legacy to Lucy, or to pay over to her trustee the trust portion thereof; and so they seem to have thought, as is evidenced by the fact that no receipt has been passed nor settlement made betwixt these executors and Lucy's trustee; and W. T. Smith as trustee seems to have acted prudently in not giving a receipt.

We must not be understood, in what we have said regarding the sales of the lots in the towns of Laurens and Abbeville, as declaring those sales illegal and void, as that question is not before us; but we only intend to say that if the fact were that so late as 1864, the executors converted real estate into Confederate bonds as an investment for a trust estate, we would not readily sustain such conduct; but we have concluded that the investment was not in fact made by Lucy's trustee.

Wherefore it is the judgment of this Court that, in the interest of, and on behalf of the legatee Lucy W. Dickerson, and of her children as remaindermen, the respondents, John R. Smith and Wm. T. Smith, as executors of the last will and testament of John Smith, deceased, do account for the one-eighth part of the estate of said testator which came into their hands, or which should have come into their hands, in which said accounting reference must be had to the real facts and circumstances attending said administration and surrounding said estate, so that substantial justice may be done consistent with the principles herein announced, due effect being given only to the bona-fide dealings heretofore had betwixt said executors and legatee.

It is further adjudged that in view of the

attitude of Wm. T. Smith towards the said Lucy and her children as revealed in the progress of this litigation, some other fit and suitable person, upon the application of  
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Lucy, be appointed by \*the Court below to take charge of the said trust estate. Also should the one-eighth part of the estate of John Smith, when ascertained, be but thirty thousand dollars or less, then the whole must be regarded as trust property, and delivered to the trustee to be appointed by the Court below, she to receive only the excess of thirty thousand dollars, if such there should be, as her absolute estate.

It is further adjudged that the decree of the Circuit Judge be reversed in all respects wherein it is at variance with the judgment of this Court, and the principles herein announced; and lastly that the cause be remanded to the Circuit Court for the county of Laurens, for the purpose of carrying into effect this judgment in accordance with the facts as found, and the principles of law herein laid down.

#### 17 S. C. 313

#### WITTE BROS. v. CLARKE.

(November Term, 1881.)

##### [1. Courts ⇨475; Dower ⇨69.]

The Court of Common Pleas has concurrent jurisdiction with the Court of Probate in cases of dower. Therefore, after action commenced in the Common Pleas for the foreclosure of mortgages on a tract of land, and notice of lis pendens filed, the Court of Probate cannot entertain jurisdiction of a petition by the widow of a former owner for dower in such land.

[Ed. Note.—Cited in Shaw v. Barksdale, 25 S. C. 204, 213.

For other cases, see Courts, Cent. Dig. § 1232; Dec. Dig. ⇨475; Dower, Cent. Dig. § 240; Dec. Dig. ⇨69.]

##### [2. Judgment ⇨653.]

The rights of the mortgagees against a decree in the Court of Probate granting dower on such petition, are not affected by an application subsequently made by them in that Court for leave to become parties and refused upon the ground that the cause had ended, nor by their failure to appeal from such refusal or from the decree for dower.

[Ed. Note.—Cited in Re Mayo's Estate, 60 S. C. 408, 38 S. E. 634, 54 L. R. A. 660.

For other cases, see Judgment, Cent. Dig. § 1160; Dec. Dig. ⇨653.]

##### [3. Appeal and Error ⇨148.]

No person can appeal from a decree of the Court of Probate, except parties to the cause. They are the only "persons interested" in such decree, or that could be "injured thereby," within the meaning of section 57 of the Code of Procedure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 925; Dec. Dig. ⇨148.]

##### [4. Mortgages ⇨199.]

A mortgagee, put by the mortgagor in possession of the mortgaged premises for the purpose of having the rents applied to the interest due on the debt, must account for such rents,

and, if so put in possession before her assignment of the mortgage to third persons, she cannot credit the same on the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 520; Dec. Dig. ⇨199.]

##### [5. Constitutional Law ⇨93.]

Where a testator, who died in 1861, bequeathed to his daughter a sum of money which was not to be delivered until the executor had caused the same to be secured to such daughter, free from the debts, control, etc., of any husband she might marry, the executor in 1869

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could \*properly pay over this legacy to the daughter herself, then a married woman, the constitution of 1868 having effected that which the testator directed.

[Ed. Note.—Cited in Langston v. Smyley, 38 S. C. 124, 16 S. E. 771.

For other cases, see Constitutional Law, Cent. Dig. § 200; Dec. Dig. ⇨93.]

##### [6. Husband and Wife ⇨81.]

This money being lent to the husband under the security of his mortgage deed, the wife could assign such mortgage to secure the payment of debts due by the husband. Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581 [40 Am. Rep. 705] and Clinkscales v. Hall, 15 S. C., 602 approved.

[Ed. Note.—Cited in Gleaton v. Gibson, 29 S. C. 518, 7 S. E. 833.

For other cases, see Husband and Wife, Cent. Dig. § 335; Dec. Dig. ⇨81.]

##### [7. Constitutional Law ⇨93, 96.]

The fact that the marriage took place prior to 1868 does not affect the rights of the wife in this matter, no other rights having meanwhile become vested. Witsell v. Charleston, 7 S. C., 88, approved.

[Ed. Note.—Cited in Gleaton v. Gibson, 29 S. C. 516, 7 S. E. 833.

For other cases, see Constitutional Law, Cent. Dig. § 200; Dec. Dig. ⇨93, 96.]

##### [8. Husband and Wife ⇨144.]

Money of a wife lent to the husband to be accounted for by him when required so to do, is an interest-bearing demand from its date.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 551; Dec. Dig. ⇨144.]

##### [9. Marshaling Assets and Securities ⇨6.]

The rule requiring a creditor holding two liens to first exhaust that property on which a subsequent creditor has no lien, is inapplicable where its enforcement would operate to the prejudice of the prior creditor.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 7; Dec. Dig. ⇨6.]

##### [10. Judgment ⇨272.]

A decree is valid, although not filed within sixty days from the last day of the term of court at which the cause was heard. Koon v. Munro, 11 S. C., 140.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 512-523; Dec. Dig. ⇨272.]

Before Wallace, J., Kershaw, June, 1879.

Action by George W. Witte and Armin F. Witte as Witte Bros. against T. H. Clarke, Sallie L. Clarke, T. W. Lang, Harriet M. Lang, L. McCandless, T. L. Boykin and several judgment creditors of T. H. Clarke, commenced March 6th, 1877. By supplemental complaint filed in September, 1877, Mrs. Louisa G. Clarke was made a party defend-



ant. The nature of the action and the facts are fully stated in the opinion of this Court.

The Circuit decree was filed December 2, 1879. Omitting its statement of undisputed facts, it was as follows:

The supplemental complaint raises a question as to the validity of the judgment of the Probate Court adjudging that Louisa Clarke is entitled to dower in Green Hill plantation, and demands that she be required to establish her right to dower in this Court. This is asking in effect that the judgment of the Probate Court be treated as a nullity. This can only be done when it appears that the Court is entirely without jurisdiction of the subject matter in relation to which the judgment is pronounced. Jurisdiction in the allotment of dower is conferred by the constitution on the Probate Court. Errors of law by that Court, in a proceeding within its ju-

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risdiction, can only be corrected by appeal in the manner provided by law. The right of appeal from the Probate Court may be exercised by any one "interested in any final order, sentence or decree," of that Court. Any person desiring to exercise his right to have revised a proceeding in the Probate Court by the Circuit Court, must pursue the remedy established by law. There was no appeal in this case and the judgment is final and conclusive, and is proof of every fact necessary to support it. There is no proof of fraud or of secrecy, nor want of proper parties.

The next question relates to the validity of the assignments by Sallie L. Clarke to Thomas W. Lang and Leslie McCandless. Burwell Boykin died in 1861, leaving his last will and testament, by which, among other things, he bequeathed to his daughter, Sallie L., the sum of four thousand dollars, which was to take effect upon her attaining the age of twenty-one years, or marrying, but which she was not to enjoy until it was secured to her free from the debts, liability, contracts and disposition of any husband she might have.

The manifest intent of the testator was to create a separate estate for the benefit of his daughter that could not be taken by the creditors of her husband, or in any way be alienated by him. This much was expressly provided for. Nothing was said in the will as to the power of Sallie L. to control or dispose of the bequest. At the time the will was executed, a married woman had no power to alienate, dispose of or pledge, for her husband's debts, her separate estate. This rule has been changed by the constitution of this State adopted in 1868. We must suppose that Burwell Boykin, if he intended that his daughter should have power to alienate her separate estate, would have expressly bestowed the power upon her, as without such bestowal under the law as it stood in 1861 she could not do so. The state of the law at the time, taken in connection with the omis-

sion by the testator to provide for any control of her separate estate by his daughter, forces the conclusion that he did not intend that she should control it. If she had remained unmarried until she attained the age of twenty-one years, then while sole she

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would have had the power to dispose of her beneficial interest and thus defeat the trust; but the moment she married, disability intervened.

The power of married women over their property rights is enlarged by the constitution of 1868, and the law enacted in pursuance of it. This trust, however, is unaffected by the change in the civil status of married women. When a contract is made it is presumed to be made with reference to the existing law applicable to its terms, and a subsequent change of the law does not affect the law of that contract in existence at the time it was entered into; so, in analogy to this rule, a trust created must be presumed to have been created with reference to the law as it existed at the time, and a subsequent change of the law leaves the trust unaffected by the change. I conclude, therefore, that the assignments of the mortgage by Mrs. Sallie L. Clarke to Lang and McCandless are void and of no effect. This debt of the separate estate of Sallie L. Clarke does not bear interest, the funds being in the possession of her husband.

Miss Harriett M. Lang, holding a mortgage of both Jumping Gully Creek plantation and Green Hill plantation, must first exhaust the proceeds of the sale of Jumping Gully Creek plantation and for any balance go upon the Green Hill plantation, after prior liens upon Green Hill plantation are extinguished.

It is ordered, adjudged and decreed, that the order enjoining Mrs. Louisa Clarke from proceeding to enforce her judgment of the Probate Court for dower in Green Hill plantation be set aside and vacated. That the assignment by Mrs. Sallie L. Clarke to Thomas W. Lang and Leslie McCandless are null, void and of no effect. That Green Hill plantation be sold and the proceeds of the sale be applied first to the costs and expenses of the proceedings in dower by Mrs. Louisa Clarke in the Probate Court. Next to the payment of the judgment in dower by that Court in favor of Mrs. Louisa Clarke. Next to the payment of four thousand dollars, without interest, to T. L. Boykin for the use of Mrs. Sallie L. Clarke. Next to the payment of the balance, if any, on the debt to Miss Harriet M. Lang, secured by mortgage

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bearing date 25th March, 1870, \*the proceeds of the sale of Jumping Gully Creek plantation being first applied thereto. Next to the mortgage debt of the plaintiffs herein. And next to the debt of Miss Harriet M. Lang, secured by mortgage bearing date 17th March, 1876. That Jumping Gully Creek plantation

be sold and the proceeds be applied to the debt to Miss Harriet M. Lang, secured by mortgage bearing date the 25th March, 1870. That T. H. Clarke be barred and foreclosed of all equity of redemption in Jumping Gully Creek plantation and Green Hill plantation. That the parties or any of them have leave to apply at the foot of this decree for orders fixing the time and terms of sales ordered herein.

The exceptions to this decree are given in the opinion.

Messrs. Buist & Buist for plaintiffs.

Messrs. Leitner & Dunlap and W. G. DeSaussure for T. W. Lang.

Mr. J. T. Hay for Miss Lang.

Mr. J. H. Rion for T. L. Boykin and Mrs. S. L. Clarke.

Mr. L. F. Youmans, Attorney-General, for Mrs. Louisa G. Clarke.

Arguments of W. L. DePass, deceased, were read in behalf of Mrs. L. G. Clarke and L. McCandless.

April 26th, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. This action was commenced by the plaintiffs for a foreclosure of a mortgage on certain real estate, known as Green Hill plantation, executed by the defendant T. H. Clarke, and the other defendants, except Mrs. L. G. Clarke, were made parties, as claiming to hold liens by mortgage and judgment on the same real estate. After the action was commenced, and after the filing of the notice of the pendency of the action, the defendant Mrs. L. G. Clarke filed

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\*her petition in the Court of Probate, claiming dower in said plantation as the widow of Dr. H. H. Clarke, who, she alleged, died seized of the same. No persons were made parties to this proceeding except the mortgagor, T. H. Clarke, and his wife, Mrs. S. L. Clarke, who, it is alleged, had been put in possession of Green Hill as mortgagee. They interposed no defence, and the proceeding resulted in a judgment, rendered April 20, 1877, for a large sum of money, assessed in lieu of dower, which, by a decree of the Judge of Probate, was declared to be a prior lien on Green Hill.

The plaintiffs and the defendant Miss H. M. Lang, on discovering the existence of this judgment, gave notice of a motion, on the 22d of August, 1877, to be made to the Judge of Probate, to be made parties to that proceeding, and to set aside said judgment. This motion was refused by the Judge of Probate upon the ground, amongst others, that the proceeding for dower was no longer pending, but had passed into a final judgment. Thereupon the plaintiffs, on the 14th of September, 1877, obtained an order from one of the Circuit Judges, at chambers, for leave to file a supplemental complaint, mak-

ing Mrs. L. G. Clarke a defendant herein, and enjoining her from further proceeding under her judgment for dower, which order, though resisted, was not appealed from by Mrs. L. G. Clarke. The supplemental complaint was duly filed, in which the plaintiffs—after setting out the facts above stated, and charging that the claim for dower was unfounded; that the proceedings in the Court of Probate were so secretly and privately conducted that the plaintiffs and the other mortgage creditors of T. H. Clarke were not informed thereof until long after the judgment for dower had been rendered; that they were so conducted with a view to prevent the plaintiffs and the other creditors from taking any steps to resist the same and that the judgment for dower, so obtained, is a fraud upon the rights of the creditors of T. H. Clarke—demanded judgment that Mrs. L. G. Clarke be required to establish her claim of dower, if any she has, under this action; that plaintiffs and the other creditors of T. H. Clarke be permitted to contest said claim; that Mrs. L. G. Clarke be perpet-

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\*ually enjoined from enforcing the judgment obtained by her in the Court of Probate; and for such other and further relief as may be necessary.

Mrs. L. G. Clarke, answering both the original and supplemental complaint, insist upon her right to bring her action in the Court of Probate for dower; that she was not compelled to make any persons parties thereto, except those who were in possession of the land out of which she claimed dower; that the proceedings were openly and fairly conducted, and denying the allegations to the contrary; that she was entitled to dower in the premises, her deceased husband having died seized thereof, and denying plaintiffs' allegations to the contrary—prayed judgment that the temporary injunction be dissolved and that she might be permitted to enforce her judgment for dower. The defendants T. H. Clarke and T. L. Boykin answered, submitting their rights to the judgment of the Court, and the defendants T. W. Lang, S. L. Clarke, H. M. Lang and L. McCandless also answered, setting up their several claims as mortgagees, which will hereinafter be more particularly stated. The remaining defendants, so far as appears from the "Case" submitted here, do not seem to have answered, and no notice is taken of their claims in any of the proceedings below.

An order was passed directing a referee to take the testimony and report the same to the Court, from whose report it appears that the following claims were presented and offered in evidence, which are stated here in the order of their dates, and for convenient reference numbered consecutively, rather than in the order in which they appear in the report of the Referee, viz.: (No. 1.) A



mortgage of T. H. Clarke to T. L. Boykin, executor of Burwell Boykin on Green Hill, dated December 19th, 1869, to secure the payment of four thousand dollars, bequeathed to Mrs. S. L. Clarke by the will of her father, Burwell Boykin. (No. 2.) A mortgage of T. H. Clarke to Miss H. M. Lang on Green Hill and Jumping Gully plantations, dated March 25th, 1870. (No. 3.) A mortgage of T. H. Clarke to the plaintiffs on Green Hill, dated January 9th, 1875. (No. 4.) A mortgage of

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T. H. Clarke to Miss H. \*M. Lang, on Green Hill dated March 31st, 1875. (No. 5.) A mortgage of T. H. Clarke to Miss H. M. Lang, on Jumping Gully, dated March 17th, 1876. It also appeared in evidence that T. H. Clarke turned over the possession of Green Hill plantation to Mrs. S. L. Clarke, "to be rented by her during the year 1877, to enable her to repay herself out of the rents and profits thereof, for the arrearages of interest due her on the four thousand dollars before mentioned," which, as we have seen, was secured by mortgage No. 1.

The defendants T. W. Lang and L. McCandless both claimed to be assignees of mortgage No. 1, and there was a contest between them, in the Court below, as to who had priority, but as the Circuit Judge held that neither of the assignments were valid, he did not determine anything as to the question of priority, and therefore it will be unnecessary to detail the testimony as to this point. So also it will be unnecessary to advert to the testimony as to whether Dr. H. H. Clarke was ever seized of Green Hill plantation, inasmuch as the Judge below held that this was concluded by the judgment in the Court of Probate.

The Circuit Judge, in making a statement of the various incumbrances, seems to have fallen into an error, induced probably by a mistake in the allegations of the complaint, as to the liens held by the defendant, Miss H. M. Lang; for he says that mortgage No. 5 was on Green Hill, whereas the testimony, as stated in the Referee's report, shows that this mortgage was on the Jumping Gully plantation. So that this defendant, instead of holding only one mortgage on Jumping Gully, in fact held two—one dated March 25, 1870, which covered both Green Hill and Jumping Gully, and the other, dated the 17th of March, 1876, covering Jumping Gully alone.

By the Circuit decree it was adjudged that the order enjoining Mrs. L. G. Clarke from proceeding to enforce her judgment obtained in the Court of Probate be set aside; that the assignments by Mrs. S. L. Clarke to T. W. Lang and L. McCandless were null and void; that Green Hill plantation be sold, and the proceeds be applied, first, to the costs and ex-

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\*penses of the proceeding for dower in the Court of Probate; next to the payment of

the judgment in dower; next to the payment of four thousand dollars, without interest, to T. L. Boykin, for the use of Mrs. S. L. Clarke; next to the payment of the balance, if any, on the debt to Miss H. M. Lang, secured by the mortgage of March 25, 1870, the proceeds of the sale of Jumping Gully being first applied thereto; \*next to the mortgage debt of the plaintiffs, and next to the debt to Miss H. M. Lang, secured by the mortgage of March 17, 1876; and that Jumping Gully be sold, and the proceeds applied to the debt to Miss H. M. Lang, secured by the mortgage dated March 25, 1870.

From this judgment the plaintiffs and the defendants T. W. Lang and Miss H. M. Lang appeal upon the following grounds: 1. Because his Honor erred in holding that said plaintiffs and defendants are estopped by the judgment for dower obtained in the Court of Probate. 2. Because the Circuit decree was not filed within the time required by law. 3. Because the evidence showed that Dr. H. H. Clarke was never seized of Green Hill plantation. 4. Because the claim for dower was barred by the statute of limitations. 5. Because his Honor should have ordered all the costs of this case to be paid out of the proceeds of the sale of Green Hill, before the payment of any of the liens thereon, either for dower or otherwise.

The plaintiffs and the defendant Miss H. M. Lang also appeal upon the further ground that the defendant Mrs. S. L. Clarke should have been required to account for the rents and profits of Green Hill while the same was in her possession as mortgagee.

The defendant T. W. Lang also appeals: 1st. Because his assignment was adjudged to be null and void. 2d. Because the claim for four thousand dollars secured by mortgage No. 1, was held not to be an interest-bearing demand.

The defendant, Miss H. M. Lang, also appeals: Because the Circuit Judge erred in holding that the proceeds of the sale of Jumping Gully must be applied to the first mortgage held by her.

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\*The defendant, McCandless appeals: 1st. Because his assignment was held to be null and void. 2d. Because the debt secured by the mortgage which he claimed as assignee was held not to be an interest-bearing demand. 3d. Because the Circuit Judge should have adjudged that his assignment was entitled to preference over that of the defendant, T. W. Lang.

Some of the questions presented by these grounds of appeal were not considered or passed upon by the Circuit Judge, inasmuch as from the view which he took of the case they could not arise, and these questions are therefore not properly before us for review. The question whether Dr. H. H. Clarke was seized of Green Hill during coverture, and if so whether his widow's claim for dower is

barred by the statute of limitations; and the question as to which of the two rival assignments of mortgage No. 1 is entitled to priority must be remanded to the Circuit Court.

We proceed to confine our inquiries to such questions as, in our judgment, are properly before us for decision, leaving all other matters for the consideration of the Circuit Court. These questions are: 1st. As to the effect of the judgment obtained by Mrs. L. G. Clarke, in the Court of Probate. 2d. Whether Mrs. S. L. Clarke should have been required to account for the rents and profits of Green Hill during the time she was in possession. 3d. Whether the assignments made by her were null and void. 4th. Whether the debt secured by mortgage No. 1 was an interest-bearing demand. 5th. Whether the proceeds of the sale of Jumping Gully, should be first applied to the debt secured by mortgage No. 2. 6th. Whether the costs of this action should be paid out of the proceeds of the sale of Green Hill before any of the alleged liens. 7th. Whether the failure to file the decree within the time required by law, invalidated the judgment of the Circuit Court.

1. As to the judgment for dower. It is very true that the Court of Probate has jurisdiction in cases of dower, but its jurisdiction is not exclusive, for the Court of Common Pleas has concurrent jurisdiction in such cases. This is the necessary result of the principles announced in the case of *Walker v. Russell*, 10 S. C. 82. Now, it is a well es-

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tablished principle "that \*where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject matter must adjudicate, and neither party can be forced into another jurisdiction." *Jordan v. Moses*, 10 S. C. 433. In this case, the Court of Common Pleas had obtained jurisdiction over the subject matter in controversy (Green Hill plantation), before any proceedings were instituted in the Court of Probate by Mrs. L. G. Clarke for the purpose of obtaining dower in said land, and the plaintiffs and such of the defendants as held liens thereon could not be forced into the Court of Probate for the purpose of having their claims adjudicated.

The fact that the plaintiffs and one of the defendants, from abundant caution, attempted to become parties to the proceedings in the Court of Probate, cannot affect the matter, because their application was refused upon the ground that there was then no proceeding pending in the Court of Probate, it having terminated by a final judgment on April 20, 1877, and their application not having been made until some time in the month of August following. Nor can these parties be prejudiced by failing to appeal from the judgment rendered by the Court of Probate, or from the refusal to admit them as parties to the proceedings in that Court after such pro-

ceedings had terminated. Not being parties they could not appeal, for, although the language of the Code, § 57, is "any person interested in any final order, sentence or decree of any Probate court, and considering himself injured thereby, may appeal therefrom," yet this language must be regarded as referring only to persons who are parties to the proceedings in the Court of Probate, for no one can properly be said to be interested in any final order or decree made in a proceeding to which he is not a party, nor can he consider himself injured thereby; for nothing can be better established than the doctrine that judgments bind only parties and their privies. *Freem. Judg.* § 154.

After the Court of Common Pleas had assumed jurisdiction of the subject matter and had been called upon to adjust and determine the priorities of the liens claimed by the several parties upon the land in question, and after the filing of the notice of the pendency of the action, of which all persons were

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\*bound to take notice, the Court of Probate certainly could not assume jurisdiction and determine that the lien claimed by Mrs. L. G. Clarke was prior and superior to all other liens, especially where the other lien holders were not made parties. Such a course would almost inevitably lead to a conflict of jurisdiction and produce inextricable confusion. One tribunal might decide one way and the other render an opposite judgment. When the action of the plaintiffs was commenced to which all persons whom the records showed held liens on the subject matter sought to be affected were made parties, and after notice of the pendency of the action was filed, any other person who claimed to hold any incumbrance or lien on the same subject matter, was not at liberty to go into another tribunal for the purpose of having such lien enforced, but, to do so, must go into the same tribunal, and thereby have the whole matter adjudicated by that tribunal. We think therefore that the Court of Probate, had no jurisdiction to render the judgment relied upon in this case, and that the Circuit Judge erred in holding that the plaintiffs and the defendants holding mortgages on Green Hill were concluded thereby.

2. As to the accountability of Mrs. S. L. Clarke, for the rents and profits of Green Hill, during the time she was in possession. She was originally the real owner of the mortgage on this plantation, and the testimony is that she was put in possession by the mortgagor for the purpose of having the rents and profits applied to the interest which had accrued upon the debt secured by her mortgage. This being the case, nothing would seem to be clearer than that she should account for the rents and profits, and, if she continued to be the owner of the mortgage, that the amount due by her on such accounting should operate as a credit on the debt se-



cured by the mortgage. But, if she had assigned the mortgage to a third person before she was put in possession of the mortgaged premises, while she would be individually liable for rents and profits, we do not see how such liability could operate as a credit on the mortgage debt, after it had been assigned to a third person.

3. The next inquiry is as to the validity of the assignments made by Mrs. S. L. Clarke,

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to T. W. Lang, and to McCandless. \*It seems that the money secured by the mortgage of which she executed the assignments in question, was a legacy to her under the will of her father, Burwell Boykin, who died in 1861, the ninth and tenth clauses of which are as follows: "Sec. 9. In lieu of the interest in my estate which I have herein devised to my sons, I give and bequeath to each of my daughters, living at the time of my death, the sum of four thousand dollars. \* \* The bequest in this section to each of my said daughters is to take effect and be delivered, as each of them arrives at the age of twenty-one years, or be married. Sec. 10. I direct that my executors before delivering or consenting to the possession of any property bequeathed in this will to my daughters, shall cause the same to be secured to them, and each of them respectively free from the debts, liabilities, contracts, disposition and control of any husband, present or future, that each may have."

The defendant, Mrs. S. L. Clarke, who was one of the daughters of the testator, intermarried with her co-defendant T. H. Clarke, in 1866, before she attained the age of twenty-one years, and on December 19, 1869, T. L. Boykin, the executor of Burwell Boykin, at her request and by her consent, turned over this legacy of four thousand dollars to the said T. H. Clarke, taking from him (as stated by the referee) "his accountable receipt to Thomas L. Boykin, executor, to hold said four thousand dollars subject to the bequest of said sum in said will," together with a mortgage on Green Hill "to secure payment of said sum, according to the terms of said bequest," or as stated by the circuit judge, "a receipt for the same by which he promised to repay the same when required to do so by any court of competent jurisdiction," together with a mortgage on Green Hill, which mortgage was upon conditions "that the said T. H. Clarke should hold the said sum of four thousand dollars, subject to the terms of the bequest in said last will and testament of Burwell Boykin, and shall account for the same when duly required to do so by any one having competent authority, and to pay the same when so required by any court of competent authority."

On February 15, 1876, Mrs. S. L. Clarke,

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being then a married woman, executed an assignment of this mortgage to the defend-

ant T. W. Lang to indemnify him against any loss on account of a note due by himself and T. H. Clarke jointly, and on March 17, 1876, she executed another assignment of this same mortgage to the defendant McCandless to secure a debt due to him by her husband T. H. Clarke, and the original mortgage was delivered to McCandless by the executor, T. L. Boykin.

It will be observed that the bequest to Mrs. S. L. Clarke was to her absolutely without any limitation over in favor of any one, the only restriction being that it should not be made liable for the debts of her husband. Before the adoption of the present constitution this could only be effected by the interposition of a trustee, but now no trustee is necessary for that purpose, as the provisions of the constitution effectually protect the wife's separate property from the marital rights of her husband. It will also be observed that the bequest is not to the executor, or to a trustee for the use of the daughters, but is directly to them, and the executor is only charged with the duty of seeing that the bequest is secured from liability for the husband's debts before delivering or paying over the legacy to any one of the daughters. Hence, when provision for that purpose was made, the executor not only had the right, but it was his duty to pay over the legacy provided the legatee had married or attained the age of twenty-one years. The will does not prescribe how such provision shall be made, and therefore, when it is made in any effectual manner, it would be the right and the duty of the executor to pay over the legacy. Now, as we have said, the provisions of the present constitution are amply sufficient to secure the wife's separate property from liability for the husband's debts, and hence, after its adoption there was nothing to prevent the executor from paying over this legacy to Mrs. S. L. Clarke, or to anyone whom she might direct.

When the executor at the instance of Mrs. S. L. Clarke turned over this money to her husband, the practical result was the same as if he had paid her the money, and she had then loaned it to her husband, taking his

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bond and mortgage \*to secure the repayment thereof. This she had a perfect right to do, as the constitution, art. XIV. sec. 8, invests her with the same power to dispose of her separate property that a single woman has. She therefore could dispose of this money as she pleased, and if she desired to lend it to her husband, she had a perfect right to do so, and to take from him a mortgage to secure its repayment. This being the case, it follows necessarily that she could assign this mortgage to whomsoever and for whatsoever purpose she might desire, even to secure a debt due by her husband. These views are fully sustained by the recent cases of *Pelzer v. Rodgers & Co.* and *Campbell & Co.*, 15 S. C.

581 [40 Am. Rep. 705], and *Clinkscales v. Hall*, 15 S. C. 602, where the whole subject of the rights and powers of married women, under the present constitution and laws, has been so fully and satisfactorily discussed as to render any further discussion unnecessary.

It is said, however, that while this may be true where the marriage takes place, or the property is acquired by the wife after the adoption of the constitution of 1868, it is not applicable to the present case where the marriage was contracted and the property was acquired prior to 1868. We think, however, that this matter is conclusively settled by the case of *Witsell v. Charleston*, 7 S. C. 88, and that the fact that the property was acquired, or that the woman was married before the adoption of the present Constitution would not affect the question, unless the rights of other persons had vested before the constitution was adopted. Here, as we have seen, this was not the case, and hence the case last cited is conclusive authority to show that Mrs. S. L. Clarke had the power to dispose of the legacy bequeathed to her by her father's will in any way that she deemed proper, and that she could make a valid assignment of the mortgage in question for the purpose of securing a debt due by her husband.

The question as to which of the two assignments has priority was not considered by the Circuit Court, for the reason hereinbefore indicated, and we have before us for review no findings of fact or law in relation thereto. That question must therefore be referred to the Circuit Court.

4. Our next inquiry is whether the debt

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secured by mortgage No. 1 is an interest-bearing demand. Regarding this as practically a loan by the wife to the husband of a definite sum of money, we can see no reason why it should not bear interest like any other loan of money.

5. The circuit judge in making his decree that the proceeds of the sale of the Jumping Gully plantation should first be applied to the payment of the debt secured by mortgage No. 2 proceeds upon what seems to be an error of fact. He evidently supposed that the defendant Miss H. M. Lang, held but one mortgage on Jumping Gully, whereas we understand from the testimony that she in fact held two mortgages on that plantation. While, therefore, the rule upon which the circuit judge based his decree is correct—that where one person has a lien upon two parcels of property, and another has a lien upon only one of these parcels equity will require the former first to exhaust the parcel upon which the latter has no lien—yet this rule is subject to the qualification that if its enforcement would operate to the prejudice of the creditor who holds the two liens, it will not apply. 1 Story Eq. § 633 and notes. If therefore it is true that the defendant Miss H. M.

Lang holds two mortgages on the Jumping Gully plantation, it might operate to her prejudice to apply the rule above stated, and if so, there would be error in this respect in the judgment below. Inasmuch, however, as the whole case must go back, we prefer to refer this inquiry to the Circuit Court, without adjudging anything now, either of fact or law, in respect thereto.

6. The next question is as to the costs. Under the views hereinbefore presented it would follow necessarily that there was error in the judgment below in directing that the judgment dower should first be paid out of the proceeds of the sale of Green Hill, before the costs of this action are provided for. What provision shall be made in relation to the costs must be left to the Circuit Court to determine after hearing the whole case.

7. The only remaining question is disposed of by the decision in the case of *Koon v. Munro*, 11 S. C. 140.

It is the judgment of this court that the

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judgment of the \*Circuit Court be reversed, except so much thereof as directs a sale of Green Hill and Jumping Gully plantations, and that the case be remanded to that court for the purpose of carrying into effect the principles herein announced, with the privilege to Mrs. L. G. Clarke to set up her claim for dower under the proceedings in this action.

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WALKER v. WALKER.

(November Term, 1881.)

[1. *Tender* ⇨22.]

A plea of tender cannot avail as a defence without an averment of a readiness now and at all times to pay, or a production of the money in court.

[Ed. Note.—Cited in *Salinas & Son v. Ellis*, 26 S. C. 345, 2 S. E. 121; *Reynolds v. Price*, 88 S. C. 537, 71 S. E. 51.]

For other cases, see *Tender*, Cent. Dig. § 70; Dec. Dig. ⇨22.]

[2. *Mortgages* ⇨479.]

Under order requiring a referee to report what amounts were intended to be secured by the mortgage, the referee should have taken testimony and made report of all amounts due which were intended to be so secured.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1398; Dec. Dig. ⇨479.]

[3. *Mortgages* ⇨109.]

Where a deed absolute is shown by parol testimony to have been intended for a mortgage, all the conditions may be proved in like manner.

[Ed. Note.—Cited in *Moses v. Hatfield*, 27 S. C. 329, 3 S. E. 538.]

For other cases, see *Mortgages*, Cent. Dig. § 219; Dec. Dig. ⇨109.]

[4. *Mortgages* ⇨109.]

Parol testimony may be received to show, as between the parties, that the mortgage was afterwards extended to cover new debts.

[Ed. Note.—Cited in *Reese v. Lyon*, 20 S. C. 22; *Lindsay v. Garvin*, 31 S. C. 261, 9 S. E.



862, 5 L. R. A. 219; *O'Neill v. Bennett*, 33 S. C. 243, 246, 11 S. E. 727; *Levi v. Blackwell*, 35 S. C. 516, 15 S. E. 243.

For other cases, see *Mortgages*, Cent. Dig. § 247; Dec. Dig. ¶109.]

[5. *Appeal and Error* ¶1022.]

Findings of fact by referee and circuit judge in an equity cause, and sustained by the circumstances of the case, approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015–4018; Dec. Dig. ¶1022.]

[6. *Husband and Wife* ¶25.]

Where a wife constitutes her husband her agent, she is bound by his acts to the same extent as other principals are by the acts of their agents.

[Ed. Note.—Cited in *Baum v. Raley*, 53 S. C. 38, 30 S. E. 713.

For other cases, see *Husband and Wife*, Cent. Dig. § 148; Dec. Dig. ¶25.]

[7. *Mortgages* ¶417.]

The mortgagee alone may maintain action for foreclosure of mortgage given to secure future advances, the advances having been made by successive firms of which the mortgagee was a member.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1236; Dec. Dig. ¶417.]

[8. *Appeal and Error* ¶273.]

General exceptions not considered.

[Ed. Note.—Cited in *Norris v. Clinkscales*, 59 S. C. 245, 37 S. E. 821.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620–1623, 1625–1630, 1764; Dec. Dig. ¶273.]

[9. *Mortgages* ¶50.]

Where a mortgage is given by A to secure payment for advances to be made to A and B, it is not important to state separately what items were received by each.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 136; Dec. Dig. ¶50.]

[10. *Appeal and Error* ¶223.]

This court can make no original order for the costs in an equity cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1338–1342, 1344, 1346–1350; Dec. Dig. ¶223.]

[11. *Mortgages* ¶488.]

In action for foreclosure, the order for sale and payment of proceeds is administrative, and may be made after decree rendered.

[Ed. Note.—Cited in *Wallace v. Carter*, 32 S. C. 318, 11 S. E. 97.

For other cases, see *Mortgages*, Cent. Dig. § 1424; Dec. Dig. ¶488.]

[12. *Appeal and Error* ¶273.]

[Where exceptions taken are too general, and do not bring the mind of the court to any point in which its judgment is sought, they will be overruled.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1621; Dec. Dig. ¶273.]

[13. *Mortgages* ¶121.]

[An agreement that an existing mortgage shall cover future advances may be implied from the conduct of the parties.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 238; Dec. Dig. ¶121.]

Before Thomson, J., Spartanburg, October, 1879.

In this case Hon. T. B. FRASER, Judge of the Third Circuit, sat in the place of the CHIEF JUSTICE, who had been of counsel.

\*Action by Joseph Walker against William H. Walker and Mary E. Walker, commenced May 25, 1875. The circuit decree, after a statement of the facts (which sufficiently appear in the opinion of this court) was as follows:

The Court will not take up the exceptions in succession, but will state in connection the views of facts and law which govern the case.

As a fact, the jury (from the papers before me), did not find upon the matters submitted to the Referee by the second order. Without mentioning any sum the jury found that defendant, M. E. Walker, had tendered to plaintiff the sum due to Joseph Walker & Co. The second order of reference relates to the sums or amounts of the accounts due the plaintiff after the dissolution of the firm of Joseph Walker & Co. This, however, became a case for equitable relief—a case of foreclosure; in which the verdict of a jury would inform the conscience of the judge, but would not bind or fetter conclusively his own judgment. *Kirkpatrick v. Atkinson*, 11 Rich. Eq., 27.

The order of the Judge—from which it seems there is no appeal—is distinct and clear, that the Referee take into consideration the amounts of the accounts of Joseph Walker and of Walker & Fleming. The Referee did as he was commanded, and the first exception strikes rather at the order than the report. The deed has been declared a mortgage, and the question (amongst others) is for what sums of money it shall stand as security. It does not appear it was intended to secure any liquidated sum. At least, as between the parties to this proceeding it bore that character at the first. The testimony of Mary E. Walker strengthens this view. She declares she held a bond for titles from the plaintiff. This, connected with the other testimony, was an admission of indebtedness to, and title in him. The plaintiff is in the position of one seeking to foreclose, but she is also in the position of one seeking to redeem. She claims the deed is a mortgage; it is allowed. She claims having made a tender—a limited tender is found by the jury.

There can be no question but that as against a mortgagor seeking to redeem, the mortgagee is entitled to be paid all demands. To entitle her to equitable relief, she must

do equity. \*—"When the mortgagee had, subsequently to the date of the mortgage, advanced to the mortgagor other sums than those mentioned in the mortgage, or the mortgagor became indebted to the mortgagee, it was held that the mortgagee might withhold the cancelling of the mortgage until all the claims he had against the mortgagor were paid." *Walling v. Aiken*, McM. Eq., 2.

Independent of the general equity there is evidence that it was a contract of the parties

that the mortgage should be regarded as a security for advances made. Such was the intent of the plaintiff, as he swears, and giving his reasons therefor. The character of a security for advances appears to have attached to it for supplies furnished by Joseph Walker & Co., and the parties dealt with it under such belief. Was there any change or notice given to Joseph Walker or Walker & Fleming that the mortgage should no longer stand as security for advances? Had the circumstances of the parties altered, and was security no longer needed? The evidence answers in the negative. The parties continued to deal with each other in the later transactions, as they had done when the deed was recognized as a security between them. Surely the party wishing to change the condition of affairs should have given notice to the other of such intent.

That the wife to a certain extent had the management of the land is apparent, from her letter to plaintiff, wishing to purchase a mule. So the caution she gave to sell her husband only certain articles, necessary, according to her view, is evidence that she regarded his purchases of supplies as a liability on her part. The wife may give control of her separate property to her husband, so that it may become liable for his debts. *Reeder & Davis v. Flinn*, 6 S. C., 240. Or, as the Referee seems to have done, the purchase of supplies, whether made by the husband or wife, may be regarded as of joint character, and with the consent of both defendants.

It is ordered, adjudged and decreed that the defendant Mary E. Walker's exceptions be overruled, and the report of the Referee confirmed, and made the judgment of this Court. And that the plaintiff have leave to

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enter his judgment of fore\*closure for the several sums of money reported as due him by Mr. Nicholls, the Referee.

From this decree Mary E. Walker appealed on the following exceptions:

1. In sustaining any or all the exceptions of plaintiff to the first report of the Referee.
2. In overruling any or all of the exceptions of the defendant, Mary E. Walker, to the second report of the Referee.
3. In holding that the order of Judge Mackey allowed testimony to be taken of debts due others than the firm of Joseph Walker & Co.
4. In holding that the Referee erred in finding that the whole amount intended to be secured by the mortgage was \$339.75.
5. In finding that any debts after January 1st, 1873, were intended to be secured by the mortgage.
6. In not sustaining defendant's exception to Referee's report to wit: That said report was indefinite and uncertain, inasmuch as it does not report the amount due separately by each of the defendants.
7. In overruling the appellant's exceptions

to Referee's report, to wit: That the Referee erred in construing the order of reference as permitting him to report the amount intended to be secured by the mortgage to any other person than the plaintiff.

8. In not sustaining appellant's fifth exception to Referee's Report, to wit: That the Referee erred in not reporting that the charges against Mary E. Walker were unauthorized except for the articles for which she gave orders, and that for those orders payment has been made.

9. In confirming the report of the Referee.

10. In holding that in this proceeding appellant stands as one seeking to redeem a mortgage, and for that purpose is bound to pay other debts than those due plaintiff or Joseph Walker & Co.

11. In holding that appellant contracted to pay other debts than those due Joseph Walker & Co.

12. In holding that appellant contracted that any other debts except the debts due Joseph Walker & Co., should be secured by the mortgage.

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\*13. In holding that appellant gave her husband, the co-defendant, control of her separate property, so as to become liable for his debts.

14. In holding that the purchase of articles, charged in the account, whether made by appellant or her husband, could be regarded as of joint character, and with the consent of both defendants.

15. In refusing to hold that nothing whatever was secured by the mortgage to plaintiff.

16. In refusing to hold that all of appellant's debt to plaintiff was paid.

17. In not decreeing that the plaintiff should pay the costs of the proceedings, or at least all costs up to the time the case was referred to the Referee.

18. In giving judgment against appellant in favor of Joseph Walker.

19. In giving judgment against appellant in favor of Walker & Fleming.

20. In giving judgment against appellant in favor of Joseph Walker & Co.

21. In ordering foreclosure of mortgage of the land in favor of all or either of said alleged creditors.

22. In decreeing that the plaintiff have leave to enter his judgment of foreclosure for the several sums of money reported as due him by Mr. Nicholls, as Referee.

23. In not specifying the terms upon which said judgment of foreclosure was to be entered.

24. In refusing to dismiss the complaint.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, S. J. Simpson, contra.

May 12, 1882. The opinion of the Court was delivered by



Mr. Justice FRASER. On examining the admitted facts and the evidence contained in the "Case" before this Court, it appears that this appellant, Mary E. Walker, was seized of the tract of land described in the complaint in this case; that by proper conveyances the land was conveyed to A. W. Cum-

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mings as security for a debt due to him; that when this debt was paid, except the sum of \$49.00, by consent of Mary E. Walker, Cummings conveyed the land to Joseph Walker & Co., a firm consisting of Joseph Walker, the plaintiff, and J. G. Goodlett (the consideration being stated in the deed at \$149.00), who took title to the land as security for \$49.00 advanced to Cummings, and for \$100.00, either to be advanced or then due by W. H. Walker, the co-defendant. Some time after this Joseph Walker and James G. Goodlett gave to Mary E. Walker a written agreement to reconvey the land to her on the payment of \$350.00 on January 1st, 1873; this \$350.00 was the amount of a credit extended to Mary E. Walker and her husband, W. H. Walker, on the security of the title to this land; that this written agreement was delivered up to Joseph Walker & Co. by W. H. Walker, and there is no evidence of any consent to its delivery by Mary E. Walker; the firm of Joseph Walker & Co. was dissolved on March 19th, 1873; on April 1st, 1873, James G. Goodlett assigned all his interest in the land to Joseph Walker, having previously sold to him his interest in the firm of Joseph Walker & Co.; about May 1, 1873, C. E. Fleming bought what had been the interest of James G. Goodlett, and the business was carried on under the name and style of Walker & Fleming; large sums of money being due, as appears by the books, by Mary E. and W. H. Walker to the successive firms of Joseph Walker & Co., Joseph Walker and Walker & Fleming, Joseph Walker commenced this action to recover possession of this land from the defendants, who had always remained in possession of it; W. H. Walker, the husband, has never answered the complaint; Mary E. Walker answered the complaint, alleging that the title was held by plaintiff only as a mortgage to secure a debt, and that on December 31st, 1874, she had tendered the whole amount due, \$293.00.

The plea of tender not having been followed up by an averment that appellant has always been and still is ready to pay it, or by a production of the money in court, cannot avail the appellant as a defence, even if the whole sum due had in fact been tendered as alleged. 2 Green Evid. § 600.

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\*The case came on to be heard before his Honor Judge T. J. Mackey, and on the trial of certain issues of fact referred to them, the jury rendered a verdict: 1. That the deed under which plaintiff claimed "was in-

tended to operate as a mortgage." 2. That Mary E. Walker did tender to plaintiff the whole amount of debt due by her to Joseph Walker & Co., intended to be secured by the mortgage."

After this verdict was rendered, Judge Mackey made an order appointing a Referee "to take testimony and report" what amount is due Joseph Walker & Co. from the defendant, Mary E. Walker, at the time of the tender and subsequent thereto; and that he do further take testimony upon any special matter involving said accounts; that the Referee do report also the accounts due from W. H. Walker, and also what amounts were intended to be secured by the mortgage, and that the said report, as well as evidence taken, be made subject to the findings of fact already made by the jury.

There are only two facts settled by the verdict of the jury: 1. That the deed was intended as a mortgage. 2. That the whole amount due by Mary E. Walker had been tendered which was intended to be secured to Joseph Walker & Co. The verdict did not fix the amount due to Joseph Walker & Co. intended to be so secured, and did not settle the question whether there were any other amounts intended to be so secured. When the reference was held under this order the Referee ruled out all testimony as to accounts due to Joseph Walker after Goodlett had retired from the firm, and reported that the amount due Joseph Walker & Co. at the date of the dissolution, and intended to be secured by the mortgage, was \$339.00.

To this report the plaintiff excepted, and upon the hearing before his Honor Judge Pressley, the report was recommitted to the Referee "to take testimony and report the same as to amount of the account due to plaintiff after the dissolution of the firm, made by M. E. Walker and W. H. Walker, or either of them, and whether the same was intended to be secured by the mortgage, and if so how much thereof. It is further ordered that the Referee make separate statements of the amounts of the accounts made

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with Joseph Walker & Co., Joseph \*Walker, successor to Joseph Walker & Co., and with Walker & Fleming, successors to Joseph Walker, by the defendants, or either of them." It will be seen that this order brings back the investigation to an inquiry as to the matters contemplated by the original order of Judge Mackey, as expressed in the words "and also what amounts were intended to be secured by the mortgage."

A reference was held under this order, and the Referee made a second report of the amounts due, after allowing all proper credits, as follows: To Joseph Walker & Co., \$339.75; to Joseph Walker, \$304.66; to Walker & Fleming, \$287.88. The Referee also reported that these two latter amounts

were intended to be secured by mortgage. The verdict of the jury had settled it as a fact that the amount due Joseph Walker & Co. was intended to be so secured, but did not fix the amount.

In the verdict of the jury the word "intended" is used as expressing such mutual intention as to make the deed a mortgage, and to make that mortgage a security for certain debts therein named, and it is but fair to hold that the word is used by the Referee in the same sense, expressing such mutual intention as is necessary for a contract, when he says that the amounts due Joseph Walker and Walker & Fleming were intended to be secured by the mortgage.

This report came before his Honor Judge Thomson on exceptions. The exceptions were overruled, and the report confirmed and made the judgment of the Court, \* \* \* and it was ordered "that the plaintiff have leave to enter judgment of foreclosure for the several sums of money reported as due him, by Mr. Nicholls, the Referee. From this judgment Mary E. Walker has appealed to this Court on various grounds.

The 1st, 3d and 7th exceptions raise questions as to the scope of the first order of reference, made by Judge Mackey. Whatever may have been the relevancy or value of the facts when ascertained, it was certainly within the scope of the words used in that order—"also what amounts were intended to be secured by the mortgage." The Referee should have taken the testimony and reported the amounts due to Joseph Walker and to Walker & Fleming, if,

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as reported by the Referee to the \*Court, these amounts were intended to be secured by the mortgage. These exceptions, therefore, must be overruled.

The 4th exception is that the Referee erred in finding that the whole amount intended to be secured by the mortgage is \$339.75. There is some misapprehension of the fact in this, as such does not seem to be the Referee's report.

The 5th, 8th, 11th, 12th, 13th, 14th, 15th, 16th exceptions raise the main issues in this case. The Referee has found as a fact, and in his report the Circuit Judge has concurred, that all these accounts, including the amounts due Joseph Walker & Co., Joseph Walker and Walker & Fleming, were intended to be secured by this mortgage. These exceptions raise the issues: 1st, Whether in fact it was intended by these parties, viz., Mary E. Walker, and the successive firm of Joseph Walker & Co., Joseph Walker, and Walker & Fleming, that these amounts should be secured by the mortgage; and 2d, Whether the fact, if established, authorizes in this case a judgment of foreclosure and sale of the land for the payment of these debts.

By the tender, the appellant admits the liability of the land for at least \$293.00 to

Joseph Walker & Co. It is true that as to the accounts due to Joseph Walker and Walker & Fleming there is no written agreement. The appellant cannot complain of the want of written evidence, because it is by parol testimony that she can show that a deed absolute on its face is only a mortgage. If it can be shown to be a mortgage, then certainly the whole condition of the mortgage can be shown in the same way by parol evidence.

It is contended, however, that while this is true as to the original condition of the mortgage, it is not true as to conditions superadded by the parties afterwards. It is very distinctly laid down that while as to third parties a mortgage cannot be extended to cover new debts, yet this may be done by parol amongst the parties themselves, even when the mortgage is one created in the usual way by deed. See Jones Mort. § 357, where it is said that while such an agreement cannot be set up against a mortgagor at law, it can be in equity. The form in which the question comes up is now of no consequence.

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\*In this case there was no distinct agreement in words between the parties. The evidence of an implied contract is very strong. The husband is said to be insolvent and unreliable; no credit could be obtained originally until this security was given; most of the articles were for family use or other necessities. Soon after the dissolution of the firm of Walker & Co., Joseph Walker received a letter from the appellant requesting him to pay for a horse, and inquiring for fertilizers and groceries. This was April 25th, 1873, and within four days we find these very articles charged in the account amounting to over \$200, and this account ran on for several years charged against Mary E. and William H. Walker, husband and wife, payments made on it, and not one word of complaint that any of the articles were purchased by W. H. Walker; and the parties commenced their dealings on this security only. This court thinks that the inference is a fair one that it was the intention of these parties, a mutual intention, such as constitutes an agreement, that these debts should be secured by the mortgage. If any other two parties had lived together and in common as these two, Mary E. Walker and her husband W. H. Walker, and had dealt in this way, we do not think there would be any reasonable objection to an inference that there was an implied contract. The husband is not entitled, as a matter of course, to be held out as the agent of the wife, but when she interferes in the business, as she has done in this case, and in fact allows him to act for her, she is as much bound as any one else who constitutes an agent. This court holds therefore that there was an implied contract to extend this security to cover the debts of Joseph Walker and Walker &



Fleming, and that such implied agreement is valid and binding on the parties.

There is no valid objection to this agreement made with successive firms which assumed in this matter the obligations and acquired the rights of Joseph Walker & Co. *Lawrence v. Tucker*, 23 How. (U. S.) 27 [16 L. Ed. 474]. The rights of the creditors in this case depend on this agreement and not on any right, as in *Walling v. Aiken*, McM. Eq. 1, of a mortgagee to demand in a suit to redeem any amounts outside of the mortgage debt which may be due him. This right can

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exist only between \*parties one of whom can plead discount. Joseph Walker stands in this case in the place of Joseph Walker & Co. as to the title and in the absence of any agreement, there could be no set off between Mary E. Walker in this suit and the other two firms.

The 2nd, 9th, 18th, 19th, 20th, 21st, 22nd, and 24th exceptions are too general and do not bring the mind of the court to any point in which its judgment is sought.

The 6th exception is not well taken because the referee had no testimony before him on which he could have made a statement of the amounts purchased by the defendants separately, and it would not have been important if he could have done so.

As to the 10th exception, the Court holds that it is not important to consider the question raised if the judgment of the Circuit Court is sustained on other grounds, but the views of the Court have been indicated on the point raised by it.

As to the 17th exception, it is a matter of discretion in equity cases in the Circuit Judge as to who shall pay the costs, and as to this there has been no order. This court cannot direct the Circuit Judge to make an order for costs in such cases.

Exception 23d. A judgment of foreclosure is usually attended with an order of sale and for the payment of the proceeds, but these are merely administrative orders and can be made at any time hereafter.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

17 S. C. 339

# UNION BANK v. WANDO MINING AND MANUFACTURING CO.

(November Term, 1881.)

## [1. Corporations 253.]

Under the charter of a corporation, its stockholders were liable to the extent of the par value of their shares for all its debts that were to be paid within one year from the time the debt was contracted, and that were sued against the corporation within a year after maturity. *Held*, that a judgment against the corporation did not prevent the stockholders when subse-

quently sued under this provision of the charter, from interposing a defence to their liability on the original debt.

[Ed. Note.—Cited in *Sadler v. Nicholson*, 49 S. C. 11, 26 S. E. 893; *Newton Cotton Mills v. Springs*, 56 S. C. 538, 540, 35 S. E. 222.

For other cases, see *Corporations*, Cent. Dig. § 1025; Dec. Dig. 253.]

## [2. Corporations 237, 577, 579.]

After a sale of the property and good will

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of the corporation to a new \*company, and the election of the officers of the old corporation to the same offices in the new, the officers discounted notes of the old corporation in a bank for the purpose of raising money to pay its indebtedness. *Held*, that they then had no power to contract debts that would impose an individual liability on the stockholders under this charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 928, 2307; Dec. Dig. 237, 577, 579.]

## [3. Banks and Banking 116.]

And the president of this bank having been a director of the old corporation and present at the meeting that authorized the sale, the bank was chargeable with notice of these facts.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 285; Dec. Dig. 116.]

## [4. Bills and Notes 139.]

Other notes were executed by the old corporation during its existence and at maturity successively renewed, and the judgments obtained against the company were based upon these renewal notes, the suits having been brought more than a year after the maturity of the first notes given for the original consideration, but within a year after the maturity of the last renewals. *Held*, that it was incumbent upon the suing creditors in this action to show that the renewal notes were given in payment, without which there was no individual liability on the part of the stockholders.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 340-354; Dec. Dig. 139.]

## [5. Appeal and Error 1022.]

A finding of fact by the master, reversed by the Circuit Judge, approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. 1022.]

## [6. Corporations 264.]

But even if these renewal notes were intended to be payment, the officers had no power thus to extend indefinitely the liability of the stockholders, and, no suit having been brought against the corporation upon the original debts within a year after maturity, there was no right of action under this charter against the stockholders.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1084-1098, 2274; Dec. Dig. 264.]

## [7. Corporations 264.]

[The charter of a mining and manufacturing corporation made the stockholders liable for debts of the corporation payable in one year from the time when they should be contracted, if sued against the corporation within a year. Notes were given by the corporation, and paid as they matured by giving new notes. *Held*, that the year began to run from the maturity of the original notes, not from the maturity of the substituted notes.]

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1088; Dec. Dig. 264.]

Before Thomson, J., Charleston, June, 1880.  
Hon. W. H. WALLACE, of the Seventh Circuit, sat in the place of Mr. Justice McIVER, who had an interest in the cause.

This was an action commenced in November, 1878, by the Union Bank of South Carolina, in behalf of itself and other creditors, against the Wando Mining and Manufacturing Company and all its stockholders. Judgment creditors of the defendant company were afterwards called in, and they appeared and presented their claims. The purpose of the action was to recover these debts from the individual stockholders by virtue of the liability imposed upon them in the section of the charter quoted in the opinion of this Court, executions against the company itself having been returned nulla bona.

The facts are stated in the opinion. The notes, other than those of the Union Bank, were renewals made payable, some in the words "within one year after date," and others "six months after date," and were all

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traced back to antecedent notes which were payable, some "one year after date" and others "two years after date." They were all promissory notes. The notes, when taken up by the company, were all kept and showed indorsements in words, "received interest to date on within, also renewal note for same amount," "received interest on within and new note for principal," "received note in settlement of this note same amount," "received note in renewal," etc. The case was referred to W. D. Porter, Master in Equity, whose report, omitting its statement of facts and some other minor matters, was as follows:

The main question that underlies this whole case is whether the notes sued upon or the original debt for which they were given is the indebtedness for which the shareholder is responsible.

It is conceded in argument that the notes of plaintiff, as well as those sued by Lord & Inglesby, have been traced back to their original debt or considerations, and that no action has been brought within one year from the time such original debt became due. The suing creditors claim that the last note sued on constitutes in each case the debt of the company, and that suit was brought within one year after it became due. Defendants claim that the maturity of the first note in each case was the time the debt became due, and that suit was not brought within one year from such maturity in any of the cases. In all of the cases notes have been renewed and brought down to time of suit; as one note matured another was given in place of it, paying only the interest.

The Constitution of 1868 provides, in Art. 12, Sec. 5, Title Corporations, that all general and special Acts passed pursuant to this section shall make provision therein for fixing the personal liability of stockholders un-

der proper limitations. The Act to incorporate the Wando Company provides for a limited several liability, sometimes called an individual liability. Not only is this liability confined to debts of a certain class, and to an amount equal to the shares of capital stock held by each member, but it does not attach until judgment has been obtained against the corporation and nulla bona returned on the execution. It is therefore not

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primary, but secondary; it is contingent upon the failure of corporate property out of which to raise the money. In this respect, the stockholder is in the nature of a surety or collateral obligor. The liability is only for such debts as are to be paid within one year from the time they were contracted, and upon which debts suit has been brought within one year from the time they became due. And the liability is not fixed until, according to the sheriff's return, there is no corporate property that can be levied on. The statutory provisions are the measure of the individual liability of the shareholders. And inasmuch as the liability is restricted, and individual liability is repugnant to the law of corporations, it must be construed with reasonable strictness.

It is true that the fundamental law of the State provides for a personal liability of the stockholders. The character and extent of that liability it leaves to the Legislature. Sometimes it is greater, sometimes less. But the Constitution does not abolish corporations. It recognizes them by the title "corporations" in the Constitution. It recognizes a corporate liability, and a personal liability. It does not confound them, but keeps them separate and distinct. The latter is superadded in a limited degree to the former in certain contingencies, and upon certain conditions; and when this cumulative liability is to be enforced, the contingencies must have arisen, and the conditions have been performed.

There are certainly three classes of persons to be considered in these transactions: 1st, The corporation, an artificial person with a defined legal existence; 2d, The shareholder, a natural person with a limited several liability; 3d, The creditor: the rights and responsibilities of each must be kept in view.

It is settled law in England and in this country that a promissory note is only an evidence of indebtedness: unless paid, it is no extinguishment of the indebtedness. It fixes the amount of the debt and the time of payment; and if not paid at maturity, the holder may, upon bringing the note into Court, resort to and bring action upon the original cause of indebtedness. It is equally well settled as a general rule, that a renewal of a note is no extinguishment of the old debt, and no creation of a new debt. It is only an

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extension of the time of payment. The pro-



cess is well known. When the old note is about to fall due, a new note is put in bank and discounted, with the understanding that the proceeds of the discount are to be applied to the old note. Mr. Hacker, in his testimony, says that he believed such to be the understanding and such the process in the Union Bank with the Wando Company. Simple renewal is simple extension of time and prolongation of credit. Really the debt is not paid—it stands as before.

If something else, say, for example, the note of a third person, be accepted in payment, this has been held to extinguish the old debt on the principle of accord and satisfaction. Or where a surety gives his note for the debt of the principal which is accepted by some distinct act, it operates as an accord and satisfaction. It is the change of security which operates this effect, but it is not payment; it is accord and satisfaction. This was the case in *Peters v. Barnhill*, 1 Hill 234, which was strongly relied on. In that case it was not the note of the principal debtor, but the note of the surety, a third person, that was held to extinguish the debt. In these transactions there was no change of security, no intervention of the obligation of third persons; the renewals were pure and simple, and I can find no case where such renewals have been held to extinguish the debt. A promise that they should so operate would be nudum pactum, it would be without consideration, and not binding in law.

But it is urged that Mr. Inglesby, one of the attorneys of the Company, and also of a large number of the creditors, in his testimony affirms and insists that the new notes were given and accepted in payment. And it is further urged that this may be done under the law of South Carolina, although not under the law of New York. According to the law of South Carolina an agreement, even though in writing, to be binding, must be upon sufficient consideration. A note "for value received" is prima facie evidence of consideration, but it may be inquired into.

Where would be the considerations for these renewals? During the long series of them for years, the debt still remains the same. There may be consideration for the

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extension \*of time in the payment of interest, but none whatever for the satisfaction of the debt. The argument of plaintiffs is that the old debt was extinguished whenever a new note was made. That is as much as to say that a debt may be paid by an unfulfilled promise. Promise is not payment. With special care and diligence the Company kept all the notes surrendered, and linked them together by writing "renewal" upon them, so that the chain is perfect. They are traced back to the original cause of indebtedness with entire accuracy.

The cases in our reports that speak of a

note being taken in satisfaction of a debt use such expressions as these: "Express agreement," *Costello v. Cave*, 2 Hill, 528 [27 Am. Dec. 404]; "Special engagement," *Chastain v. Johnson*, 2 Bail., 574; "Stipulation," *Bryce v. Bowers*, 11 Rich. Eq., 47; and these are accompanied by some act, or by the intervention of some third person or new security. Now where is the evidence of any such "express agreement," "special engagement," or "stipulation?" There must be more parties than one to such a contract. The proper parties would be the bank, which was represented by its president, the Wando Company, which was represented by its president, and the holders of the note, who were represented by their attorneys.

The president of the bank, Mr. Mowry, has not been examined, nor has Mr. Gibbon, the president of the company. They say nothing. And even if Mr. Mowry should testify to such a special agreement, his authority to extinguish a debt by a promise might well be questioned by his board. An authority to renew in the usual way would not imply an authority to renew in such an unusual way. There is no evidence whatever of what the board of the bank, or the board of the Wando Company thought or assented to, in relation to the effect of the renewals. The proof, therefore, of an express, special agreement is not sufficient. Mr. Inglesby's testimony is, without doubt, an honest and strong expression of his understanding in relation to the renewals and their legal effect, but is not such evidence as is required to establish an express contract between all the parties concerned.

But supposing there was such express

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agreement between \*the parties named, could such an agreement, by which a renewal note was to extinguish the preceding debt and create a new debt, bind the individual stockholders upon their limited several liability? The stockholders are to be considered in two lights, first in reference to their corporate liability, and then in reference to their separate individual liability. In relation to the former the directors are their agents, and may bind them within the legitimate range of corporate business affairs. But these shareholders have also private rights and responsibilities which affect their private property as distinguished from their corporate property. Just as a judgment against the corporation cannot bind them except for such debts as they are liable for, so no contracts or agreements of the directors, by which their several liability is affected can bind them without their consent. The statute provides that they shall not be liable for any debt contracted by the Company which is not to be paid within one year from the time the debt is contracted; and therefore, no action of the corporation or the creditor, or both, by which the indebtedness of the corporation

is renewed or extended can affect the stockholders. They are not agents of his for any such purpose. He is an integer of the corporation only for corporate purposes. Not only the words of the statute, but its policy also, interpose for his protection.

Manifestly the object of the Legislature was to prevent that very accumulation of indebtedness which is the bane of individuals as well as corporations, and which is now sought to be thrown upon the individual shareholder. The several debts represented by these notes have been rolled along for a series of years, and instead of being paid within the year of their contracting, have been kept alive and perpetuated by the process of bank renewals. It is not intimated, for it is not believed, that there was any sinister or dishonest purpose in this matter. The commercial panic, the great depreciation of real and other property, the over-extension of their business operations, and the fearful rates of interest and commissions that had to be paid for credit and money, are sufficient to account for the result. But a faithful pursuit of the policy indicated by the act

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\*would have gone far to relieve creditors or stockholders from the heavy burden which must fall upon one or other of them.

The debt for which stockholders may be made liable is a debt that is to be paid in one year, and which if not paid is to be sued within one year. Payment is something that discharges the debt, not something that keeps it alive and perpetuates it. But if this process of keeping alive and extending be carried on by the corporation and the creditor, it cannot affect the stockholder whose statutory liability is restricted to one year from the contracting of the debt, and who cannot be held liable unless it be put in suit in one year from its maturity.

But it is argued that the stockholders knew and assented and are therefore bound. The stockholders undoubtedly knew that much more than the capital was invested in plant, and that there was a large amount of bills payable. This they knew from the annual reports, and they only met once a year. But what proof is there, or what fact from which they could infer, that there was an arrangement by which their liability, instead of being restricted to debts contracted within a year was extended to debts contracted in a series of years. No such arrangement or contract could be made to bind them without their express assent. The 4th Section of the charter was notice to the creditor. It was enough to put him on inquiry. He and the corporation cannot enlarge or extend the statutory liability of the stockholders by inference and without his express agreement.

The sale of the mines, works, and material on hand, and of the good will of the company's business, was equivalent to a cessation of the company's business. It was not

a dissolution, because there was some other property to be sold, and there were debts to be paid. But it was an announcement that the company had ceased to do the business for which it was incorporated. The corporation, its officers and stockholders, were certainly bound by this action. The resolution to sell was unanimously adopted, 2,039 shares, upon a vote by shares, voting for it. To say by unanimous vote, we will do no more new business is to say as plainly as

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language can speak, we will \*create no new debt. The power of the officers to borrow money and make notes, was an implied power, not a power expressly granted. The resolution of 25th June, 1877, and subsequent sale, which took place in July, 1877, was certainly a revocation of the power to bind the company and the stockholders by new debts. It put the company in liquidation, and withdrew the implied power to borrow moneys or create new obligations. The notes upon which the judgments of the Union Bank are founded, all bear date subsequently to the sale; they are dated in February and March, 1878. They are renewals of old notes. The attorneys of the bank contend that they are new contracts, and new debts contracted as of their respective dates. This view has been discussed elsewhere.

It is also said that the bank is not affected by this action of the company and stockholders. Look at the situation of the parties. Mr. Mowry, the President of the bank, was a director in the company, and Mr. Gibbon, the endorser of the notes, sat at both boards. Messrs. Mowry and Gibbon were both present at the passage of the resolution of 25th June, 1877. It is well known as the usage of banks to intrust ordinary renewals to the president, and here the president and a director sat on the company board. The knowledge of Mowry was official, for it related to the business of the bank, and the bank is bound by the legal effect of his knowledge. The legal effect of the sale was, that although the officers of the company might renew bills payable, in the sense of extending an old debt, they could not renew them in the sense of creating a new debt. Morse, Banks, 74.

The main question here under consideration, arose in Parrott v. Colby, 6 Hun, 55, and it was held that the acceptance of a note did not merge or extinguish the original indebtedness, but only operated to extend the time of payment, and that as plaintiff had not brought his action within one year from the time the original debt became due, the defendant was not liable: and also that the personal liability of a stockholder in such cases cannot be renewed or extended by any renewal or extension of the indebtedness, which the creditor may make with the corporation. This decision, which was well con-

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sid\*ered and well reasoned, was affirmed



on opinion below by the Court of Appeals, 71 N. Y., 597. The same doctrines are affirmed by the same Court of Appeals, in the case of the Jagger Iron Company v. Walker, 76 N. Y., 521, with additional force of reasoning. A certified copy of the decision in this case was produced. The reasoning in these cases impresses me as sound and incontrovertible, and I am of opinion that the law of South Carolina is in accord with them.

My conclusion is that judgment should be for defendant stockholders.

The case came up for trial on exceptions to this report, and in April, 1881, his Honor filed the following decree:

The Master, in his report, says:

"The main question that underlies this whole case is, whether the notes sued upon or the original debt for which they were given, is the indebtedness for which the shareholder is responsible. The suing creditor claims that the last note sued on constitutes, in each case, the debt of the company, and that suit was brought within one year after it became due. Defendants claim that the maturity of the first note in each case was the time the debt became due, and that suit was not brought within one year from such maturity in any of the cases. In all of the cases notes have been renewed, and brought down to time of the suit; as one note matured, another was given in place of it, paying only the interest." These extracts from the full and elaborate report of the Master, present the "main question" in the case.

Though the right of a creditor of the Wando Mining and Manufacturing Company to resort to a shareholder for payment of the Company's debt, may not, in strictness, be called a statutory right, still, it is certain, that outside of the statute no such right exists. The Act of Assembly, then, must be our guide in declaring the remedy to be pursued, the circumstances under which the remedy can be enforced, and its extent.

It is needless to rehearse the manifold rules for the construction of statutes, through the application of which the meaning of the Legislature is to be ascertained. There are

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no better \*rules than that words shall receive the meaning they have in common use, and that what is plainly expressed needs no interpretation. Our first step is an examination of the act, and to understand what a creditor would learn from its reading. He would read, that a shareholder was liable for all the debts contracted by the company, to the extent of the par value of his shares, with the condition that the debt was to be paid within one year from the time of contracting it; and that suit must be brought within one year from the time after the debt became due. But he would find no explanation of what is meant by the words, "contracting a debt."

The meaning of these words may, in some

degree, be ascertained from the transaction itself, or, rather, from the character of the instruments used in the transaction. These are promissory notes, which, by the indorsement of the payees, may be converted into bills of exchange. They are negotiable papers in the fullest sense. In a word, they are complete contracts in and of themselves. There is no need for the expression of any consideration in them. Though the words, "value received," may be found in them, and it might be necessary, as descriptive of the note, to use the words in a declaration (before the Code), no consideration need be expressed in the note, nor proved in suit upon it. The character of the instrument implies consideration received. It is clear, that any purchaser of a note, before maturity, has the right to require payment, without inquiry into the consideration. Surely, in assumpsit, the indorser or bearer could recover upon the instrument alone, without reference for proof to aught but the note; and, even in debt, between the payee and maker, no consideration must be stated in the declaration.

Thus: supposing the case to be one of renewal only, one complete contract is given up for another, though of the same character; and, if it be asked, as a fact, what is the consideration? it may be answered, the surrender of one note is a good consideration for the giving up of the other. Any disadvantage to one party, or advantage to the other, is sufficient as a consideration. Upon the note surrendered, no action can ever be maintained. It has done its duty, and is

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gone forever. \*A note taken up by the maker, though not paid, can never afterwards be negotiated. It is functus officio. *Beck v. Robley*, 1 H. Black. 89.

Does it not, then, lie upon the party alleging that which is called a renewal or a continuation of the first contract, to show that the new note or contract, complete in itself by law, is, in fact, by the act of the parties dependent upon some former contract, and must take effect in connection with it?

A very material inquiry is, what was the intent of the parties in the renewals made, or in the giving of the new notes? Upon this subject we have the testimony of Mr. Inglesby. As stated by the Master, he "in his testimony affirms and insists that the new notes were given and accepted in payment." Under the circumstances of the case, however, the Master thinks this express agreement is not sufficiently proved; and in the absence of those who also probably knew the facts, but were not produced as witnesses, declines to regard the intent established. If the money had been actually paid when the new notes were given, and immediately thereafter lent to the payees upon the new notes this would certainly be a new loan. What further would be required in this transaction

to complete a loan? the payment of the discount.

According to the testimony the interest was paid. What was then the contract between the parties regarded only as a renewal? The debtor stipulated beforehand, or an agreement to the effect existed, that the money was again to be lent to him, or that he was to give a new note for the old note upon payment of the premium, or discount. Less than this, the parties could not do to accomplish even an ordinary renewal. Thus the acts necessary to constitute a new debt are the same as those required for a renewal. What, then, constitutes the difference between a renewal and a new loan? Only the intent of the parties. There can be no question as to the intent of the attorney for the creditors; and it is not difficult to believe that the company would be willing for the use of the money to regard the transaction in the character of new loan or contract.

It appears from the testimony and the re-

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port of the Master \*that eminent counsel had for others loaned large sums of money to the company, and were undoubtedly anxious about the security of the funds. Can it be for a moment supposed with the charter before them, showing the necessity of the debt being contracted within the year to bind the stockholder, that the necessary precautions to place the transaction in the character of a new debt would be omitted.

It is manifest from the testimony of one of the firm, that he regarded no transaction had occurred which would impair the stockholders' liability; and numerous transactions called settlements, payments, or renewals, had been effected through him. Without giving to any opinion of the attorney the force of a contract between the creditor and debtor, it is certain that on one side, that of the creditor, there was no idea that the transaction was a mere substitute or renewal.

The entries upon the notes surrendered often declare settlement, interest paid, and new note given for principal. These entries were open and known to all parties, and were contemporaneous with the new notes given. One of the most important facts disclosed by such entries is the manner in which the settlements were made. The old note is declared to be settled by the amount being included or embodied in the new note. The old security is declared to be settled (extinguished), and a new note given for the amount.

Can there be a more distinct declaration of the end of one contract and the beginning of a new, or of what the intent of the parties was? The correct view of extinguishment or payment depends upon the agreement of the parties. Even the parting with an old note by the creditor and the acceptance of a new, or the delivery of a note if negotiable without indorsement, may, in the

absence of other proof, furnish a presumption of the intention of the parties. But adding the testimony of witnesses, the entries made and the conduct of the parties, the evidence preponderates of the intent of the parties in favor of a new contract, and the extinguishment of the former, which in substance is payment.

Upon acceptance of the charter, the shareholders were bound by all its provisions. We

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look therein in vain for any power \*vesting in the shareholders the right to assent to or dissent from the contracting of debts by the company. The shareholders are in no way required to be parties to the contracts or debts. The act, too, is wholly silent as to the mode of contracting the debt or when it must be contracted to render the shareholders liable. Nor is anything said about a debt continued or renewed. "Debt contracted" are the words of the act and not when was the debt incurred or commenced. The reasonable meaning of the act attaching liability to the shareholder seems to be completed when a contract is made by the company binding it for the payment of a debt.

It is ordered, adjudged and decreed—That so much of the report of the Master as determines that the shareholders of the stock in the Wando Mining and Manufacturing Company are not liable for the par value of their shares to the plaintiff on the ground that the debt was not contracted within the time required by the charter, be reversed, and that the plaintiff recover against the shareholders or stockholders the debt for which suit is brought, as provided by the charter, and have leave to enter or docket judgment accordingly. Also ordered—That the exceptions of the different parties to the Master's report, except as sustained in the decree, be overruled, and that said report, in all its parts, except as reversed in this decree, be confirmed, and its findings of fact and conclusions of law made the judgment of the Court. Ordered—That plaintiff be allowed costs.

The defendants appealed upon the following exceptions:

1. Because his Honor erred in ruling, that the debts set up in this case were incurred within the period required by the charter of the Company, in order to fix the liability of the shareholders.

2. Because his Honor erred in overruling the finding of the Master, as matter of fact, that the notes in question were renewals of other notes running over a period of more than two years, and that his Honor erred in not holding, with the Master, as conclusion of law, that each of such renewals was simply a renewal of the evidence of the debt, and not the creation of a new debt.

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\*3. Because his Honor erred in overruling so much of the Master's report as finds, that



by the term, "debt," used in the statute, for which the shareholder may be made responsible, is meant, the original debt contracted by the Company, the subsequent renewals operating as the repetition of the evidence of the debt.

4. Because no one of the notes sued upon comes within the terms of the charter, by which the individual liability of the stockholder is created, not being a debt contracted by the Company, which is to be paid within one year from the time the debt was contracted; and, because none of the suits, in evidence, was brought within one year after the debt became due. And his Honor erred in not so ruling.

5. Because, in no event, can the shareholders be made liable for any contract made by the President of the Company after the corporation had disposed of its lands, factory, and machinery, and had ceased to do business, especially to persons who had notice of this; and that his Honor erred in omitting so to rule.

6. Because, in so far as the charter imposes a liability upon shareholders in the corporation, it is in derogation of the common law, and must be strictly construed.

7. Because the decree of his Honor creates a liability upon persons, for debts contracted by the Company, long anterior to the transfer of shares to them, for which debts, neither they nor the Company, during their connection therewith, received any consideration.

8. Because the decree finds as matter of fact, and holds, as conclusion of law, that the transfer of stock, held as collateral security, constituted such transferees stockholders in the Company, individually liable under its charter.

9. That the Master, having found as matter of fact, that the notes sued by the plaintiff were renewals of other notes, he should also have found that they were usurious. And, in no event could the plaintiff be entitled to interest and costs; and the said notes were not within the scope of the powers of the officers of the corporation, and not chargeable upon the stockholders. And, that his Honor, the presiding Judge, should have so ruled.

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\*10. That his Honor, the presiding Judge, was in error in holding, that a note, payable within twelve months after date, or, within one year after date, is a debt creating an obligation, for which, under the charter, a stockholder is individually liable.

11. Because the testimony shows, that the notes in question, being renewals of previous notes, and could be traced to the original debt with entire accuracy. That many of the notes were either originally, or during their currency, were payable at a period longer than one year after date.

That these matters of fact should have been found by his Honor, and he should,

thereupon have found his conclusion of law, that no such note could be converted by renewal into an obligation of which a stockholder would be held individually liable.

Messrs. A. D. Cohn, Buist & Buist, J. N. Nathans, J. & J. Hamphill, McCrady & Son, Simonton & Barker, for appellants.

Messrs. Hayne & Ficken, contra.

Mr. James Conner, same side.

First. Whether one security operates as payment and satisfaction of another is always a question of intention. The intention is the controlling element, and this may be shown by facts and circumstances as well as by positive proof. 2 Dan. Neg. Instr., §§ 1221, 1259, 1260; 2 Spears, 436; 5 Rich., Eq. 166; 3 S. C. 109; 11 S. C. 527; 13 S. C. 253; 15 S. C. 72, 518, 613.

Second. Each of the notes sued upon was intended to be, and was actually accepted in payment of the note which preceded it. The intention was payment or satisfaction, and not substitution. Hence each of the notes sued upon represents a "debt contracted" by the Company, at the time when it was given and accepted in place of the preceding note. The Company and the creditors intended to create a new liability, which might be enforced, irrespective of the time when the "original indebtedness" was contracted.

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\*The notes in question may be divided into two classes: 1st. The five notes sued upon by the Union Bank. 2d. The thirty-eight notes sued upon by the other creditors.

(a) As to the Notes of the Union Bank: The stockholders are liable for at least three of these, even if the theory insisted on by appellants be correct, that they are "renewals," pure and simple, of loans or debts "originally contracted," at dates anterior to the dates when these particular notes were discounted, for the so-called "original indebtedness" was "contracted," and "became due" less than one year before suit was brought for the collection of the notes sued upon. But respondents maintain that the stockholders are liable for all of the notes held by the Bank, on the ground that a new loan or debt was contracted when each of said notes was discounted. The correct doctrine being that when a "renewal note," as it is called, is discounted, and the drawer is credited with the net proceeds (as was done by the Bank here) and debited with the amount of the old note, which is cancelled and given up to him, a new loan is created, and the debt on the old note is completely extinguished. *Thomp. Liab. Stock*, §§ 101, 298; *Ang. & Am. Corp.*, § 620; 10 *Serg. & R.*, 63; 15 *Serg. & R.*, 163; 4 *J. J., Marsh*, 1; 1 *McC.*, 358; 1 *Strobb.*, 467.

(b) As to the Notes Included in the Second Class: The testimony shows that these notes were intended to be, and were actually accepted in payment or satisfaction of the pre-

ceding notes for which they were exchanged; and such being the intention of the parties, each new note operated as payment or satisfaction of the preceding note and the debt evidenced by the former note was thereby as completely extinguished and discharged as if it had been paid in money.

Third. The proposition advanced by the appellants that "no contract or agreement of the Directors of the Company by which the stockholders' several liability is affected can bind them without their consent" is wholly untenable. The consent of the stockholders to a contract or agreement of the Directors on behalf of the Company is not necessary. The stockholders are bound in their individual capacity for all debts contracted by the Company which are in their nature debts for

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which \*they are liable under the charter. Their liability arises from the nature of the contract. The moment the Company contracts a debt of the sort for which the stockholders are severally liable, the creditor of the Company becomes eo instanti a creditor of the stockholders. The debt of the company becomes their debt at the instant of its creation. The contract made by the stockholder was entered into when he became a stockholder. His becoming a stockholder was a voluntary act. His liability arose from that act. It is a mistake to call it a statute liability. 1 Comst. 47; 2 Otto, 509; 13 S. C. 220.

Fourth. Appellant's 5th and 9th exceptions affect only the notes held by the Union Bank. The stockholders contend that they are not liable for these notes, first, because they were contracted by the President of the Company "after the corporation had disposed of its lands, factory and machinery, and had ceased to do business;" and secondly, because the notes were "usurious." Neither defence, we submit, is tenable in this action.

(1) The President and Directors had express authority under the By-Laws of the Company "to manage its affairs and exercise the power and franchises of the Company as they might deem advisable, provided their action in the premises be not inconsistent with the Charter." This authority was unrevoked when the notes in question were discounted by the Bank. The resolution of June 25th, 1877, merely "authorized" the President and Directors to accept an offer of \$75,000 for the factory, etc.; but it was left to the Board to wind up the Company's business and settle its affairs "in such manner as they might deem advisable."

(2) The money borrowed from the Bank was honestly applied by the President and Directors to the payment of overdue liabilities of the Company, and by such retention and enjoyment of the proceeds of the notes, the Company has rendered the act of the President in borrowing the money, as binding as if he had been expressly authorized to discount the notes. It will be presumed that he

rightfully exercised the power he assumed to exercise, and the Company and the stockholders are estopped from denying it. 101 U. S. 351, 181.

(3) In this action the only question open

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for inquiry, is the \*nature of the debts, upon which the judgments are founded—do they fall within the class of debts for which the stockholders are individually liable under the charter? There can be but one answer to this question, for the notes are all payable "sixty days after date," and suits for their collection were brought against the company within three months after they became due. We submit that the stockholders as well as the Company are estopped by the judgments already recovered against the Company from averring, in this action, that the notes upon which said judgments have been recovered are either "usurious," or that they were "not within the scope of the powers of the officers of the Company," for the judgments against the Company bind the stockholders, and were conclusive as well of the amount due upon the notes, as of their validity. Freem. Judg. § 177; Thomp. Liab. Stock. § 329; 8 Abb. Pr. R. 52; 91 U. S. 56.

May 22, 1882. The opinion of the Court was delivered by

Mr. Justice WALLACE. The exceptions to the circuit decree are numerous. To consider them in detail would unnecessarily extend this opinion. The issues made by the pleadings depend upon a few decisive questions, in the discussion of which all the material points made in the exceptions will be embraced.

The Wando Mining and Manufacturing Company accepted a charter, and organized and proceeded to do business under it which contained the following provision, to wit:

"Section 4. That every shareholder of said company shall be individually liable for the debts contracted during the time he or she shall be a shareholder in said company to the extent of the par value of his or her shares in the same: provided, that no person holding stock as an executor, administrator, guardian or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, guardian or trustee shall be liable in like manner, and to the

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same extent as the testator or intestate or ward or person interested in such trust fund would have been, if he had been living and competent to act and hold the said stock in his own name. And provided further, that no stockholder shall be personally liable for the payment of any debt contracted by the



said company, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against said company within one year after the debt shall become due, and no suits shall be brought against any stockholder in said company for any debt so contracted unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in said company, nor until an execution against the company shall have been returned unsatisfied in whole or in part."

After a prosperous business career of several years, the company became embarrassed, and on June 25, 1877, by a unanimous vote of the stockholders passed the following resolution, to wit:

"Resolved, That the President and directors of the company be authorized to sell the mines and works on Ashley River, the material now on hand and the good will of the business of the present company to a new company that may be formed to carry on the business, for the sum of \$75,000, the new company assuming through its officers the expense of collecting in the assets of the old company."

The sale contemplated by this resolution was effected on the same day and upon the terms set out in the resolution. Mr. George E. Gibbon, the President of the old company, and Mr. Francis B. Hacker, its Secretary and Treasurer, being immediately elected President, Secretary and Treasurer of the new company respectively. The amount realized from the sale was applied to the reduction of the indebtedness of the company. Subsequently, by authority of the shareholders, the Board of Directors sold the company's wharf. Out of all its available assets, the company was not able to pay its debts, and suits were brought against it by its creditors, and judgments obtained which in the aggregate amount to a large sum. Executions upon these judgments having

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been returned unsatisfied, this \*action is brought to establish the individual liability of the stockholders upon the unsatisfied demands against the company. The issues arise mainly under the section of the charter above quoted, the creditors claiming that suits were brought upon their demands within one year from the maturity of the debts, and that their debts were contracted to be paid within one year from the time they were made, and that therefore the individual stockholders became liable upon the return of the executions unsatisfied. All of this is denied by the defendants.

Before proceeding to the examination of this controversy, it will be convenient to consider the issue made upon the notes held by the Union Bank, and upon which judgments have been obtained against the company. There can be no doubt of the rights of the

stockholders in this action to set up any available defense that goes to the question of their liability upon the note upon which judgment has been obtained against the company. The defendants in this action were not as individuals parties to the action in which judgment was recovered. That suit was against the corporation which in law is a distinct person from the individual members which compose it. The ground of the liability of the company may not prevail against the stockholders. For it is only when a judgment is obtained against the company upon debts of a certain description, and upon which suits have been brought within a specified time, that the stockholders are liable. In this action it is therefore necessary to establish that the conditions of the liability of the stockholders exist. To do this necessarily involves an inquiry in this action into the grounds of the stockholders' liability. Of course, then, it is competent for these defendants to interpose any defence that goes to the question of their liability upon the notes upon which the judgments were obtained. In Abbotts' Digest of the Law of Corporations, 2 vol., p. 299, pp. 22, 23, the following language occurs: "In New York the liability of the individual members of a joint stock company, after judgment and execution against the company unsatisfied is that of partners, and consists in the original demand against the company, not in the judgment against it. Therefore a

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\*complaint to enforce the liability must show all the facts necessary to constitute a subsisting cause of action against the company on the original demand."

Now as to the notes held by the plaintiff in this action, the defendants allege that they are not liable thereon, because they were made by Geo. E. Gibbon and F. B. Hacker, after the company had ceased to do business, and Gibbon and Hacker had no longer authority to bind them by new obligations. The notes referred to were drawn by Gibbon and Hacker as President and Secretary and Treasurer of the Wando Mining and Manufacturing Company, at sixty days, and dated in February and March, 1878, and endorsed by Gibbon to the bank. The money raised upon them was applied to past due notes of the company. It is conceded in the argument that the President of the company, as such, was authorized to contract debts for the company, and that his contracts would bind the stockholders if the debts were within the description of such as could be set up against them. This power manifestly had its source in his relation as agent ex-officio to the company, and of course was limited by the scope of his agency. He was agent to carry out the objects of the company. These objects were the manufacture and sale of fertilizers. Any transaction of his in relation to these objects or that was

necessary or incidental in their prosecution was within the scope of his agency and binding upon the company.

In June, 1877, many months before the notes now held by plaintiff were drawn, the company had sold all of its property that was used in the manufacture of fertilizers, and thus had deprived itself of the present means of carrying on its former business; had sold the good will of the business to another company, and thus bound itself in law not to further continue the business; had appointed the new company its agents to collect its assets. Thus there was no longer any business for the officers to conduct. By the force of these transactions, the reason and foundation of official agency was dissolved. With the disappearance of the reason upon which alone it rested, the power of agency was destroyed. As if in recognition of this result these same officers assumed, before the

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execution of the \*notes under consideration, the same official relations to the new company, that they had sustained to the old, with the same powers of agency, and for the same reasons, and in reference to the same subject matter, and to conduct the same business.

By the force of these facts the former president and secretary of the company were deprived of all power to create new obligations as between the stockholders and all persons having notice of the facts. The outstanding indebtedness was a matter for the attention of the company, its former officers being deprived of such means as the company had for its payment by the withdrawal of the assets from their hands. Mr. Mowry was president of the Union Bank, and a director of the Wando Mining and Manufacturing Company, during all the time of the occurrences which had the effect to deprive the president and secretary of the company of all powers of agency, and was present at the meetings of the company at which they took place, and was president of the bank at the times when these notes were discounted. His knowledge was therefore official, and the bank is bound by the legal effect of his knowledge. These notes of the plaintiff therefore are not obligations upon the individual shareholders of the Wando Mining and Manufacturing Company.

The next question relates to notes that were made by agents of the company before the sale of its property. Actions have been brought upon all the notes against the company, and judgments obtained. It is conceded that all these notes can be and have been traced back through successive notes to their original debt, and that no action has been brought upon any such original debt within one year, after such debt became due. This statement discloses the grounds of controversy between the parties. The suing creditors of the company claim that the notes

upon which they have obtained judgments constitute in each case the debt of the company, the former notes in each case having been paid successively by subsequent notes, and that therefore each new note represented a new debt; and that the notes sued upon were new debts that were to be paid within a year, and were sued upon within a year after maturity. Defendants claim that the

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maturity of the first notes given for \*the original consideration was the time the debt, for which they were liable, became due; and that suit was not brought within one year from maturity on any of those notes; that when one note was taken up and another given, it was not payment, but renewal only; that the debt thus having longer than a year to run the conditions of personal liability of stockholders do not exist.

Under the common law no individual liability attached to members of a corporation for the payment of its debts. The liability of the shareholders of this company is created by the charter, and only exists upon the conditions therein stated. If a person who proposed to become a creditor of the company desired to increase the safety of his debt by securing the personal liability of the shareholders, he could do so by making a contract that his debt should be paid within a year. Upon such a debt the shareholders were personally liable. If not paid within the year then to preserve his right to resort to the stockholders, he must bring his action within a year from the maturity of his demand.

Are the suing creditors within these requirements? It appears that the notes they are now seeking to set up were given for previously existing notes, and they for others that existed before them, the original debt in each instance being more than two years old before suit brought, no suit being brought within a year from the maturity of the original debt. Whether the suing creditors, then, are within the requirements of the charter depends upon the question whether these last notes were payments of the previous notes or not. A debt is a legal obligation to pay money. This contract can only be discharged by the payment of money, or by a new contract in relation to the same subject matter by which it is agreed that something else than money will be given and received in discharge of the contract. See *Costello v. Cave*, 2 Hill, 528 [27 Am. Dec. 404]; *Chastain v. Johnson*, 2 Bail. 574; *Bryce v. Bowers*, 11 Rich. Eq. 47. The burden of proving this new contract is upon him who affirms it. *Johnson v. Clarke*, 15 S. C. 72. It is not proved by the mere fact that one note is given for another. There must be additional proof of an agreement between

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the parties \*that one note shall be given and accepted in satisfaction of the other.



The only direct testimony upon that point in this case is that given by Mr. Inglesby, who testifies that his understanding was that the new notes were received in payment of the old. But other parties to these transactions do not testify to such an understanding upon their part, and the writing upon the notes that were taken up and preserved by the company does not indicate that such was the understanding of the officers of the company. We on the whole agree with the Master, before whom the testimony was taken, that "The proof, therefore, of an express special agreement is not sufficient. Mr. Inglesby's testimony is without doubt an honest and strong expression of his understanding in relation to the renewals and their legal effect, but is not such evidence as is required to establish an express contract between all the parties concerned."

Suppose for the sake of the argument that there had been an express agreement between the officers of the company and its creditors that each new note should be given and accepted in full satisfaction and payment of the preceding note. The charter provides that the shareholders shall not be liable upon a debt of the company unless it is contracted to be paid within a year, and if not paid, sued within a year from maturity. Upon the supposition that a new note is accepted as payment of the old at maturity, and at the maturity of the second note another is received in payment of it, and so on indefinitely, would each new note create a new obligation against the company, and binding upon the shareholders under the charter?

There is no actual, only technical payment. Only an agreement between the officers of the company and its creditors that something shall be considered payment, which as matter of fact is not payment. The intent of the statute manifestly is to limit the liability of stockholders to debts, to be paid within a year. By this supposed understanding between the creditors and officers of the company, it is attempted to extend the liability of shareholders for an indefinite length of time. A construction of a statute that thus plainly defeats its intent cannot be sound.

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\*Nor would the fact that this was done by the agents of the company give it any binding force against the stockholders. For that they are not authorized as agents of the shareholders to do that is plain from the charter, of which all persons dealing with them as agents must take notice. We must therefore conclude that the debts of the company which it is sought to establish against the shareholders are not obligations upon which they are liable.

This conclusion renders the consideration of the special defences of particular shareholders unnecessary. The judgment of this

court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

17 S. C. 364

AGNEW v. ADAMS.

(November Term, 1881.)

[1. *Homestead* ⚡7.]

As against debts contracted prior to the Constitution of 1868, an assignment of homestead is a nullity.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 9; Dec. Dig. ⚡7.]

[2. *Execution* ⚡249.]

A sheriff's sale of land under an execution, having no lien, will be valid, if there be at the time in his office an execution having lien.

[Ed. Note.—Cited in *Trumbo v. Cumming*, 20 S. C. 336; *Woody v. Dean*, 24 S. C. 506; *Matthews v. Nance*, 49 S. C. 397, 27 S. E. 408.

For other cases, see *Execution*, Cent. Dig. § 697; Dec. Dig. ⚡249.]

[3. *Trial* ⚡233.]

In charging the jury that this principle was correct, if the holder of the unsatisfied execution had not abandoned his claim or waived his right, and in leaving this question to the jury without further explanation, the presiding judge in this case erred.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. ⚡527-530; Dec. Dig. ⚡233.]

[4. *Homestead* ⚡203.]

Where executions having no lien upon a homestead are levied upon a tract of land, of which the homestead is a part, and the whole is sold, the homestead will pass under such sale, if there then be in the Sheriff's office, an execution having lien upon such homestead, although it was not levied, was unknown to the purchaser, and no special orders had been given by its owner for its enforcement, McGowan, A. J. dissenting.

[Ed. Note.—Cited in *Garvin v. Garvin*, 34 S. C. 398, 13 S. E. 625.

For other cases, see *Homestead*, Cent. Dig. § 384; Dec. Dig. ⚡203.]

[5. *Stipulations* ⚡14.]

An agreement that the evidence taken at the first trial, shall be used as evidence at the second trial, and "no further oral testimony to be introduced," does not prevent the introduction of a judgment and execution not in evidence at the first trial.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. § 32; Dec. Dig. ⚡14.]

[6. *Evidence* ⚡332.]

A record offered in evidence, properly excluded, as either irrelevant or else as intended to show the validity of a judgment, which the Supreme Court, on a former appeal in this cause had declared to be invalid.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1237-1246; Dec. Dig. ⚡332.]

Before Pressley, J., Richland, July, 1881.

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\*This is a second appeal of the case reported, 15 S. C. 36, action by Thomas Agnew v. Robert Adams. At the second trial the following agreement was signed by the attorneys of record.

It is agreed that the testimony given on the former trial, as stated in the brief for the Supreme Court, subject to the objections

and exceptions therein taken, shall be the evidence on the new trial. Plaintiff to be at liberty to introduce the records in the cases in which judgments obtained against defendant were introduced on the former trial, and to be at liberty to offer in evidence record in case D. Crawford & Sons, John Agnew, Sr., & Son, and John Agnew, Jr., plaintiffs v. Robert Adams, Amie A. Weston, James P. Adams, and Jesse E. Dent, Sheriff. Defendants to have leave to object to it. The defendant to have permission to produce the original return and assignment of homestead of the appraisers referred to as lost at f. 34, the execution of which is admitted. No further oral testimony to be introduced.

Accordingly the evidence at the former trial was introduced at this. The plaintiff then offered in evidence under the aforesaid agreement between counsel from the Common Pleas of Richland County, the record in the case of D. Crawford & Sons, John Agnew & Son, and John Agnew, Jr., plaintiffs v. Robert Adams, Amie A. Weston, James P. Adams and Jesse E. Dent, Sheriff of Richland County, defendants, stating to the Court that the said record would show that the res litigata, as well as the res judicata, the point in issue as well as the point decided therein, was the validity of the judgment of Amie A. Weston v. Robert Adams, and that it was therein decided, ordered, adjudged and decreed that the said judgment was valid, the same being done in a proper suit between proper parties, brought for the express purpose of testing its existence and validity and binding upon Robert Adams. The defendants' attorneys objected on divers grounds. His honor ruled this record inadmissible, to which ruling plaintiff duly excepted.

The plaintiff next introduced in evidence the record in the case of F. W. McMaster,

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Administrator v. John P. Adams \*and Robert Adams. The cause of action therein arose prior to the adoption of the Constitution of 1868, being a bond for the payment of money, dated December 1, 1853, judgment regularly obtained in open court, dated May 11, 1874, for \$4727.25, the penalty of the bond being for \$4700 and \$27.25 being the costs and disbursements. This was the only judgment of this plaintiff against Robert Adams. The execution therein was of active energy at the time of the sale by the sheriff, and the levy thereunder on the lands in dispute in this suit was regularly made and endorsed thereon before or about the time the homestead was assigned, which levy was never renewed. Defendant's attorneys objected to this judgment and executions being received in evidence: Because, by agreement of counsel, none other than the judgments and executions offered and received on the former trial were to be offered in this, and that the record showed this was altogether a different case. His Honor overruled this objection un-

less the defendant could show another judgment of McMaster v. Robert Adams.

The defendant introduced in evidence the original assignment, of which a copy is contained in his answer, which had never had any plan annexed to it, so far as could be ascertained by inspection.

The presiding Judge charged the jury that, under the decision of the Supreme Court, the judgments of James P. Adams and Amie A. Weston, and the executions based thereon did not bind the homestead, and, therefore, as there was no valid sale of the land under them, were out of the case and not to be considered by the jury; to which plaintiff duly excepted. He also charged the jury that: "A question is raised as to the assignment not having been recorded according to law. I will now give you and all parties a chance to decide it flatly. A marriage settlement is declared by law to be totally void unless recorded within a certain time; yet the Courts have decided that it is good between the parties though not recorded. The Courts, in other words, have decided that recording is not necessary between the parties, provided they have actual notice. I

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charge you that this assignment did not \*lose its validity by reason of any defect in the recording; and I further charge you that a defect in the recording, not attributable to the debtor, would not invalidate it. I go further and charge you that, where the parties to a proceeding in Court do everything which is required of them, no neglect by a public officer can deprive them of their legal rights. In this case the homestead was assigned after a levy and advertisement under these executions, and Colonel Wallace, according to the testimony, forbade the sale of the homestead. I charge you that this was actual notice. I also charge you that if necessary, the assignment has been sufficiently recorded." To which plaintiff then and there excepted.

His Honor refused to charge the jury, as requested by plaintiff, "That no matter what may have been the relative rank of F. W. McMaster, administrator, judgment and execution, or what may be the proper distribution of the proceeds of the sale or the rights between F. W. McMaster, administrator, and the plaintiff-purchaser, the plaintiff as purchaser took title from the Sheriff, valid against the defendant judgment debtor, and must recover against the judgment debtor if the jury find as a fact that the cause of action in McMaster's case arose prior to the Constitution of 1868 and the executions and levies were as stated in the brief for the Supreme Court." He however charged that the preceding request would be "allowed if McMaster had not abandoned his claim or waived his right, and if the Sheriff proceeded under his execution." To which charge and refusal the plaintiff duly excepted.



His Honor refused to charge the jury, as requested by plaintiff: "That if the Sheriff had in his office, at the time of sale, the F. W. McMaster, administrator, judgment and execution, and the same constituted a lien on the defendant's homestead, the sale will be referred to them and the plaintiff be entitled to the land in controversy under the Sheriff's deed." He however charged that the preceding request would be allowed unless the jury believed, from the circumstances, that McMaster had abandoned his claim and waived his right. To which charge and refusal plaintiff duly excepted.

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\*His Honor charged the jury "that if McMaster gave orders not to sell, or in any manner abandon his claim under his judgment after the homestead was assigned, and if the jury believed that, after said claim had been withdrawn, the sale was made, as testified by sheriff, only under the judgments of Mrs. Weston and J. P. Adams, then such sale would not give the purchaser a valid title to the homestead. In such case the sale could not be referred to the judgment of McMaster if his claim had been withdrawn or abandoned. That a creditor whose judgment was not a lien on homestead could not, by including it in a sale of land which was bound by his judgment, thereby sacrifice the rights of a creditor whose judgment was a lien on the homestead." To this plaintiff duly excepted.

His Honor charged the jury "that a senior judgment creditor affected by homestead assignment has no right to have a sale made except by co-operation or assent of the junior judgment creditor who has a lien on the homestead." To which plaintiff duly excepted.

Verdict was for defendant. Plaintiff moved for a new trial and that being refused, appeal to this Court on the exceptions above noted.

[For subsequent opinion, see 26 S. C. 101, 1 S. E. 414.]

Messrs. Bachman & Youmans, for appellant.

Messrs. Bacon & Moore, contra.

May 30, 1882. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. This is a contest over a tract of land lying in Richland County, containing some 200 acres, claimed by the plaintiff appellant as a purchaser at sheriff's sale, and resisted by the defendant respondent on the ground of homestead.

It appears that in 1874 the real estate of respondent, situate in said county, embracing 902 acres, was levied upon by the Sheriff by virtue of sundry fi-fas then in his office. The respondent claimed a homestead, and the Sheriff caused to be assigned to him the 200 acres now in dispute. Upon the interposition of this claim of homestead the sale was post-

poned in fact, it seems that an injunction

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was obtained restraining the \*sale. Some time after this, to wit, on February 10th, 1878, two of the judgment creditors assigned their judgments to John Agnew, Jr., who, claiming that these judgments were founded on debts contracted before the adoption of the Constitution of 1868, and therefore under a recent decision not subject to the Homestead provision therein, ordered the Sheriff to proceed to execute. The Sheriff thereupon readvertised and sold, the appellant being the purchaser at the bid of \$225. At this sale the attorney of respondent gave notice of the assignment of homestead as above, and forbade the sale.

This action was then commenced by the appellant, to wit, on September 30, 1878. At the trial a verdict was rendered for the appellant, but upon appeal to this Court, the judgment was reversed and the case remanded. (15 S. C. 36.) This reversal was upon the ground that the Sheriff had no authority to sell the homestead under the two judgments by virtue of which he had acted, because as to the first, to wit, the Amie Weston judgment, it was a nullity, having been rendered by the Clerk of the Court after the Act of 1873; and as to the other, the James P. Adams judgment, the debt was contracted after the adoption of the Constitution of 1868—the Court holding that neither of these judgments had liens upon the land. The Court also held that there was no fatal defect in the assignment of the homestead; that the act had been substantially complied with, and as to the two judgments of appellant the assignment was sufficient.

Upon the second trial, from which this appeal comes, the same testimony was offered as upon the first, with the addition, on the part of the plaintiff, of the introduction of a judgment and fi-fa in favor of F. W. McMaster for \$4,727.25, dated May 11, 1874. This judgment was junior to the judgments under which the Sheriff acted, but it was founded on a debt admitted to have been contracted before the homestead provisions. This judgment raises the important question involved in the appeal, to wit: Did it legalize the sale by the Sheriff of defendant's homestead? The appellant's attorney requested the Judge to charge that it did, "provided the jury found as a fact that the cause of action therein arose prior to the

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Con\*stitution of 1868, and the executions and levies were as stated in the [former] brief for the Supreme Court." His Honor Judge Pressley charged as requested, "provided McMaster had not abandoned his claim, or waived his right, and had proceeded under his execution."

The request of appellant was no doubt founded upon *Bull v. Rowe*, 13 S. C. 360. In that case this Court held, after a full and

exhaustive examination of the law of homestead in this State, that the Constitution of 1868 upon this subject must be read as if no part applied to debts contracted before its adoption; that a debtor could not claim a homestead as to such debts by virtue of such constitutional provision, or by any subsequent acts passed thereunder. Previous to *Bull v. Rowe*, it had been decided in this State that an assignment of homestead, where it had been returned for record, was invalid as to old debts. *Choice v. Charles*, 7 S. C. 171; *Ryan v. Pettigrew*, 7 S. C. 146. But *Bull v. Rowe* went still further, and held that the whole proceeding was void, and that no homestead as such per se could be allowed in such cases, because there was no constitutional provision or act (under the principle held in *Gunn v. Barry*, 15 Wall. 610 [21 L. Ed. 212]; *Cochran v. Darcy*, 5 S. C. 125; *Ex parte Hewett*, 5 S. C. 409), which exempted any species of property from levy and sale as to such debts—quoting from *Thompson*, § 230, as follows: "It is scarcely necessary to say as a general rule, that a dedication of homestead in whatever form, does not have the effect of withdrawing it from liability on account of any pre-existing debt, lien, conveyances, or charges which otherwise would have bound the land;" also § 29: "Every debt created by contract prior to the passage of any homestead or exemption law is privileged from the operation of such law. To this rule, as the writer understands it, the Court can now admit no exception."

In the case of *Newton v. Summing*, 59 Ga. 399, it is said: "Those whose claims outrank the constitution may stay out of the Ordinary's Court, and nothing there done will be in their way." Under this principle, there can be no such thing as a homestead per se assigned against a debt pre-existing

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the Constitution of 1868, by virtue of any constitutional provision or act of the General Assembly passed thereunder proprio vigore.

The next question is, was the land in dispute sold by the Sheriff under the *McMaster* judgment? Under *Bull v. Rowe* and the other cases cited, the assignment of the homestead in 1874 was a nullity as to *McMaster's* judgment, it being founded on a pre-existing debt. But the question now is, has that judgment been enforced, and was the land sold thereunder by the Sheriff at the sale in 1878? The land was advertised for sale in 1878 under but two executions—the *Amie Weston* and *James P. Adams* executions. The deed of the Sheriff recites the *Amie Weston* execution alone, but the advertisement recites them both. At the time of the levy and the sale, the *McMaster* execution was in the office of the Sheriff with active energy. Now, with these facts above considered could the sale be legally referred to the *McMaster* execution? Such was the decision in the cases of *Gist v. McJunkin et al.* 1 McM. 342; *Mc-*

*Knight v. Gordon*, 13 Rich. Eq. 246 [94 Am. Dec. 164], and *Vance v. Red*, 2 Speers, 90.

In *McKnight v. Gordon* Chancellor Inglis said for the Court: "But there were in the Sheriff's hands at the time of the levy and sale sundry other executions against the mortgagor. The Sheriff's official acts in the levy and sale, and the deed made in pursuance thereof will not be made void by his referring them to a power and authority which he has not, if they can be supported by any power and authority which he in fact has. To such actual power and authority the law will refer them," citing *Gist v. McJunkin*, supra. In *Vance v. Red*, supra, the property was sold under a fi-fa which in fact had no lien; yet the sale was referred to an unsatisfied fi-fa in the hands of the Sheriff, although "Wait orders" had been indorsed thereon.

So that, the law in our State seems to be, that where the Sheriff has in his office an unsatisfied fi-fa having lien, his sale of such property will be valid, although the levy and advertisement originate as matter of fact from a fi-fa having no such lien. In *Vance v.*

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*Red* the property had been sold by the debtor before the fi-fa under which it was levied had been entered in the Sheriff's office, and therefore free from lien, yet the sale was referred to an older fi-fa which did have lien, although "Wait orders" had been indorsed on said older fi-fa (See *Greenwood v. Naylor*, 1 McM. 414, and *Snipes v. Sheriff of Charleston*, 1 Bay. 295.) This principle, however, was not denied by the Circuit Judge; he conceded it to be the law, but charged that it did not apply in this case. "If *McMaster* had waived his rights, or had not proceeded under his fi-fa," and he left it to the jury inferentially, if not directly to determine whether this was so. The real question then is, Did the Judge err in attaching these qualifications to the general principle?

There is no doubt as to the proposition that a party may waive almost any right. He may not only waive a right, but he may affirm a nullity. He may do this not only expressly by words, but by conduct. As was said by *McGowan, A. J.*, in *Bull v. Rowe*, supra: "The doctrine of estoppel applies to constitutional as well as other rights, and to proceedings absolutely void as well as those merely voidable. So that the first qualification which the Judge attached to the general rule, as an abstract proposition, was not erroneous. As applied to this case, however, we think it needed some explanation. "If estoppel by conduct is relied on, it must appear that it induced action, the disavowal of which would be inequitable, and which, therefore, the party who holds out the inducements is estopped from disavowing." *Bigelow on Estoppel*, 480; *Bull v. Rowe*, supra. There is no estoppel without fault to the injury of another. *Ibid.* These qualifications, we think, might and should have



been attached to the proposition charged by the Judge, that the principle contended for by appellant would be allowed "if McMaster had not abandoned his claim or waived his right," especially as this condition was super-added to the request, and there was no evidence in the case of an express waiver by McMaster of his rights.

But the Judge further charged, in effect, that even though McMaster had not abandoned his claim or waived his rights, yet the sale by the Sheriff could not be referred to his fi-fa unless it appeared that the Sheriff

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had proceeded under it. \*This, we think, was error. The cases cited above hold that where there is a valid fi-fa in the office having lien upon the property, whether the party plaintiff or the Sheriff has actually proceeded under it or not, the sale may be referred to it and such sale will be valid. *Vance v. Red*, supra.

We see nothing in the agreement as to the admission of testimony which excludes the introduction of the McMaster judgment. Nor do we find any error in excluding the record in the cases of Crawford & Sons, John Agnew & Son, and John Agnew, Jr., against Robert Adams and others. This record was intended to show that as between the parties to the said record, the judgment of Amie Weston against Robert Adams was valid. In the former appeal in this case, this Court had decided expressly that the Amie Weston judgment, as applicable to this action was invalid, and that the plaintiff could found no right thereon. If the purpose of its introduction on the second trial was to ground a right to plaintiff in conflict with the former opinion of this Court, it was properly excluded. If it was to establish an abstract proposition in no way affecting the question, it was irrelevant, and its exclusion was not error.

We do not understand the pertinency of the third exception, as to the recording of the assignment of the homestead and the plot. In the former opinion it was understood that the assignment had been returned for record, and had been recorded, but that the plot, though left in the Clerk's office, had not been recorded. Upon these facts, the Court held the assignment valid, at least as to the debts then before the Court subject to homestead exemption. We understand that Judge Pressley's ruling went to the extent that where a debtor is entitled to a homestead, the recording of the assignment is not absolutely necessary, as between the parties, provided they have actual notice. This case does not depend upon the question whether the assignment of the homestead was in form and according to the terms of the act, but whether the debtor was entitled to a homestead—not whether it was set off regularly, but whether he had the right to have it set off at all. Such being the fact, we do not

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regard the question raised in this exception as properly in the case, and therefore we express no opinion in reference to it. We have already said in the former opinion that there was no objection to the homestead on the ground of the want of formality in the assignment, or the failure to record the plot.

It is the judgment of this Court, that the judgment of the Circuit Court be reversed, on account of error in the charge of the Judge in reference to the McMaster judgment and fi-fa, and that the case be remanded for a new trial.

Mr. Justice McGOWAN, dissenting. I concur with the majority of the court in the opinion which has just been pronounced except as to so much of it as holds that the sale by the supposed authority of the executors of Amie A. Weston, assignee, and James P. Adams, which were incorporated in the homestead, must be referred to the execution of F. W. McMaster, which appears to have been recovered on a cause of action older than the constitution, and which happened to be in the Sheriff's office at the time of the sale; although the homestead had been assigned under that execution and no instructions had been given by McMaster, the plaintiff, to proceed under it against the homestead, and even its existence at the time of the sale as an execution which could reach the homestead was unknown both to the Sheriff and Agnew, the purchaser.

In October, 1870, there were in the Sheriff's office of Richland County, several executions against Robert Adams, viz.: T. P. Weston, *Guardian v. Robert Adams*, February 3, 1874; Glenn A. Kaminer v. Robert Adams, February 6, 1874; James P. Adams v. Robert Adams, February 6, 1874; F. W. McMaster v. Robert Adams, February 11, 1874; and several others of the same date. These executions were all levied upon the property of Robert Adams, who claimed homestead, and in January, 1875, the Sheriff issued his warrant, naming all the executions except that of Weston, which had been assigned to Amie A. Weston, to lay off homestead for the defendant Adams, which was done by commissioners appointed for that purpose. At that time none of the creditors

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\*objected to homestead, but after the decision of this court declaring that the provisions of the constitution and laws which purported to allow homestead as to debts older than the constitution were void, it was claimed that two judgments against Robert Adams had been rendered on such contracts and as against them the assignment of homestead could not stand. These were the judgments of Amie A. Weston, assignee, and James P. Adams, which were purchased by John Agnew, Sr., who had them specially levied upon the homestead, and the advertisement of

the Sheriff declared that it would be sold under these executions alone. Notwithstanding objection by Adams, the Sheriff sold according to his notice. The plaintiff Agnew, became the purchaser, took Sheriff's deed reciting that the sale was made under the execution of Amie A. Weston, assignee, and brought this action against Robert Adams for the homestead. He recovered a verdict, but upon appeal to this court it was set aside and a new trial granted on the ground that as to homestead the executions of Weston and Adams, under which it was sold, were inoperative and conferred no authority upon the Sheriff to sell, and therefore no title was conveyed to the purchaser.

At the new trial ordered it was discovered that among the cases under which the homestead was assigned and which were lying dormant in the Sheriff's office, there was one, that of F. W. McMaster as administrator, which had been recovered upon a cause of action older than the constitution, and it was then for the first time urged that although the deed from the Sheriff under the executions of Weston and Adams, by authority of which the homestead had been sold, were void for the reason that the Sheriff had no right to sell the homestead under these executions, yet that it must be held valid by referring the sale to McMaster's execution, although the plaintiff McMaster had not directed it to be levied upon the homestead, and as a matter of fact was not so levied, or at the time of sale even known to exist as an execution which could reach the homestead.

The Circuit Judge charged the jury, "That if McMaster gave orders not to sell or in any

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manner abandoned his action \*under his judgment after the homestead was assigned, and if the jury believed that after said claim had been withdrawn, the sale was made as testified by the Sheriff, only under the judgments of Miss Weston and J. P. Adams, then such sale would not give the purchaser a valid title to the homestead. In such case the sale would not be referred to the judgment of McMaster, if his claim had been withdrawn or abandoned. That a creditor whose judgment was not a lien on the homestead, could not by including it in a sale of land which was bound by his judgment thereby sacrifice the rights of a creditor whose judgment was a lien on the homestead," etc. Under this charge the jury found for the defendant and the question is whether it was error. It is undoubtedly true that the Sheriff could derive no authority to levy and sell from executions which were either satisfied in fact, or as to the homestead were inoperative. *Hunter v. Stevenson*, 1 Hill. 415; *Thrower v. Vaughan*, 1 Rich. 18; *Mouchat v. Brown*, 3 Rich. 117.

As was said by Judge Butler in the case of *Thrower v. Vaughan*, "The doctrine as

recognized in the case of *Hunter v. Stevenson*, seems to be this, that every execution unsatisfied on the face of it is prima facie authority to sell, but this, as Mr. Justice O'Neill remarks, may be rebutted by the defendant. He may show that before the sale the execution was paid and thereby the Sheriff's authority to sell was ended. Satisfaction in fact must be regarded as the termination of the authority of a Sheriff to act under legal process, so far as he may have acquired a right under it to convey title to another. No conveyance can be good which rests upon that which is null and void." Mr. Freeman also on the same subject says, "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights are obtained. Being worthless itself, all proceedings based upon it are equally worthless. It neither binds nor bars any one." It is plain therefore that, as decided in the former judgment in this case, the executions of Mrs. Weston and J. P. Adams being entirely inoperative as to the homestead, could give no authority to the Sheriff to levy and sell it to another. "No conveyance can be good which rests upon that which is null and void."

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\*But it is urged for the plaintiff that the sale, void under the inoperative executions, should as a matter of law be referred to the McMaster execution, which seems to have been reached upon a cause of action antedating the constitution, and at the time of the sale was lying in the Sheriff's office. It is true there is a class of cases in our reports which holds that the official sale of a sheriff under process which does not give him the power to sell, may, under certain circumstances, be sustained by referring it to any other authority in his office at the time, under which he might have proceeded. It does not seem to me, however, that the circumstances here bring this case necessarily within the rule. The doctrine has arisen out of the policy to sustain sheriff's sales. It proceeds on presumptions contrary to the fact, and in my judgment should not be extended beyond what is absolutely required by the decided cases.

It is not necessary to cite the cases upon the subject, commencing with that of *Gist v. McJunkin*, 1 McM. 349. It will be found upon examination that in all the cases in which the principle has been applied, one thing has always been considered indispensable, viz.: that the authority in the office to which the sale may be referred must be clear and beyond all doubt, a subsisting living authority, simply waiting to be enforced without further instructions. For obvious reasons the Court will not presume against the fact that the Sheriff acted under a particular authority, or refer his action to it, unless his right to do so was perfect and unmistakable.



The case under consideration is in this respect peculiar. It arises out of the sale of a homestead exemption, and I suppose it is as certainly the policy of the State to support homestead exemptions as to sustain Sheriff's sales. This is certainly the first case of the kind in this State; and it seems to me that from the very nature of the homestead exemption the Sheriff of his own head had no authority whatever to levy and sell a homestead already assigned without at least express directions from the plaintiff in execution against whom it was assigned. That officer is specially restrained by law from levying and selling the homestead upon pain

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of being indicted as for a misdemeanor. The amendment of the code then recently passed giving a lien to judgments, declared in terms that this section shall not be so construed as to make final judgments in any case a lien on the real property of a judgment debtor exempt from attachment, levy and sale under the constitution." The Court will not presume that the Sheriff did what it was not his plain duty to do.

We assume it to be true that the execution in the McMaster case as originally issued, contained the usual general authority to the Sheriff to make the money; but the Sheriff in the discharge of his duty had long before levied the execution, and in response the defendant Adams had applied for and had had assigned to him this very homestead under executions, including this one. That assignment was acquiesced in by the execution creditors and the defendant placed in possession of the homestead. Subsequent to that time the execution had remained dormant in the Sheriff's office, and so far as concerned the rights and duties of the Sheriff, a ministerial officer, was substantially functus officio.

It is true that latterly, after the second levy and sale of the homestead under the inoperative executions, this Court in the case of Bull v. Rowe, 13 S. C. 360, decided, that whilst the laws and the right to homestead were general, an exception existed in reference to debts which were contracted before the adoption of the Constitution, and as to these, the provisions of the Constitution and laws allowing homestead were void and might be so declared whenever the fact was made to appear in any proceeding, direct or collateral. But I do not understand that this decision of itself actually on the instant vacated every homestead which had been previously assigned against such debts. It set aside the homestead in the particular case then before the Court, and it also declared a general principle, which the parties in similar cases might avail themselves of. But that result did not follow the decision without some action on the part of those interested in such cases.

The principle declared might include the case of Mr. McMaster, and if so he had the

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right to take measures to enforce his execution without regard to the homestead, and if he chose to do so it was his right without a sacrifice of the property to receive upon his execution the full value of the homestead, as to which his was and is the only effective execution in existence. But as I understand it all this was for his own exclusive option and action. The homestead previously assigned stood against all the world but him, and prima facie against him until he proceeded against it. He might or might not avail himself of his right to set aside the homestead. Whether his case was within the exception established by the Supreme Court; and if so, whether he chose to avail himself of it, were matters of himself alone, and neither the Sheriff, nor the plaintiff Agnew, nor any other creditor of Robert Adams, could, to suit his own conscience or interest, determine that matter for him.

It was decided in the case of Monchat v. Brown, 3 Rich., 117, that even parol instructions to the Sheriff by the plaintiff in execution to "Wait orders" was binding upon the Sheriff, so that a sale under another execution which was in part paid, could not be referred to that execution so as to give life to the sale otherwise void. It does seem to me that the circumstances here, and especially the peculiar nature of a homestead exemption, make a much stronger case of suspension of the Sheriff's authority, than the mere verbal "Wait orders" in that case.

After the assignment of homestead, Mr. McMaster never gave the Sheriff orders to proceed under his execution, for the very good reason that at that time it was not known that it could be done, and the question presented is not whether McMaster was estopped from proceeding under his own execution, but whether any other person without his authority could come in collaterally and require the Sheriff to sell under his execution, or have the sale referred to that execution at a subsequent time, so as incidentally to infuse its latent virtue into the title of a purchaser who did not purchase with the least reference to it, but on the contrary under executions which could not possibly touch the homestead.

Under these circumstances I cannot think it was error in the Circuit Judge, when he

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charged the jury that if McMaster gave no orders to the Sheriff to proceed under his execution, or in any manner abandoned his action after the assignment of homestead, then such sale could not give the purchaser valid title to the homestead.

New trial granted.

## 17 S. C. 380

## JONES v. MILLER.

(November Term, 1881.)

[1. *Dower* ¶25.]

A widow is not entitled to dower in lands of her husband, sold after marriage under the lien of a judgment obtained before marriage.

[Ed. Note.—Cited in *Shiell v. Sloan*, 22 S. C. 157; *Brown v. Cave*, 23 S. C. 258; *Seibert v. Todd*, 31 S. C. 210, 9 S. E. 822, 4 L. R. A. 606; *Shell v. Duncan*, 31 S. C. 563, 10 S. E. 330, 5 L. R. A. 821; *Holley v. Glover*, 36 S. C. 417, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883.

For other cases, see *Dower*, Cent. Dig. § 77; Dec. Dig. ¶25.]

[2. *Dower* ¶79.]

Judgment was obtained against an unmarried man in 1860, and after his marriage other judgments were obtained. Land and personal property were levied upon under these judgments and sold on the same day, the personal property realizing a sum more than sufficient to pay the ante-nuptial judgment. The advertisement mentioned the land first, but there was no evidence to show which was in fact first sold. *Held*, that the widow of the debtor was entitled to her dower, the burden of proving that the land was first sold being on the purchaser. *McIver, A. J.*, dissenting.

[Ed. Note.—Cited in *Seibert v. Todd*, 31 S. C. 211, 9 S. E. 822, 4 L. R. A. 606; *Shell v. Young*, 32 S. C. 471, 11 S. E. 299.

For other cases, see *Dower*, Cent. Dig. § 294; Dec. Dig. ¶79.]

[This case is also cited in *Chapee & Co. v. Rainey*, 21 S. C. 11, 20, and distinguished therefrom.]

Before Kershaw, J., Abbeville, January, 1881.

Hon. T. B. FRASER, of the Third Circuit, took the seat of Mr. Justice McGOWAN, who had been of counsel in the cause.

Petition by Nellie H. Jones against Jacob Miller for dower, filed in the Probate Court of Abbeville, June 17, 1879. The facts stated in the brief appear in the opinion of this Court. The Circuit decree, reversing the order of the Probate Judge, was as follows:

The demandant claims dower in lands in the possession of the defendants, who hold the same under a conveyance of the husband's title from the Sheriff of Abbeville County, made in pursuance of a sale under executions, founded on judgments against the husband, existing at the time of the marriage, and constituting liens on the lands prior thereto, but enforced by sale after the marriage.

The defendants claim that the right of dower arising subsequent to the lien of the judgments, is defeated by the Sheriff's sale and conveyance under the judgments.

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\*It is said that we have no decision of this question in our own reports, and no statute affecting it, and that it must be determined according to the principles of the common law, and in this I concur.

Mr. Park, in his learned and authoritative

treatise on the law of dower, says: "It is obvious that as the husband may, by alienating the lands at any time before marriage, or before the title of dower has attached, altogether intercept that title, and prevent its ever arising, he may, under the same circumstances, create derivative interests or charges which shall be good against the wife when her title to be endowed is complete by the death of her husband. Thus his leases, his statutes, or recognizances, are all binding on the wife, and she shall hold the lands assigned to her in dower, subject to them" (p. 236).

"The remedy by statutes merchant and staple and eligit, which are meant by the term 'statutes' in the above extract, was by judgment and execution, or extent, for satisfaction of debts acknowledged by record, by virtue whereof the lands were delivered to the creditor, by process directed to the Sheriff and appreciated by the jury. At common law, lands were not subject to execution, though goods and chattels might be seized and sold by a writ of fi-fa. Lands descended to the heir were liable for the specialty debts of the ancestor, and by statute 3 and 4 W. & M. c. 14, the heir was made answerable for lands descended, and all devises made to the prejudice of creditors were avoided. Then the statute 5 Geo. 2 c. 7 enacted that lands, negroes and other hereditaments and real estates of persons indebted should be liable for their debts in like manner as real estates are by the law of England liable by specialty, and subject to like remedies for seizing, selling, etc., as personal estates in the plantations are." *D'Urphey v. Nelson*, 4 McC. 129, note.

Since that act was passed, it has been the law of this State that there is no distinction between lands and personal chattels, but they are considered equally liable for the satisfaction of debts, and subject in the same manner to be seized and sold for that purpose, under the process of the courts.

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\*There can be no difference in principle between the effect of a judgment by statute given before marriage, and that of the more efficient judgment now allowed the creditor, upon the claim of dower. If the former was to have its full effect according to its exigency, in derogation of the claim of dower, so must the latter prevail according to its exigency. Hence a sale in satisfaction of such judgment would transfer the land to the purchaser, relieved of the claim of dower, because the right of dower attached to the land when the lien of the judgment had already covered it, one of the incidents of which was a right to sell the land under execution in satisfaction of the judgment debt. The rights of the creditor under his judgment had become vested before the right of dower attached. It could not displace those rights



and consequently it attached to the lands in the condition they then were, affected by the lien of the judgments, subject to the rights of the judgment creditors, and liable to be sold for the satisfaction of their debts. The right of dower attached subject to all these incidents, and hence it was divested or defeated by the sale.

Though this question has never been brought directly before the courts of review in this State, it is well settled that the claim of dower is subordinate to that of a mortgage under a mortgage existing at the time of the marriage. She may come in and redeem the estate and then be endowed, but not till then. *Crafts v. Crafts*, 2 McC. 54. In many of the States the question has been made and decided in relation to judgments. 1 Scrib. Dower, 572; *Brown v. Williams*, 31 Me. 403; *Freem. Judg.* § 361.

It was said at bar that many of these decisions may be affected by the statute law existing in the States where they were made. While that may be true, yet those statutes, if they exist, in this particular are declaratory of the common law and consistent with it, as has been shown. It is not to be wondered at that the cases are uniform in this respect, not one appearing to the contrary, for if it were otherwise, it would result that a man might defeat the rights of his creditors, under the judgments of the court, by his voluntary act of marriage.

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\*It was contended by the counsel for demandant that although the general rule may be as stated, yet that there are peculiar circumstances here which will save the rights of demandant. There were some judgments and executions against the husband existing before the marriage, and some obtained after. Besides the lands levied on, there were forty-four slaves advertised by the Sheriff with the lands, and some other personal property, to be sold under said executions. All the property was sold the same day, and under all the executions. If the personal property had been first sold and the proceeds applied to the judgments entered before the marriage, they would have been satisfied and extinguished, and the land would have been sold under the judgments entered after the marriage. In that case the demandant would have been entitled to her dower. It is contended here that this court shall decree as if that had been done, because dower is a favored claim in the law. There is no evidence as to the order in which the property was sold, except that the real estate was first mentioned in the Sheriff's advertisement. It was to the interest of the creditors that the land should be first sold, because in that case it would be sold free from the right of dower and would command a higher price. A judgment creditor has a right to select what property of his debtor shall be sold under his execution. *McAlley v. Barber*, 4 S.

C. 48; *Wagner v. Pegues*, 10 S. C. 262. It may therefore be assumed that the creditors directed the sale in the order most consistent with their interests, in the absence of any better evidence on the subject.

But, if it were otherwise and the slaves were first sold, all being sold on the same day and under all the executions, there would have been no application of the purchase money, probably no payment, until all the sales were complete. The executions would have been paid out of a common fund. The purchaser, however, would have had the right to refer his purchase to any of the judgments under which the property was sold, and the creditors would have had a right to direct the application of the proceeds in accordance with their interests. Could Mrs. Jones at the time of the sale, having only a contingent right of dower, have invoked the

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intervention of a court \*of equity, quia timet, to compel the creditors to adopt a different course in order to preserve her contingent right? There is no precedent for such a proceeding. The creditors had vested legal rights which entitled them to levy on and sell this property in satisfaction of their debts, in the manner most likely to produce that result, and it was well said that a contingent equity will never divest a legal right.

It is ordered and decreed that the judgment of the Probate Judge herein be set aside and reversed, and the petition be dismissed. Also ordered that the demandant do pay the costs of the proceeding and the costs of the appeal.

From this decree the demandant appealed upon the following exceptions:

1. Because his Honor the presiding Judge erred in holding that the existence of the judgments against the husband prior to marriage barred the widow's right of dower.

2. Because if this was not error it is submitted that the sale just after marriage, in invitum, of more than a sufficiency of his personal property on the same day with the real estate should have been so applied, by operation of law, as to satisfy the antecedent judgments and let in the widow's claim of dower.

Messrs. L. W. Perrin, J. C. Sheppard, for appellant.

Messrs. W. H. Parker, O. T. Calhoun, Burt & Graydon, contra.

June, 17, 1882. The opinion of the Court was delivered by

Mr. Justice FRASER. In a case like the present, where parties stand entirely upon their technical rights, and these are dependant upon the exact facts of the case, it is to be regretted that so much has been left to mere inference, or as to which the Court must be governed entirely by presumption.

It appears from the "case" submitted to

this Court, that H. A. Jones was seized of valuable real estate, and was the owner of a large number of slaves and other personal property; that some time in 1860, judgments were obtained and duly entered

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\*up against him to the amount of \$17,000; that after these were entered up, to wit, on December 19, 1860, he intermarried with Nellie H. Jones, the demandant; that after the marriage other judgments to the amount of \$20,000 or \$30,000 were obtained and duly entered up against him; that these latter judgments were obtained early in 1861; that executions were duly issued on all of these judgments; that about March, 1861, H. A. Jones and wife left the State and never returned; that all the records in the proceedings in relation to said judgments were destroyed by fire at Abbeville, in November, 1872; that from such secondary evidence as could be obtained, it appears that the executions issued under the above judgments were duly levied on the real and personal estates of H. A. Jones; that the land appears first on the list of property as advertised for sale by the Sheriff; that the land and slaves were sold on sales-day in May, 1861; that the land was sold for about \$9,000 or \$10,000; that there were thirty-six slaves sold on that day, the average value of which was \$500; that the remainder of the personal estate was sold several days after this sales-day, and that after all the proceeds of sales were applied, there was still a deficiency of about \$10,000; and that H. A. Jones has died, leaving Nellie H. Jones, his widow, surviving him, who in this proceeding demands her dower in the lands of H. A. Jones, her husband, sold as above.

The Court has been left entirely to conjecture as to the true amount due on the oldest of the above judgments at the sale in May, 1861. If these judgments had been obtained early in 1860, the \$17,000 might, by interest, have increased with costs to over \$18,000, and may have reached the sum of \$18,500. If the judgments had been obtained in December, 1860, the sum may not have been over \$17,500. There is nothing, however, in the "Case" which shows whether \$17,000 was an interest-bearing sum or the total amount of principal, interest and costs, at the date of the sales in May, 1861. As to the sale of the slaves on sales-day, in May, 1861, the statement in the "Case" is that there were thirty-six of them sold at an average value of \$500 each. This is all the evidence on the subject, and it would be arbitrary for

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the Court to fix any other \*than thirty-six as the true number, and \$500 as the average value. The Court must, therefore, fix the amount of the sale of the slaves on sales-day in May, 1861, at \$18,000. It must, therefore, be held that the slaves, sold on sales-day in May, 1861, as the property of H. A. Jones,

under these executions, brought the sum of \$18,000, an amount sufficient to extinguish the executions issued under ante-nuptial judgments, so far as there has been any evidence to fix the amount due on them at that date.

This Court concurs with the Circuit Judge in holding that the lien of these ante-nuptial judgments was paramount to the claim of dower in this case. This position is fully sustained by the authorities to which he refers in the Circuit decree. Park on Dower, 236; Scrib. Dower, 572; Freem. Judg., § 361. The doctrine on this subject is correctly stated by Mr. Scribner (vol. 1, p. 572) as follows: "Where a judgment lien is acquired against the husband's land prior to his marriage, and the land is sold subsequently thereto in satisfaction of the judgment debt, the right of dower of his wife in the land is defeated."

While there is some difference between the statements in the Circuit decree and in the "Case" before this Court, as to the number of slaves sold, the same conclusion has been reached—that there was ample personal property sold on that day to pay off these older judgments if the proceeds had been so applied. When the widow demands her dower in her husband's land, and shows seizin of the husband, her marriage with him and his death, she is entitled to her dower unless the respondent can show affirmatively something which defeats her claim. The burden of proof is then on him. "The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." 1 Green. Evid., § 74. "It applies to every fact which is essential or necessarily involved in that proposition." Ibid., note. Wilder v. Cowles, 100 Mass. 487. Now the propositions on which respondent relies in this case are, first, that there were ante-nuptial judgments against the husband; and second, that this land was sold under them, or one of them. Unless these two things are made to appear affirmatively, the land is liable to dower. It cannot be inferred

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\*that the land was sold first because it was first on the list of advertised property, especially when the writ of fi-fa mentioned the property (if it was properly made out) in the reverse order, "goods and chattels" being first mentioned and afterwards the lands, etc.

Neither is it a safe presumption that creditors sold the land first because it was their interest to do so. It may be safely presumed that the Sheriff did his duty, and sold for cash, each sale standing by itself and for itself, as each separate article or piece of property was sold. The Sheriff became, when the property was knocked down to a bidder, prima facie liable for the proceeds, and if in fact the money was paid afterwards, the application must have been made as of the very instant the sale was made. This ap-



plies to the land as well as the personal property. If, in fact, the land had been put up and bid off first, a subsequent compliance by the purchaser would have defeated the claim of dower, and made his title good. If the personal property had been put up and bid off first, then a subsequent compliance with the bid would have settled and paid off the older judgments and executions; and their liens on the land would have been just as effectually extinguished as if the money had then and there been paid when the bid was made.

If there had been no other property of the judgment debtor sold on sales-day in May, 1861, except this land for \$9,000 or \$10,000, there could be no doubt that the land was sold to pay these judgments and executions, amounting to \$17,000, but personally was sold on the same day and more than was sufficient to pay off these judgments and executions which antedated the marriage, and the Court cannot presume, in the absence of any proof on the subject, that the land was sold first, and the personalty last. If all the property sold had been land, and if instead of a number of slaves land to the value of \$18,000 had been sold in addition to the land now in dispute, by what principle could it now be held that these lands now in dispute were first sold? Clearly no such conclusion would follow without throwing on the widow the alternative of losing her dower in \$28,000 worth of land when it could have been extinguished only, at most, in \$17,000 worth,

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or of proving the executions to each parcel, as the cases came up. The burden of proof is not on her but on him who alleges that her right has been extinguished by a sale under an existing lien. To deprive one of rights there must be proof, something more than a probability, that creditors did what they now know to have been their interest to do, but of which they have not preserved the evidence. At most nothing more than a probability has been shown, and this Court does not think that this is sufficient to defeat the widow's right of dower.

It is therefore ordered and adjudged that the judgment of the Circuit Court be reversed, and that the case be remanded to the Probate Court for such further proceedings as may be necessary and proper to carry out the judgment of the Probate Court herein.

Mr. Justice McIVER, dissenting. I cannot concur in the conclusion reached by the majority of this Court, and on the contrary, think that the Circuit Judge has taken the correct view of the case. I do not deem it necessary to add anything to what has been said by the Circuit Judge, except to say that, in my judgment, there was no sufficient evidence to warrant the conclusion that the personal property sold on the day the land

was sold, brought an amount sufficient to satisfy the antenuptial judgments. Those judgments amounted to seventeen thousand dollars, but whether this was the amount at the time of the sale or the amount at the time of the recovery of the judgments does not distinctly appear. The statement in the "Case" is that "during the year 1860, and prior to the marriage, judgments to the amount of \$17,000 were obtained, and this would indicate that seventeen thousand dollars was the amount recovered, which, of course, would bear interest from the time of the recovery. But exactly when the judgments were recovered does not appear, except that it was some time in 1860, prior to the marriage, which took place on December 19th, 1860. It does, however, appear, from the Statute Book, that at that time the Court for Abbeville, where those judgments were recovered, was appointed to be held on the first Mondays in March and October in each

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year (12 Stat. \*262) and if the judgments were recovered in October, 1860, the interest to the first Monday in May, 1861, when the property was sold, to say nothing of the costs, would carry the amount over eighteen thousand dollars. And as it is not pretended that the personal property sold on that day brought more than eighteen thousand dollars, there would still be a balance due on the ante-nuptial judgments, even after applying to them the whole amount of the proceeds of the sale of the personal property, which would authorize the sale of the land under those judgments.

But in addition to this, I do not think that the evidence is sufficient to justify the conclusion that the personal property sold on the day the land was sold brought the sum of eighteen thousand dollars. The only testimony on this point, as derived from the "Case," is that thirty-six slaves were sold on the day the land was sold—the other personal property having been sold on a subsequent day—"and the witnesses estimated the average value of a lot of negroes at that time at \$500"—not that such was the average value of this particular lot of negroes. Hence, in order to reach the conclusion that they brought eighteen thousand dollars, we must first infer, without any evidence from which to draw such inference, that this particular lot of negroes were of the average value, and next that they brought a full average value at Sheriff's sale—an inference not justified by experience, as it very frequently happens that property does not bring its value under the Sheriff's hammer.

It seems to me, therefore, that the judgment of the Circuit Court should be affirmed.

**Judgment reversed.**

17 S. C. 389

ANNELY v. DESAUSSURE.

(November Term, 1881.)

1. The points decided on the former appeal in this cause (12 S. C. 488) stated.

[2. *Mortgages* ⇨426.]

To action for foreclosure of a mortgage on the undivided interest of a tenant in common in real property, the purchaser of such interest from the mortgagor is a proper party.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1277; Dec. Dig. ⇨426.]

[3. *Partition* ⇨85.]

Where a co-tenant under an honest conviction of exclusive ownership \*390

\*puts improvements upon the common property, a mortgage upon the other tenant's interest should be so foreclosed as to give to the improving tenant the part improved by him, or if that be impracticable he should have so much of the proceeds of sale as were due to the improvements. *Scaife v. Thomson*, 15 S. C. 337, approved.

[Ed. Note.—Cited in *Lumb v. Pinckney*, 21 S. C. 475; *Buck, Heflebower & Neer v. Martin*, 21 S. C. 593, 53 Am. Rep. 702; *Johnson v. Pelot*, 24 S. C. 265, 58 Am. Rep. 253; *Heath v. Haile*, 45 S. C. 648, 24 S. E. 300.

For other cases, see *Partition*, Cent. Dig. § 244; Dec. Dig. ⇨85.]

[4. *Partition* ⇨86.]

And he is not liable to account for such rents and profits as were due to the improvements put upon the property.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 247½; Dec. Dig. ⇨86.]

5. Suggestions as to how the costs should be paid.

[6. *Partition* ⇨85.]

[Where one, believing himself in good faith to be the owner of land, makes valuable improvements thereon, and it afterwards appears that he is only a tenant in common, and it is not practicable, on partition, to set off to him the land on which the improvements stand, he should be allowed, not for their cost, but for the increased value of the land arising from them.]

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 241; Dec. Dig. ⇨85.]

Before Mackey, J., Charleston, May, 1881.

This was an action by Amelia L. Annelly and Julia A. Blake, as devisee and executrix of Anna M. Annelly, to foreclose a mortgage given by John W. Lewis, on his one fourth interest in the Commercial Wharves of Charleston, to secure the payment of two bonds of the same date and for the same amount, payable, one to Amelia L. Annelly and the other to Anna M. Annelly. After the execution of the bonds, Anna M. Annelly died, and by her last will and testament appointed Julia A. Blake, executrix, and gave her entire estate to Julia A. Blake, Francis P. Lewis and John W. A. Lewis. The mortgagor died, and W. G. DeSaussure became the sole executor, with full power to sell all of his testator's lands. Acting under such power, and with the co-operation of the other owners, and, as he supposed, with the assent of the mortgagees, he made sale of his testator's interest in the Commercial Wharves for

a full price to the "Commercial Wharf and Cotton Press Company," who, in full persuasion of a perfect title, at once erected very costly improvements. The defendants were W. G. DeSaussure, executor, the purchaser, and the heirs-at-law of John W. Lewis, two of whom were devisees of Anna M. Annelly. For a more particular statement, reference is made to the case as reported in 12 S. C. 488.

Upon the return of the cause to the Circuit Court it was referred to the Master to inquire into the matters directed by the Supreme Court. The Master declined to hear testimony de novo, and confining his inquiry to two points, reported that there were no persons having any interest in the assets of the estate of Anna M. Annelly except the three devisees before the Court, and that actual partition of the premises was impracticable. \*391

Exceptions to this report were overruled by the Circuit Judge and order of foreclosure passed upon one-sixth (that is, one fourth less two thirds in one eighth) of the entire property; and the Commercial Wharf and Cotton Press Company were ordered to pay the costs.

This company and also W. G. DeSaussure, executor, appealed to this Court upon exceptions which raised the questions considered in the opinion.

[For subsequent opinion, see *Ex parte Blake*, 18 S. C. 603; 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725.]

Messrs. Simonton & Barker, DeSaussure & Son, for appellants.

Messrs. Campbell & Whaley, contra.

June 30, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. This was an action to foreclose a mortgage on an undivided fourth part of certain real property in the city of Charleston, known as the Commercial Wharves. Inasmuch, however, as the case has been before the Court on a former occasion, when it was fully reported (12 S. C. 488), it will be unnecessary to encumber this opinion with a detailed statement of the facts. We, propose, therefore, to confine ourselves to the consideration of the questions which are now presented for our decision.

We think that the former decision settled two things. 1st. That the plaintiffs were entitled to have their mortgage foreclosed in this proceeding. 2d. That F. P. Lewis and J. W. Lewis, Jr., not having appealed from the former Circuit decree, were bound by its terms and that their rights must stand as settled by that decree. The practical result, therefore, is that the plaintiffs are entitled to have a foreclosure of their mortgage upon the one undivided sixth part of the property known as the Commercial Wharves, but how that should be done—what provision, if any, should be made in regard to, the im-



provements put upon the property by the Commercial Wharf and Cotton Press Company, and how the account for rents and

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profits of \*the mortgaged premises should be taken, were left unsettled by the former decision of this Court. As is said in the opinion of Willard, C. J., "So far as it regards the question of improvements made jointly by the assignee of a tenant subject to mortgage and his co-tenants not affected by such mortgage, or, as in the present case, by a party uniting both these characters, no inquiry has been made and findings of fact presented enabling this Court to determine whether the improvements are of a character, and the property so circumstanced, as to call for the recognition of equitable severalty in them, as regards the undivided interest derived under different titles. *Williman v. Holmes*, 4 Rich. Eq. 475. For the want of a proper basis of fact, that question cannot be considered in the present stage of the case; but there should be an inquiry into such facts and proper action thereon."

Mr. Justice Haskell (the other Associate Justice, having filed a dissenting opinion), while concurring with the then Chief Justice in the conclusion that the executor of John W. Lewis had no authority to act for the mortgagees in making the sale to the Commercial Wharf and Cotton Press Company, and that the mortgagees had not ratified such sale either by acquiescence or otherwise, and also in the conclusion that such of the parties as had not appealed were bound by the circuit decree, limited his concurrence to these points, and said expressly that, while the mortgage to the extent not affected by the acquiescence of such of the parties as had not appealed from the former circuit decree, "remains a lien on the interest held by Lewis," yet, he adds, "what that interest is has not been considered by the Circuit Judge, for the whole case turned upon the point which is error, and the right to foreclose being thus denied, the question of partition was never reached."

It is manifest, therefore, that when the former Circuit decree was reversed and the case remanded, it was for the purpose of ascertaining "whether there are parties other than the devisee Julia A. Blake, and the co-devisees, entitled to participate in the assets of the estate of Anna M. Annely;" next, "whether the improvements are of a

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nature and the property so circumstanced as to call for the recognition of equitable severalty in them as regards the undivided interest derived under different titles," according to the principles established by the case of *Williman v. Holmes*, supra, and after these matters were determined, then that a decree for foreclosure should be rendered. These inquiries have been made, and it has been ascertained that no persons other than

the devisees are interested in the assets of the estate of Anna Maria Annely and that the property is so situated that it would be impracticable to make actual partition so as to give the benefit of the improvements to the improving co-tenant and leave the remainder to be sold under the mortgage; and to these findings no exception has been taken.

The Circuit decree, which is now before us for review, directs a sale of the one undivided sixth part of the property without making any allowance for the improvements, and if, as most likely will be the case, the proceeds of the sale shall prove insufficient to satisfy the mortgage debt, requires the Commercial Wharf and Cotton Press Company to account for "the rental value of the premises directed herein to be sold, while in the possession of the defendant the Commercial Wharf and Cotton Press Company, from the filing of the complaint in this case," and requires that the costs of the case be paid by the said company. To this decree the defendants except on various grounds, which we do not propose to state in detail, but rather the questions which we understand to be raised by these exceptions.

The first question is as to the scope and effect of the former decision of this Court: whether it remanded the whole case for a hearing de novo of all the issues of law and fact. Upon this point we have already, in giving an outline of the case, indicated our opinion that the majority of this Court held, at the former hearing, that the defence then mainly relied upon—that the sale by the executor of the mortgagor was made by the authority of the mortgagees, or if not that it was ratified by their subsequent conduct—could not be sustained, and that the plaintiffs were entitled to a judgment of foreclosure.

The next question is whether the Com-

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mercial Wharf and \*Cotton Press Company was any longer a necessary or proper party to the action. We think the company was a proper party. It was in possession of the mortgaged premises claiming an interest therein, and before that interest was severed and ascertained by partition, it seems to us clear that it was a proper party to the action. While the executor of the mortgagor had no authority, as it has been settled by the former decision of this Court, to make the sale free from the lien of the mortgage, he certainly had the authority to contract for the sale of the equity of redemption and this was all that could pass under the contract of sale, by which the company was enabled to take and retain the possession. We think, therefore, that there was no error on the part of the Circuit Judge in refusing to dismiss the complaint against the Commercial Wharf and Cotton Press Company.

The next inquiry is whether the Com-

mercial Wharf and Cotton Press Company is entitled to any allowance for improvements which it put upon the common property upon an undivided one sixth of which the plaintiffs hold a mortgage. There is no doubt that the rule is that where a mortgagor, or a purchaser from him, puts improvements upon the mortgaged premises, and the premises are subsequently sold under a judgment for foreclosure, that there can be no allowance for the improvements, and that the same will inure to the benefit of the mortgagee to the extent necessary to satisfy his mortgage debt. But where premises are held by two persons as tenants in common, and one of the co-tenants gives a mortgage on his undivided share, and the other co-tenant enters into possession, as he has a right to do, and improves the common property, it seems to us that the same rule should apply as in cases of partition. In such case the mortgagee can claim nothing more than his mortgagor could, and if he, upon partition, would be required to allow the improving tenant anything for improvements, we see no reason why a mortgagee of an undivided share of real estate should not be required to make the same allowance to the improving tenant, upon a sale under a judgment for foreclosure.

In the recent case of *Scaife v. Thomson*,

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15 S. C. 337, we \*had occasion to consider the question of the right of an improving co-tenant to an allowance for improvements upon the common property where a sale for partition becomes necessary; and it was there held that while it was true that the rule was settled that the improving co-tenant was not entitled to the exclusive benefit of his improvements where he was aware at the time of making the improvements, that other persons were entitled to interests in the property so improved, yet "when one has expended his money in the improvement of property, under the honest conviction of exclusive ownership in himself, it seems to us that there is manifest equity in allowing him the benefit of such improvements, as far as the same can be done without injury to the other co-tenants." That case also holds that where actual partition is practicable, it should be so made as to give to the party who had made the improvements that portion of the common property which had been improved, without accounting for the increased value imparted to such portion by the improvements (as was done in *Williman v. Holmes*, supra). "But even if such partition cannot be made and a sale should become necessary, we see no reason why, upon the same principle, the improving tenant should not be

allowed out of the proceeds of the sale—not the cost of such improvements, but—the amount which such improvements can be shown to have enhanced the value of the property."

In the case now under consideration there cannot be a doubt that, when the Commercial Wharf and Cotton Press Company took possession of the property in question and contracted for the improvements, they were acting under the honest conviction, based upon the advice of eminent counsel, that they had acquired the exclusive ownership of the property free from the lien of the mortgage, and hence under the principle above announced, the company is entitled to an allowance for the improvements—and as it has been ascertained that actual partition is not practicable but that a sale of the undivided sixth part of the property will be necessary, the company must be held entitled to receive out of the proceeds of the sale—not the proportionate part of the cost of the improvements put upon the common property, but—the amount which

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such im\*provements shall, upon inquiry, be ascertained to have enhanced the value of such one undivided sixth part, and that the balance of the proceeds of the sale be applied to the mortgage debt.

The next inquiry is as to the rents and profits. This, too, it seems to us, is settled by the principles announced in *Scaife v. Thomson*, supra, and in taking the account of the rents and profits the Commercial Wharf and Cotton Press Company should not be held liable for such rents and profits as may be due to the improvements put upon the property by said company.

The only remaining inquiry is as to the costs. We are unable to perceive any just ground for imposing the entire costs of the case upon the Commercial Wharf and Cotton Press Company. So much of the costs as were incurred in resisting the unsuccessful defence, originally set up by that company, might with propriety be imposed upon it, but we see no reason why the balance of the costs should not be provided for in the usual way. This is a matter, however, more appropriately within the province of the Circuit Court when it comes to render a final judgment, and we prefer to leave it to that tribunal.

The judgment of this Court is that the judgment of the Circuit Court be so modified as to conform to the principles herein announced, and that the case be remanded to that Court for such further proceedings as may be necessary.



17 S. C. 396

Ex parte WILLIAMS, Treasurer. GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. THE STATE ex rel. THE ATTORNEY-GENERAL v. SAME.

(November Term, 1881.)

[1. *Receivers* ¶150.]

The whole transaction connected with the closing of an account by note being in writing and set forth in the pleadings; there was no error in passing upon a petition to have such account paid out of the receiver's fund without ordering a reference to take testimony.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 268; Dec. Dig. ¶150.]

[2. *Corporations* ¶559.]

After order passed constituting the officers

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of a railroad company, in effect, receivers of the road, the company continued to conduct its business as before, officers were annually elected and no separate books were opened by them as receivers. During this time a note was given by this corporation in its corporate name, signed by the president and treasurer as such in settlement of an account for running expenses. Held, that the existence of such corporation was not interfered with, or its officers displaced, and that the note so given was not made or received with reference to the receiver's fund.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2245; Dec. Dig. ¶559.]

[3. *Payment* ¶74.]

Whether a note was received as payment of an account is a question of fact depending upon intention, but such intention appears here from the manner of closing the account by note for balance, together with receipt for such note expressed to be in settlement, and a deposit of collaterals to secure the payment of the note.

[Ed. Note.—Cited in *Witte v. Weinberg*, 37 S. C. 591, 17 S. E. 681.

For other cases, see *Payment*, Cent. Dig. § 230; Dec. Dig. ¶74.]

[4. *Payment* ¶17.]

Besides, the payee of such note having transferred it with the collaterals for value, and the collaterals having been sold by the transferee, the original cause of action on the account, if still existing, was then destroyed.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. ¶77; Dec. Dig. ¶17.]

[5. *Payment* ¶17.]

If the account was properly chargeable against the receiver's fund, it was a mere equity, which did not attach to the note given by the corporation and to the collaterals intended to secure it.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 70-77; Dec. Dig. ¶17.]

Before Aldrich, J., Richland, April, 1881.

This is a petition in the two cases above stated. For a full consideration of the important effect of the order constituting the officers of the Greenville and Columbia Railroad Company, receivers, see *In re Fifty-four First Mortgage Bonds*, 15 S. C. 304, and *Ex parte Brown and wife*, *Ibid.* 518.

The petition was filed March 19, 1881.—Answer by certain holders of second mortgage bonds was served April 9, 1881.—On April 19, Judge Aldrich passed the following order:

On motion of Buist & Buist, attorneys of the petitioner, It is Ordered, That leave be granted to any of the parties or respondents to take testimony in Columbia, before N. B. Barnwell, Master, or in Charleston, before W. D. Clancy, Master; and that the testimony so taken be used on the hearing by the Court, or before the Master, on any order of reference which may be hereafter made to him.

On the same day the motion in this case, stated in the opinion, was made, and ten days thereafter, the order dismissing the petition was filed. All other facts necessary to a proper understanding of the case, are

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stated in the opinion, but for convenience of reference, the order of Judge Melton of June 18, 1872, is here inserted. It was as follows:

2. As the State cannot be required to give security, as other plaintiffs, It is Ordered: That the president and directors of the Greenville and Columbia Railroad Company, under the order of, and subject to this Court, continue in the possession and management of the property of all kinds of the said company; and in like manner continue to conduct and carry on the business of the said company; that they make report to this Court at such times as this Court may require, of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may, from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation.

[For subsequent opinion, see 18 S. C. 299.]

Messrs. Buist & Buist, Simonton & Barker, Lord & Inglesby, for appellant.

Mr. James Conner, contra.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice McGOWAN. The Greenville and Columbia Railroad Company was indebted to the South Carolina Railroad Company, by balance of open account, December 30, 1876, and on that day W. J. Magrath, who was president of both companies, struck the balance and executed and delivered to the South Carolina Company a note of which the following is a copy:

"Columbia, S. C., Dec. 30, 1876.

"\$51,432.86.

"One day after date the Greenville and Columbia Railroad Company promises to pay to the South Carolina Railroad Company or order, fifty-one thousand four hundred and thirty-two 86/100 dollars, for value received with interest from January 1, 1875, and interest after maturity at the rate of seven per cent per annum, having deposited with the said South Carolina Railroad Company

as collateral security one hundred and three

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\*Greenville and Columbia Railroad Company second mortgage bonds of \$500.00 each, which said mortgage bonds shall at any time be subject to exchange for the new first mortgage bonds of the Greenville and Columbia Railroad Company, upon the terms of exchange accepted by other holders of this class of bonds; and in case this note shall not be paid when due we hereby give the said South Carolina Railroad Company authority to sell the said security or any part thereof, for account of ourselves, on the maturity of this note, or at any time thereafter at public or private sale, at their discretion, without advertising the same; and to apply so much of the proceeds of said security to the payment of this note as may be necessary to pay the same, with all interest due thereon and expenses attending sale of said security. If the net proceeds of said security shall not cover the amount due thereon, we hold ourselves bound to pay the balance forthwith after such sale, with interest at the rate of seven per cent per annum.

"C. H. Manson,  
Treasurer."

"W. J. Magrath,  
President."

On March 1, 1877, the South Carolina Railroad Company endorsed the said note and delivered the collaterals named therein to Geo. W. Williams, as treasurer of a committee of the directors of the South Carolina Railroad Company, as collateral security for certain loans, indorsements, and advances made by them for said company. On April 10, 1880, the said treasurer sold the 103 second mortgage bonds pledged as collateral security for said note and the proceeds of sale \$5,150.00 was credited as of that date upon the note, leaving a balance still due of \$68,642.71.

The Greenville and Columbia Railroad Company proved to be insolvent and the case of James S. Gibbes v. The Greenville and Columbia Railroad Company was filed to foreclose mortgages and sell the road. In this case the creditors of the G. & C. road were called in by publication, but no claim in regard to the said note or its considerations was presented by the South Carolina Railroad Company, although they presented

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other \*claims. The road was sold and the priorities of creditors established, showing a large amount of the mortgage debt still unpaid.

Matters stood in this condition until it was held by the Court that an order of Judge Melton in the case above stated of June, 1872, made "the officers of the Greenville and Columbia Railroad Company officers of the court, and responsible to it in the character of receivers," when on March 14, 1881, after final judgment, Geo. W. Williams, treasurer, as aforesaid, filed this petition ex parte in

the case, praying to have "the balance of said note paid out of the proceeds of the sale of the Greenville and Columbia Railroad Company, or out of the income paid over to the Master by James Conner, receiver, in preference to all other liens and claims upon said property." A motion was made before Judge Aldrich that a sufficient amount be reserved in the hands of Mr. Barnwell, the Master, to cover the claim of the petitioner, and that the Master be restrained from entering satisfaction on the mortgage given for the purchase-money of the road. Upon this motion the pleadings were read, and Judge Aldrich, holding that the original account, if it ever had any equity to be paid out of the receiver's fund in preference to the mortgage bondholders, was paid and satisfied by the aforesaid note and the collaterals to secure it given by the Greenville and Columbia Railroad Company, refused the motion and dismissed the petition.

Appeal is now made to this Court upon the following exceptions:

1. Because, there being a controversy, and an order having been made to take the testimony on the 19th April, 1881, and the testimony not having been taken before him, the Judge erred in dismissing the petition when it was only before him on a motion made on the 19th April, 1881, that a sufficient amount of money be reserved in the hands of Mr. Barnwell, the Master, to cover the claim of the petitioner, and that the Master be restrained from entering satisfaction on the mortgage given for the purchase-money of the road.

2. Because the Judge erred in not granting the motion on behalf of the petitioner on

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19th April, 1881, the fund being \*still in the possession of the Court, and being jointly payable to the petitioner if he should establish his claim.

3. Because the Judge erred in deciding as a matter of fact that the note was a payment of the account set forth in the petition, when there was no proof before him that such was the intention of the parties, and the note itself was produced and shown to be unpaid.

4. Because the Judge erred in deciding that one who takes a note, secured collaterally, cannot take advantage of the account which was the consideration of the note; whereas he ought to have decided that the consideration of the note becomes a part of the note, and whatever special equities attach to the consideration become a part of the note.

5. Because the Judge erred in deciding that the present holder negotiated for the note in open market, when the allegation is, and it is not denied but admitted, that the present holder received the same as collateral security only, and therefore holds the same for the use of the payee after his debt is paid.

6. Because the Judge erred in not deciding



that the consideration of the note so held by the petitioner, being an account for labor and material furnished to the president and directors of the Greenville & Columbia Railroad Company, between the 31st day of January, 1873, and the 30th day of December, 1876, while the property was in the possession of this court, under the order of Judge Melton of the 2d day of June, 1872, and the said labor and material having contributed to the earnings of the road, under the principles of the decree of Judge Pressley, of the 6th day of September, 1879, they were entitled to a priority of payment out of the earnings of said road, and there still being funds in possession of the court, out of which said claim could be paid, the judge should have ordered the claim to have been paid."

Did the Circuit Judge err, as alleged, in dismissing the petition? We see nothing in the case to sustain the allegation that the decision was prematurely made because the testimony had not been taken. The whole transaction was in writing, and its proper construction and effect could only be drawn

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\*from the papers themselves. The defence was in the nature of a demurrer, for want of sufficient facts to constitute a cause of action. If, according to the papers exhibited, there could be no ground for the special equity claimed to give this debt of the G. & C. R. R. Co. a preference over mortgage bondholders, it was proper to decide it at once, without the delay and expense incident to a fruitless reference.

It has been lately decided that Judge Melton's order of 1872, in the case of *James S. Gibbs v. The Greenville & Columbia Railroad Company*, supra, made the president and directors of the company officers of the court, substantially receivers, although somewhat "anomalous" in character. It seems that the full import of that order, as subsequently declared, was not understood until Judge Pressley's order in the same case was entered in 1878. In the meantime the officers of the company, elected as usual by the stockholders, without making returns to the court, or opening separate books, or contracting, or in any other way acting as receivers, continued to conduct the affairs of the company in all respects as they had done before. During this period an account, in the ordinary course of business, was contracted, as alleged, with the South Carolina Railroad Company, which that company, taking no notice whatever of the order of 1872, charged not against the officers as receivers, but in the usual way against the Greenville and Columbia Railroad Company.

It may be that the identity of the persons described as receivers with the regular officers of the company tended to some confusion in this respect; but making every allowance for that, we cannot doubt that the parties were ignorant at that time of the

effect of the order in respect to contracting accounts and their powers under it; and that credit was not in fact given to the officers of the road as receivers, or on the faith of a receiver's fund, but, as the form of the account indicates, to the corporation of the Greenville and Columbia Railroad Company.

Even if the parties had understood the full effect of Judge Melton's order, as we conceive, that order did not and could not interfere with the corporate existence of the

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company, or \*displace the officers who held their places under an act of the Legislature and the election of the stockholders. High, Receiv., § 391, and notes; Jones, R. R., Sec., § 519. But if, recognizing the latent force of the order of 1872 as lately declared, and giving it retroactive effect, we must now hold that said account, contrary to its terms and the intention of the parties, was in fact against the officers and receivers, and by a special equity was chargeable upon the income in preference to the lien of the mortgage bondholders, it is clear that the South Carolina Railroad Company accepted in liquidation of that account a note of the Greenville and Columbia Railroad Company as such. The tenor of the note is, "The Greenville and Columbia Railroad Company promises to pay," and it was signed by W. J. Magrath, President, and C. H. Manson, Treasurer, and was secured by collaterals which were the property of the company.

The extent of a receiver's powers is shown by the definition of his office: "A receiver is an indifferent person between the parties to a cause, appointed by the Court to receive and preserve the property in litigation pendente lite. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his functions in the interest of neither the plaintiff nor defendant, but for the common benefit of all parties in interest."

In this view of the case it will not be necessary to examine the items of account as to their character. The controlling question is whether the note and collaterals were taken merely in substitution for, or in payment and satisfaction of the account. There is some conflict in the cases, but we understand the law on the subject to be as stated by Judge Withers in the case of *Townsend, Arnold & Co. v. Stevenson & Walker*, 4 Rich. 62. "One rule touching the question in this case certainly is that upon a sale and delivery of goods, the promise to pay, as implied by law, is not discharged as a cause of action by merely receiving a note, whether executed by the debtor or a third person, for the existing debt. To discharge the existing cause of action, such note must be received in payment of the debt arising upon

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the sale and delivery. The \*question is what was the intention and understanding of the parties."

Whether the note and collaterals received in this case were taken in payment and satisfaction of the account was a question of fact which the judge determined against the petitioner; and as the proceeding is somewhat analogous to an action at law upon the account, alleging that it is still unsatisfied, we possibly might rest upon the determination of the question of fact by the Circuit Judge. But while it is the supposed virtue of the account which is invoked here, the right to the priority claimed is, if it exist, an equity, and we will therefore consider the petition as a "case in chancery," and examine the evidence.

The exhibits show that the account against the Greenville and Columbia Railroad Company contained two columns, debit and credit. From time to time as payments were made they were entered in the credit column. On the day of settlement the payments were aggregated and deducted from the charges, and there was found to be a balance against the G. & C. Co. of \$51,432.86. For this amount the note was taken and the item added, the last in the payment column, and the account balanced with the statement. "Dec. 31, by note dated December 30, 1876, secured by 103 second mortgage bonds of your company, \$500.00 each, with coupons, payable July 1, 1872, in settlement of balance." The following receipt was given:

"Received from C. H. Manson, treasurer, Greenville and Columbia Railroad Company, their note dated Dec. 30, 1876, at one day date, with interest from Jan'y 1, 1875, secured by second mortgage bonds as stated therein, in settlement of the above account.

"J. H. Wilson,

"Treas. S. C. R. R. Company."

It seems to us that the manner of closing the account shows that the parties intended the note and collaterals to be in payment and satisfaction of the account which was formally balanced. The words "in settlement of balance" are the words usually employed to express that purpose. Are they not as

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\*strong that the parties intended payment, as the words "settled in full," which, not in closing a mere open account but upon an official bond, under seal, where held to have that effect in the case of Griffin v. Addison, 3 S. C. 105. See *McLure v. Askew*, 5 Rich. Eq. 162, and *Kirkland v. Cureton*, 4 S. C. 122. That this was the sense in which these words were used in this case is strengthened by the fact that the note was secured by second mortgage bonds, which were delivered at the time, to the full amount of its face value.

In States where the equity of the vendor

of land is recognized, it has been held that taking other security was evidence of a waiver of equity. See *McCorkle v. Montgomery*, 11 Rich. Eq. 114, and *Mackreth v. Symmons*, 1 Lead. Cas. Eq. 242. In the light in which the parties acted the account was no more than a claim against the G. & C. Co., and the note was the same and had the advantage of being liquidated, bearing interest and being secured by collaterals. Under the circumstances there was no object for leaving the account unsatisfied, and we have no doubt that payment was intended.

But if the circumstances under which the note and collaterals were taken left the intention of the parties at all doubtful, that was put beyond doubt so far as the South Carolina Company was concerned, when they transferred the note and its collaterals for a valuable consideration to the petitioner. "Although the receiving of a note is not payment unless received as such, yet if the creditor place the note beyond his power and control so that it cannot be delivered up to be cancelled, the note is payment and the original cause of action is extinguished." Judge Wallace in *Adger & Co. v. Pringle*, 11 S. C. 535; *Townsend, Arnold & Co. v. Stevenson & Walker*, supra. Here the note is brought into court, not, however, by the South Carolina Railroad Company but by their assignee, who has sold the collateral bonds, and the parties cannot be placed in statu quo.

It is not necessary to enter into the question as to what rights or equities the South Carolina Company transferred to the petitioner, or what was the effect of the transfer to him, being merely as collateral security

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for a debt. In the view \*taken the account was extinguished, and there was nothing to transfer but the note and the collaterals which secured it. We may say, however, that if as contended for the petitioner, the South Carolina R. R. Company had the right at any time to set up a special equity on the account against a receiver's fund, that right never amounted to an express lien like a mortgage; but was a mere equity which did not go with the note and the collaterals intended to secure it.

The petitioner, in the course of business, received the note and its collaterals as simple obligations of the Greenville and Columbia Railroad Company. He was authorized to sell the collaterals and he did so, but he still holds the balance of the note against the company in the right in which he acquired it. He has all the security he contracted for. To adjudge now that he has the additional subsequently discovered equity to be paid out of the proceeds of sale of the road in priority to bondholders, who had a prior mortgage upon it, would be to take from subsisting liens and give to him that which was not within the contemplation of any of



the parties or the express terms of his contract.

The judgment of this Court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., dissenting.

#### 17 S. C. 406

#### RODGERS v. MUTUAL ENDOWMENT ASSESSMENT ASSOCIATION.

(November Term, 1881.)

##### [1. *Process* ⚡67.]

An acceptance of service of complaint by defendant's attorneys disregarded, it having been made under a misunderstanding between counsel as to the service of the summons.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 54, 161; Dec. Dig. ⚡67.]

##### [2. *Action* ⚡1.]

The distinction between subject of action and cause of action considered.

[Ed. Note.—Cited in *Smith v. Smith*, 50 S. C. 68, 27 S. E. 545.

For other cases, see *Action*, Cent. Dig. §§ 1-7, 85; Dec. Dig. ⚡1.]

##### [3. *Insurance* ⚡617.]

An agreement was made in this State between a citizen thereof and a foreign Mutual Assessment Life Insurance Association, whereby application was made for membership and the amount then paid was to be refunded, if the application was rejected; the rules of the Association required proof of death claims to be made at the home office, when an assessment was to be made and the claims paid there. *Held*, that the claim of the beneficiaries under such citizen's certificate after his death was not a cause of action that arose in this State.

[Ed. Note.—Cited in *Curnow v. Phoenix Ins. Co.*, 37 S. C. 407, 411, 412, 16 S. E. 132, 34 Am. St. Rep. 766; *Tillinghast v. Boston, etc. Co.*, 38 S. C. 323, 17 S. E. 31, 724, 725; *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S. C. 490, 18 S. E. 120, 22 L. R. A. 49; *Carpenter v. American Accident Co.*, 46 S. C. 545, 24 S. E. 500.

For other cases, see *Insurance*, Cent. Dig. § 1535; Dec. Dig. ⚡617.]

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##### [4. *Corporations* ⚡665.]

\*The cause of action not having arisen in this State and such foreign corporation having no property here, it could not be made a party defendant to an action by the beneficiaries on this certificate.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2597; Dec. Dig. ⚡665.]

##### [5. *Insurance* ⚡125.]

[A citizen of South Carolina made, in that state, an application for membership in a Maryland mutual assessment life insurance association. The rules of the association required proof of death and assessments to be made in Maryland. *Held*, that the contract was to be performed in Maryland.]

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 175; Dec. Dig. ⚡125.]

##### [6. *Insurance* ⚡627.]

[Code, § 158, provides for service by publication, where the defendant is a foreign corporation, where it has property within the state or the cause of action arises therein. A citizen of South Carolina made in that state an application for membership in a Maryland mutual

life association, the rules of which required proof of death, and assessments to be made in Maryland. The Maryland corporation had no office, officer, or property in South Carolina. *Held* that, as the contract was to be performed in Maryland, the cause of action on the certificate of membership arose there, and service on the defendant in South Carolina by publication was bad.]

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1573; Dec. Dig. ⚡627.]

Before Pressley, J., Richland, July, 1881.

Action by Ann S. Rodgers, widow, and her children, against the Mutual Endowment Assessment Association of Baltimore, Maryland. After service of the summons as stated in the opinion, defendant wrote to counsel to represent it. Such counsel, in ignorance of where the cause of action arose, or that defendant had no property or agency in this state, understood from a conversation with plaintiffs' attorneys that the summons had been properly served, and then demanded and accepted service of a copy-complaint. As soon as defendant's attorneys learned the real facts, without answering they made a motion to set aside the summons and complaint, as the defendant had not been brought within the jurisdiction of the Court.

This motion was refused, his honor saying that where a contract might be performed by one of the parties in one place and is to be performed by another one of the parties in another place, the contract may be performed in either place, and the cause of action may arise in either.

Defendants appealed upon several exceptions, all of which raised the single point that the cause of action did not arise in this State, and that, therefore, the motion should have been granted.

Messrs. Pope & Haskell, for appellants.

Messrs. N. K. Perry and J. T. Seibles, contra.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice MCGOWAN. "The Mutual Endowment Assessment Association of Baltimore, Maryland" is a body corporate, as its name indicates, of the State of Maryland. It seems to be a peculiar kind of life insurance company, which extends its benefits not by issuing policies of insurance to strangers in

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\*the usual way, but by the parties to be insured becoming members of the association, and mutually participating in the profits and losses of the risks taken. When one is accepted as a member he receives a certificate that he is a beneficiary and "entitled to mortuary benefits, to be assessed according to the tables of the association; and to be paid at the office of the association within ninety days after the death of said member shall have been satisfactorily established. All dues payable at the office of the association in Baltimore."

It seems that the association had a canvassing agent, J. J. Mackey, who induced John W. Rodgers, of Columbia, South Carolina, to make application to become a member of the association, and gave him the following paper. "Office of Mutual Endowment Assessment Association, Baltimore, Md., Sept. 8, 1880. Per due bill. Received of J. W. Rodgers the sum of fifteen dollars, it being the amount specified in the application for a membership in the Mutual Endowment Assessment Association of Baltimore. If said application is not accepted by the association the above due bill shall be returned. (Signed) J. J. Mackey, Agent."

Nothing further appears to have been done until March 5, 1881, when Rodgers died without having received his certificate of membership. The association refused to pay anything and Anna S. Rodgers, widow, and the other plaintiffs, children of John W. Rodgers, filed the complaint in Richland County, South Carolina, claiming judgment against the association for \$2,500, the alleged insurance on the life of the said John W. Rodgers, deceased. An order of publication was allowed against the corporation as an absent defendant, and a copy of the complaint was served on the secretary of the company in Baltimore. A motion was made on behalf of the defendant corporation to set aside the summons and complaint on the ground that the same had not been served on the defendants, so as to bring them within the jurisdiction of the Court. The Circuit Judge refused the motion and gave leave to answer, and the appeal comes to this Court alleging error in that order.

We agree with the Circuit Judge in disre-

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garding the matter \*of alleged acceptance of service by the attorney of the defendant, as that was clearly shown to have been a misunderstanding and was very properly not urged by the plaintiffs' attorney.

The single question is whether legal service was made upon the defendant, a foreign corporation, having neither office, officer nor property within the State. It is fundamental that a Court cannot adjudge any matter, unless the party interested is properly before it. Every man has a right to be heard and no binding judgment can be rendered against him unless he can be considered as legally present. Was the defendant here sued, a corporation of the State of Maryland, properly before the Court?

The old rule certainly was that a party could only be brought before the Court, so as to make the judgment binding upon him in one of two ways; that is to say, either by personal service in some form or other, or by seizing his property within the jurisdiction and making publication for him to come in and defend; and in the latter case the judgment could only affect the property attached.

But the code of procedure has made some change and laid down some rules upon the subject, intended to cover every case which can possibly arise under the general head of "Manner of commencing civil actions;" the first part of section 158 provides as follows: "When the person on whom service of summons is to be made can not, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the Court or a judge thereof, or of the Probate Judge of the County where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such Court or judge may grant an order that the service be made by the publication of a summons in either of the following cases, viz.: Where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein."

It is admitted that the corporation has no property in the State and the effort is made

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to bring this case under this provision, and the question is whether, according to the facts, the cause of action arose in this State. If not, the defendant could not be made a party by publication. What is the cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject-matter of the action, and, as Mr. Pomeroy says, "finds its primary and far more important application in equitable rather than legal proceedings. The cause of action is the right claimed or wrong suffered by the plaintiff on the one hand and the duty or delict of the defendant on the other, and these appear by the facts of each separate case." See *Hayes v. Clinkscales*, 9 S. C. 453, where the doctrine is approved. "The cause of action must always consist of two factors, (1) the plaintiff's primary right and the defendant's primary duty, whatever be the subject to which they relate, person, character, property or contract; and (2) the delict, or wrongful act or omission of the defendant by which the primary right and duty have been violated."

According to these principles did the cause of action arise here or in Maryland? and in making this inquiry the first point is where, as matter of fact, was the alleged contract to be performed? "When the contract is made in one place and to be performed in another, the cause of action upon such contract arises at the latter place." Story's Conf. Laws, § 280; *Bank of Commerce v. Railroad Co.* 10 How. Prac. 1, and the authorities cited. We will not consider any agreement alleged to have been made in this State between Mackey, the agent, and Rodgers at the time the



due bill and receipt were executed, except what appears in those papers. They must be looked to as containing the contract, if any, and looking at them we cannot see that any contract was made in the State, except that Rodgers, having taken the initiatory step, might file his application for admission as a member of the association, and if "said application is not accepted by the said association the above due bill shall be returned." The admission was to depend on a future event and that was to be determined at Baltimore. It does not appear whether Rodgers ever applied and actually became a member,

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so as to be entitled "to the mortuary benefits." It is certain that he never received the certificate of membership, and it may be that he never complied with the requirements which were made necessary to full membership.

But assuming that he did apply, and, having paid up all his dues, was a full member when he died, from the very nature of the association, he was not merely a stranger insured, but a member of a foreign corporation; and though living in South Carolina, bound by all its rules, one of which was that in case of death, his representative would be entitled, not to a fixed and certain sum, but to benefits "to be assessed according to the tables of the association and at the office of the association in Baltimore, provided the assessment did not exceed \$2500." If Rodgers never became a member no contract was ever consummated.

If he did become a member, and that membership imposed an obligation upon the corporation, it was by its terms to be performed in Baltimore. The applying member lived in this State, and the first preliminary step was taken in this State. He died in this State and the plaintiffs, who claim benefit from his act reside in this State, but the defendant corporation is located in Maryland, and the contract was to be performed there. The delict which created the cause of action was in refusing to pay the mortuary benefits according to the tables of the association, all which by the contract was to be done at the office in Baltimore. We cannot in any point of view, see that the cause of action arose in this State.

The judgment of this Court is that the judgment of the Circuit Court be reversed and the motion to dismiss the complaint granted.

17 S. C. 411

KENNERTY v. ETIWAN PHOSPHATE COMPANY.

(November Term, 1881.)

[1. *Dismissal and Nonsuit* ¶50.]

After issue joined by answer and reply the action may be dismissed on defendant's motion

if the complaint does not state facts sufficient to constitute a cause of action.

[Ed. Note.—Cited in *Hull v. Young*, 29 S. C. 69, 6 S. E. 938.

For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 102; Dec. Dig. ¶50.]

[2. *Nuisance* ¶23.]

An original action on the equity side of the court for injunction to restrain a corporation from throwing off gases to the injury of

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plaintiff's person and crops, will not lie—there having been no judgment in the court of law establishing the existence of such private nuisance and measuring the damages.

[Ed. Note.—Cited in *Cartee v. Spence*, 24 S. C. 556; *Threatt v. Brewer Mining Co.*, 42 S. C. 95, 96, 19 S. E. 1009; *Lipscomb v. Littlejohn*, 63 S. C. 45, 40 S. E. 1023; *Town of Cheraw v. Seaboard Air Line Ry.*, 88 S. C. 484, 71 S. E. 40.

For other cases, see *Nuisance*, Cent. Dig. §§ 55-59; Dec. Dig. ¶23.]

[3. *Nuisance* ¶23.]

The exception to this rule is found only in extreme cases, as where the thing itself is shown to be a nuisance per se, or where the mischief is irreparable and not capable of compensation in damages.

[Ed. Note.—Cited in *Hellams v. Switzer*, 24 S. C. 44; *Town of Cheraw v. Seaboard Air Line Ry.*, 88 S. C. 484, 71 S. E. 40.

For other cases, see *Nuisance*, Cent. Dig. § 58; Dec. Dig. ¶23.]

[4. *Release* ¶34, 35.]

In compromise of an action pending at law and for valuable consideration, plaintiff released defendant from all claim or right of action on plaintiff's part for damages, past and future, resulting from the operation of defendant's works, and covenanted not to sue for damages arising from this cause. *Held*, that this prevented a suit in equity for injunction as well as an action at law for damages; and, moreover, that there can be no injunction without a legal right to damages.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 82; Dec. Dig. ¶34, 35.]

[5. *Release* ¶38.]

Such release and covenant operated to estop plaintiff from doing what he bound himself under seal not to do.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 49, 50; Dec. Dig. ¶38.]

[6. *Release* ¶16.]

Neither erroneous advice, nor error of judgment by plaintiff as to the future effects, nor the suggestions of defendant, one or all, would invalidate this covenant.

[Ed. Note.—Cited in *Lawton v. Charleston & W. C. R. Co.*, 91 S. C. 335, 74 S. E. 750.

For other cases, see *Release*, Cent. Dig. § 31; Dec. Dig. ¶16.]

[7. *Appeal and Error* ¶843.]

[Cited in *Sandel v. Atlanta Life Ins. Co.*, 53 S. C. 243, 31 S. E. 230, to the point that no points raised by the answer can be considered on an appeal from order sustaining demurrer to complaint.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. ¶843.]

[This case is also cited in *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 63 S. E. 556, on the question of nuisances.]

Before Kershaw, J., Charleston, July, 1881.

Action by John Kennerty against the Etiwan Phosphate Company, commenced May 2, 1881. The opinion states the case.

[For subsequent opinion, see 21 S. C. 226, 53 Am. Rep. 669.]

Messrs. Robert Chisolm, A. G. Magrath, for appellants.

Messrs. Campbell & Whaley, A. T. Smythe, contra.

August 8, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff owns a farm near the works of the Etiwan Phosphate Company, which was incorporated for the purpose of carrying on the business of manufacturing commercial fertilizers. He alleges that in their business the defendants manufacture large quantities of sulphuric acid, which is one of the most pernicious gases in its effects upon vegetable and animal life; that the works are so constructed that sulphuric acid gas and other pernicious gases and noisome smells escape in the atmosphere and come over and on his farm and dwelling-house, to the injury of the crops and trees so as unpleasantly to affect him in his own person, both in his fields and home, and by so doing the plaintiff is irreparably damaged by the defendant corporation.

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\*The complaint further exhibits an agreement and covenant which on or about June 10th, 1876, the plaintiff entered into with the defendant corporation to settle a case then pending at law between the same parties for damages from the same cause, which, after requiring that the defendant company should pay \$2250.00 and the costs of that action, \$179.00, provided as follows: "And further, upon the said company raising the duct or escape pipes to their trunk, through which the fumes and gases from the manufactory are let off into the air to an elevation of twenty-five feet higher than their present elevation, being fifty-six feet high; and further, upon said company undertaking to keep, and actually keeping at all times their escape-pipes through which their fumes are let off at the said measured elevation and at the same distance from the land of the said John Kennerty as they now are, and their said pipes to be always of such a diameter that no greater volume of fumes can be precipitated through the top of the pipes than at present into the air. Thereupon the aforesaid terms and conditions being complied with by the company, and continued to be performed on their part, I, John Kennerty, do agree not to oppose opening of the verdict given in this case on the day of April, 1876: and at the option of the said company defendant will discontinue my present action against them, and release all claim of right of action for damages, past or fu-

ture, against the said company, that may accrue to the crops of the adjacent lands of plaintiff, Kennerty, and arising from the fumes or gases that may escape from the company's works into the air, but for future damages resulting from this cause alone, and no other, do I release, and I consent not to sue the said company for damages arising from this cause, and from this alone, so long as the conditions herein stipulated to be kept by them are observed," etc. Appended to the contract was a receipt for the money agreed to be paid.

The plaintiff does not allege that the defendants have failed to perform any of the covenants to be by them performed. He does, however, allege that the danger of the injury above stated recurs with every season,

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and that he has no adequate \*remedy at law, and prays an injunction against the defendant. An order was granted temporarily restraining the defendant from so using its works as to injure the plaintiff. It seems that an answer and a reply were filed, but without taking evidence, upon motion after notice, Judge Kershaw granted an order to dismiss the complaint upon the ground that "it did not state facts sufficient to constitute a cause of action." The parties disagreeing about the "Case" for the Supreme Court, the judge settled it by directing the answer and reply to be stricken out and only the complaint included. From this order the plaintiff appealed, and also from the order dismissing the complaint, upon the following exceptions:

1. Because in the pleadings in the case presented to the court, a cause of action was therein stated; which entitled the plaintiff to produce his proofs and be heard in support of his right to the relief asked for.

2. Because the defendant, having fully answered the complaint, admitted thereby a cause of action to be stated in the complaint; and could not, after such answer, move to dismiss the complaint on the ground that it did not set forth a cause of action.

3. Because his honor having read the pleadings in the case, the complaint, the answer and the reply, had before him a cause of action stated in the pleadings, that is, damage to the crop of the plaintiff by the wrongful act of the defendant; the answer of the defendant denying the damage, and pleading a release by the plaintiff from all actions for damage—past, present or future; and the reply of the plaintiff that the release relied on by the defendant was obtained under circumstances which did not entitle the defendant to the benefit of the defence, because of it set forth in the answer, should not have dismissed the complaint without full hearing.

4. Because the decree dismissing the complaint was made upon motion, not at the hearing of the case, and without opportunity



to the defendant to sustain, by his proof, the averments of his complaint as to the damage he sustained; and to the release, as not giving the defendant the exemption from all suits for damages as claimed in the answer.

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\*5. Because the complaint set forth damage by the defendant to the plaintiff in two modes; first, in that done to his crop by the fumes and works of the defendant; and next, because of the damage done by fumes and vapors escaping from the works of the defendant; making his residence, because of offensive smells, unwholesome and uncomfortable; and for such damage the release set up the defendant did not in terms profess to exclude every right of action; but by the limitation in its terms to damage done to the crops, did not affect the plaintiff's right to sue for a cause of action, sounding in damages, because of injury done to his residence and home, as such.

6. Because the decree dismissing the complaint would bar the plaintiff from any recovery against the defendant because of damage done to his crops, his property, his residence and home, his health, and his person because of a paper set up as a release; and excludes all evidence to prove that such paper, so called a release, was not binding on the plaintiff, and could not give to the defendant an exemption of liability for all damages, however sustained, and occasioned by the acts of the defendant willful or otherwise.

The appeal from the order "settling the case" was not argued here, and we regard it as properly abandoned.

The first four exceptions make the point substantially that after answer filed and issue joined it was too late to consider the case exclusively with reference to the allegations of the complaint; and that the judge should have allowed the plaintiff to prove the facts of the case put in issue. The objection was in fact an oral demurrer, under the sixth head of section 167 of the Code upon the ground that "the complaint did not state facts sufficient to constitute a cause of action."

The Code enacts that the only pleading on the part of the defendant shall be a demurrer, or an answer, and after setting out the grounds upon which alone a demurrer can be interposed, provides in section 171 that "if such objection be not taken by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of

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action." \*In accordance with this exception it has often been held, both in New York and in this State, that such objection may be made at any stage of the proceedings, even after issue joined and the case heard. South-

ern Porcelain Manufacturing Co. v. Thew, 5 S. C. 10; Bowden & Earle v. Winsmith, 11 S. C. 411; Balle v. Moseley, 13 S. C. 440; Coffin v. Reynolds, 37 N. Y. 640. In the last case cited it is expressly said: "It was clearly right to entertain the application at that stage of the case, since the code provides that the specific objection that the complaint does not state facts sufficient to constitute a cause of action need not be taken by answer or demurrer, but is available in any stage of the action."

All the other exceptions insist that the complaint did state facts sufficient to authorize the court to grant the injunction prayed for, and that the order dismissing the complaint was error. The principles involved are important and the consequences serious. It is not a small matter to embarrass or destroy an industry so useful as that of the Etiwan Phosphate Company, because of the consequences of operating their works in a legitimate business chartered by the State, upon their own land, and with no unlawful intent; and on the other hand it is even more important to secure to every man the enjoyment of that which is a common right, the use of pure and uncorrupted air.

For the purposes of the case we must consider the statements of the complaint as true, and so considering them, was such a case made as entitled the plaintiff to the injunction prayed for? First consider how the matter would stand if there had been no former action between the parties or covenant on the part of the plaintiff not to sue, but the action was an original proceeding of the plaintiff against the defendant for injunction. The matter complained of was that the works of the defendant company operated as a private nuisance, injuring the plaintiff in his person and in his property. The complaint was in the equity jurisdiction, not for past damages for corrupting the air, but for an injunction against the throwing off of such gases in the future, even if it re-

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sulted in the stoppage of the works. \*The existence or non-existence of a nuisance was necessarily involved in the question.

The Court of Equity is not the appropriate tribunal for the trial of such an issue. In such case the general rule undoubtedly is that equity will not grant an injunction until the legal rights of the parties are determined and the fact that a nuisance exists is established in a law court, which is the proper tribunal to decide such questions and measure the damages. The fact of damage is one which the defendant had a right to have passed upon by a jury, and the right of the plaintiff in case of success in that issue to have an injunction against the continuance of the nuisance was supplementary thereto. It may be conceded that the facts stated would constitute a cause of action at law for damages, but it does not necessarily fol-

low that they constitute a cause of action in equity as an original proceeding for the special relief of injunction.

"The equity for an injunction attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be infringed by the defendant. The existence of the right and the fact of its infringement must be tried, if disputed, in a court of law, and therefore if the plaintiff resorts to equity in the first instance he should move forthwith for an interlocutory injunction to protect his alleged right until decree, and thus give an opportunity for directing the trial at law, so that when the cause comes on for hearing it may be ready for immediate adjudication. When a motion for an interlocutory injunction is made, the court, having regard to the extent of prima facie title shown, the probability of mischief to the property, and the balance of inconvenience on either side, will either grant the injunction accompanied by a provision for putting the legal right into an immediate course of trial, or will send the parties to law, directing the defendant to keep an account, or will merely retain the bill with liberty to the plaintiff to proceed at law." Adams' Equity, 497; *Wilson v. Cohen*, Rice's Eq. 83. The complaint in this case neither alleged that the nuisance charged had been admitted or legally adjudged, nor that an action was pending in a law court, nor did it ask leave to make up an issue to try the question.

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"It is true to this general rule there are exceptions. The court as an original matter will intervene in extreme cases, for example when the thing itself is a nuisance per se, or the mischief is irreparable and not susceptible of compensation in damages. The doctrine as we understand it is stated in the case of the *Mohawk Bridge Co. v. The U. and S. R. R. Co.*, 6 Paige, 563. "The principles upon which the court should proceed in granting or refusing relief by injunction in cases of this kind are correctly laid down by Lord Brougham in the recent case of *The Earl of Ripon v. Hobert* (Cooper's Rep. temp. Brougham, 343). If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the court will refuse to interfere, until the matter has been tried at law by an action; though in particular cases the court may direct an issue, for its own satisfaction, where an action could not be brought in such a form as to meet the question."

It was not alleged that the operation of defendant's works authorized by the Legis-

lature was in itself a nuisance, "but only something which may according to circumstances prove to be so," nor was it alleged that the right had been decided at law, and it is at least doubtful whether the facts stated, under the circumstances, made out such a case of irreparable mischief as required the judge, without reference to a trial at law, to grant the injunction.

But there can be no doubt, when we consider the allegation of the complaint that there had been a former action at law by the plaintiff against the defendant for the same causes, which action the plaintiff had compromised and for valuable consideration covenanted with the defendant to discontinue, and to release all claim or right of action for damages present or future against the said company arising from the fumes or gases that may escape from the company's works in the air; "but for the future damage resulting from this cause and no other, do I release &c.: and I consent not to sue the

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said company for \*damages arising from this cause, so long as the conditions herein stipulated to be kept by them, are observed."

The plaintiff agreed to release and "not to sue for future damage arising from the fumes or gases that may escape from the company's works in the air, etc.," the identical thing he is now seeking relief against by way of injunction. It seems to us that considering the whole of this agreement together, and the circumstances under which it was executed, the fair construction of it is, that the parties intended to bar all judicial proceedings for the same cause—a suit in equity for injunction as well as suit at law for damages. We do not suppose that the parties had in view the difference between an action at law and a proceeding in equity, and that in providing against the former they intentionally omitted to provide against the latter, which would enable the party covenanting against future suits for damages, to accomplish his purpose only the more effectually in another way, by injunction. The qualification in the covenant has reference to the cause, and not the objects to be affected by it "for damages arising from this cause and this alone."

But if we restrict the agreement to the technical meaning of the terms used, the covenant not to sue for future damages incidentally affected the remedy by injunction in the equity jurisdiction, for the reason that in any and every view there can be no injunction without the legal right to rest upon. Injunction is a matter of grace and without the legal right as a foundation will not be granted; "Equity will not grant an injunction for the protection of a naked legal right, which plaintiff and those under whom he claims have covenanted not to exercise." *Bosby v. McKim*, 7 Harr. & John., 468. In that case Justice Dorsey said "The



annals of judicial proceedings do not furnish a case, where a court of Equity has granted a perpetual injunction to a plaintiff to protect him in the enjoyment of a naked legal right, which he and those under whom he claims, have by the most solemn deeds stipulated not to exercise."

But it is urged that the agreement was not binding on the plaintiff; that it was executed at the suggestion of defendant upon erroneous advice, and so far as it undertook

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to covenant \*against suing for future injuries was illegal and void. No allegation is made in the complaint that it was obtained by misrepresentation or fraud. It would not be enough to invalidate the covenant, if it was executed upon erroneous advice or at the suggestion of the defendant, or that the plaintiff was mistaken in his judgment as to the effect of the changes required to be made in the works, or from all these causes combined. The plaintiff entered into it deliberately, received the consideration in money, and acquiesced in it for a number of years.

Without entering into the learning with which the point was argued at the bar, whether a covenant not to sue for future injuries from a known cause in existence is good, or without considering the precise difference between a covenant not to sue, and the conveyance of an easement or an executed license, it is enough for us to say, that there can be no doubt that the plaintiff is estopped from doing what he covenanted under seal he would not do. Whilst compromising a suit then pending for past damages arising from a certain cause, the plaintiff, for value received, covenanted not to sue again for injuries from the same cause if they should arise in the future. When such injuries do afterwards arise as alleged he cannot disregard his covenant. To allow him to do so would operate as a fraud.

It may be true that as a general rule a thing in the future cannot be released, but a covenant for a consideration not to do a particular thing, such as building a house, or in some uncertain emergency to seek legal redress, will be enforced in order to avoid circuitry of action and upon the principle of estoppel. As was said by Chief Justice Spencer in the case of *Chandler v. Herrick*, 19 John, 134: "It is well settled that a covenant never to sue an obligor may be pleaded as a release to avoid circuitry of action." Covenant not to sue, if it convey or pass no present right, is an agreement to pass it when it occurs: like a covenant for future assurances, it is a warranty that the expressed intention shall not be defeated by the grantor or his privies. Big. Est. 333.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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\*PEAKE v. PEAKE.

(April Term, 1882.)

[1. *Appeal and Error* ⇨1000; *Equity* ⇨381.]

The verdict of a jury upon issues referred to them out of chancery is entitled to great weight, but is not absolutely binding upon the conscience of the Judge who hears and decides the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3926; Dec. Dig. ⇨1000; *Equity*, Cent. Dig. § 816; Dec. Dig. ⇨381.]

[2. *Equity* 381.]

Upon the trial of the case by the Court after such verdict, the Judge has the power to hear further testimony upon the issues considered by the jury.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 813-817; Dec. Dig. ⇨381.]

[3. *Equity* ⇨381.]

After a verdict on issues referred certified to by the Judge presiding, with his own approval of the findings, judgment cannot be entered up on the law side of the court in accordance with such verdict, but there must be a further hearing of the cause by the Court on its equity side.

[Ed. Note.—Cited in *Rynerson v. Allison*, 30 S. C. 538, 9 S. E. 656.

For other cases, see *Equity*, Cent. Dig. § 813; Dec. Dig. ⇨381.]

Before Fraser, J., Abbeville, November, 1881.

At the hearing of this appeal Hon. J. H. HUDSON, of the Fourth Circuit, sat in the place of Mr. Justice McGOWAN, who had been of counsel in the cause.

The order of the Circuit Judge fully presents the case, and its statements will be found in the opinion of this Court. Continuing, the Circuit Judge thus gives the reasons which influenced his judgment:

To enable a judge properly to decide an issue of fact, he should have the right, when parties deem it necessary for their protection, to hear the testimony for himself, and even to see the witnesses. If he is to render a judgment on the law and the facts, he ought not only to hear the testimony and see the witnesses, but he ought to have control and direction of the whole question of the introduction and the admissibility of evidence. When the testimony is taken by the Master or Referee, these matters can be reviewed on exception. There can be no exception to the admissibility of the evidence taken by another Judge, and no appeal from his rulings to another Circuit Judge, though it has been the practice to order new issues or even the same issues to be again submitted to a jury, in order that their verdict may aid the Chancellor in a doubtful case. The practice originated in cases where on hearing the evidence such doubt has arisen in the mind

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of the Chancellor as to induce \*him to ask the aid of a jury. It seems to me not to be a mere question of practice but one of jurisdiction.

Now, there is no good reason why one Circuit Judge should be required, under an order for the trial of issues, to act as a master of the court or a Referee to report the testimony, and the practice has never been to consider him bound "to state the evidence and give a minute history of the trial." See 2 Dan. Ch. Prac., (1st Am. Ed.) p. 1305, note C. Judge Kershaw does not say in his certificate that he reports in full the oral testimony, but only "notes of oral testimony." From my own personal experience, I do not consider notes of testimony taken by a presiding Judge on a trial before a jury as sufficiently full and accurate to be relied on with entire confidence in a large majority of the cases in which issues are ordered. To hold that they must be received as the only testimony which can be used on trial, would make one Judge very little more than a clerk for another.

It was for this, and perhaps other reasons, held that "notwithstanding the verdict, the party against whom it was given has a right to proceed in his case." (Story Eq. Jur., § 1479 and note x,) and that "a Chancellor may decide every question of fact for himself," (§ 376 and note.) It is for this reason that in some courts where parties ask for an issue of fact to be tried by a jury, the Court has put them on terms to agree beforehand to abide the result. See *Ansdell v. Ansdell*, 4 Myl. & Cr., 449, 454. It may be that in some of the States the practice is, in all cases, to consider the finding of the jury as conclusive on the issues submitted to them, but such practice has not been adopted here. The language of the Court on this subject in *Sloan v. Westfield*, 11 S. C. 445, and other cases, is in conformity to what I think is the law in reference to these trials.

If we assume, as contended here, that by the Code and the rules of court parties have a right to demand an order for the trial of the issues of fact in an equity case before a jury, I do not find it anywhere laid down that the verdict is conclusive, or that the Judge has no right to hear the whole case on the testimony and exercise an original jurisdiction on hearing the whole case, when it is his duty under the Constitution and law

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\*to render judgment on the law and the facts. Unless the will of the Legislature to restrict a Circuit Judge hearing an equity case as a Chancellor to the testimony taken before a jury on the trial of issues at second hand without seeing the witnesses and without any control over the process by which the testimony was introduced, was expressed in clear and unmistakable language, I would hesitate long before I would adopt such a construction of the Code or rules of court.

To hold that a Circuit Judge who hears an equity case after verdict on issues tried by a jury, is bound to render a judgment as proposed by the motion now before me, would seriously interfere with the jurisdic-

tion conferred on him by the Constitution. The motion must therefore be refused with ten dollars costs.

From this order the assignees of Jennings, Smith & Co. appealed upon the following exceptions:

1. Because, under the Constitution, statutes, and rules of court of this State, the verdict of the jury in this case is final and conclusive as to the matters of fact submitted to them for determination by the order of the Court, and being in favor of said defendants upon all the issues of fact, it was error in the presiding Judge not to render judgment that the pretended mortgage of plaintiff is fraudulent and void as to said defendants, in accordance with the verdict of the jury.

2. Because, according to the English chancery practice and the chancery practice of this State, it was error in the presiding Judge not to render judgment in favor of said defendants, based upon the verdict of the jury in favor of said defendants upon all the issues of fact submitted to them, accompanied with the certificate of Judge Kershaw that he saw no reason to be dissatisfied with said verdict.

3. Because it was error in the presiding Judge not to try the case upon the report of Judge Kershaw, his notes of the testimony taken on the trial of the issues, the depositions of witnesses examined by the Master and by commission, the verdict of the jury, the certificate of Judge Kershaw, and the other papers in the case.

4. Because it was error in the presiding Judge not to render judgment in favor of said defendants in accordance with their motion, of which notice was duly given.

5. Because it was error in the presiding Judge to hold that he could not decide the case without having the witnesses before him.

Mr. A. Burt. for appellant.

Messrs. W. H. Parker and L. W. Perrin, contra.

May 27, 1882. The opinion of the Court was delivered by

Mr. Justice HUDSON. In the introduction of his decree the Circuit Judge makes the following statement:

"This case came before me at the Special Term of the Court of Common Pleas held for Abbeville County in November, 1881. The action was brought to foreclose a mortgage given to James W. Peake, the plaintiff, by William H. Peake. Jennings, Smith & Co., who had obtained a judgment against William H. Peake after the date of the mortgage, were made parties defendant, and in their answer alleged that the mortgage was fraudulent and void, and should be so adjudged, and proper relief given. Since the commencement of the action there have been



several transfers of interest from the original parties, which I presume have been properly provided for in the case as it now stands. On February 4, 1876, the cause came up before his Honor Judge T. H. Cooke, and an order was made by him of that date, that certain issues of fact in reference to this allegation of fraud should be tried by a jury, and that the case should be placed on Calendar No. 1. On February 7, 1881, at a term of the Court of Common Pleas held for Abbeville County, his Honor Judge Kershaw presiding, these issues were submitted to a jury, and a verdict rendered that the mortgage was fraudulent, and in favor of the defendants, Jennings, Smith & Co. On April 29, 1881, two months and twenty-two days after this trial, by giving and rendition of the verdict, Judge Kershaw signed a certificate of the verdict of the jury accompanied with the testimony, some of which was taken by commission and some by the Master, and also the notes of oral testimony taken on the

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trial by the jury before \*him. Judge Kershaw also certified that he saw 'no reason for being dissatisfied with the verdict.' The cause was found by me on Calendar No. 1 and Calendar No. 2, and I marked it, 'Heard on both.' It was heard by me, however, only on a motion on notice by the assignees of Jennings, Smith & Co., who have been made parties, 'for judgment in accordance with the verdict of the jury rendered herein.' Counsel for the motion insisted on his right to have this motion heard and disposed of on Calendar No. 1. Plaintiff's counsel claimed the right to go into the whole case anew, and have the case heard in full upon testimony as an equity cause on Calendar No. 2.

"Until the motion for judgment is disposed of, I did not think it proper to complicate the case by hearing any motion on the part of the plaintiff as to the mode of trial or character of the testimony he expected to introduce."

The Circuit Judge proceeds to consider the propositions involved in the motion as touching questions of jurisdiction and practice, and renders judgment refusing the motion to enter up judgment on Calendar No. 1 in accordance with the verdict of the jury, holding that the cause is still open for a final hearing on Calendar No. 2.

In this he is correct. The confusion which has arisen upon the practice in such cases as the present, and which has brought the question so often to this court, arises from the blending by statute of the courts of law and equity into one, and of all actions, legal and equitable, into one, denominated civil action. To avoid this confusion and doubt in matters of jurisdiction and practice we should keep clearly in mind the distinction between an action in which a legal right is sought to be enforced or wrong redressed,

and one in which the relief demanded is equitable, and the forms of trial prescribed in these actions respectively. This can best be done by regarding the Court of Common Pleas, whilst hearing the first class of cases, a court of law, and whilst hearing the last class of cases, a court of equity. In the court of law trial by jury is demandable as a matter of right in actions there pending, and judgment on verdict of the jury must be entered, and generally without motion.

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\*In a court of equity the relief demanded is obtainable only on judgment or decree of the court, and trial by jury is not demandable as a matter of right. It is discretionary with the Judge whether any or all the issues of fact arising in a civil action for equitable relief shall be referred to a jury for determination. If an issue be referred, the verdict of the jury though entitled to great weight, so much so, that it will be, and ordinarily is accepted as conclusive of the issue of fact, yet it is not absolutely binding on the conscience of the Judge, but may be accepted or rejected by him according to the conclusion he may have arrived at upon hearing the evidence, if he presided at the trial, or may form from a careful review thereof, if certified to him by the Judge who did preside at the trial of the issues. But whether he be the Judge who tried the issues of fact on Calendar 1, before a jury, and then heard the whole cause on Calendar 2, on the equity side of the court, or whether he only hears the cause on the latter calendar, with the verdict of the jury and the evidence on which it rests certified to him by the Circuit Judge who presided at the trial of the issues on Calendar 1; in neither instance can he enter up judgment on the verdict, nor order it to be done, but must grant or refuse the relief demanded, according to his own findings of fact and conclusions of law upon a full hearing of the whole cause on its merits on Calendar 2, on the equity side, so to speak, of the court.

At such a hearing, whilst it would be an unusual thing for the Judge to hear further testimony upon the issues passed upon by the jury, yet he has the power to do so, and for good and satisfactory cause shown, would do so. It is for his judgment to be convinced and his conscience to be satisfied before he grants or refuses the relief demanded; and to this end the services of jury are often invoked with great advantage to the ends of justice; and the verdict is generally entitled to great respect, and ordinarily will be suffered to prevail in fixing the facts of the case referred for determination.

This Court has in a series of decisions announced and endeavored to make clear the law which under our present system governs questions of jurisdiction and the rules of

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practice in \*the trial and final determination

of equitable actions like the present, in which issues of fact are referred to a jury. *Sloan v. Westfield*, 11 S. C. 448; *C. C. & A. R. R. Co. v. Earle*, 12 S. C. 54; *Ivy v. Claussen*, 14 S. C. 273, and authorities there cited; *Grierson v. Harmon*, 16 S. C. 618; *Ostendorff v. Brown*, 15 S. C. 616; are some of the series of cases in which this Court has prescribed the rule of practice and jurisdiction controlling Circuit Judges in determining actions for equitable relief, where the parties on motion, or the Court of its own accord, have invoked the aid of a jury in deciding questions of fact.

The present action seeks to foreclose a mortgage and sell the mortgaged premises, and therefore demands equitable relief. The defence of the judgment creditors is that the mortgage is as to them fraudulent and void, and they ask that it be by the Court so adjudged and vacated accordingly. The relief here sought is affirmative and equitable, and can no more be had upon the verdict of a jury solely than can the relief demanded by the plaintiff. The cause was placed on Calendar No. 1, for the sole purpose of having a jury to determine the issues of fact referred to them. Upon the rendition of that verdict, the cause on that calendar was ended, and was not open to a motion for a judgment on verdict. After this finding of the jury the only proper place for the cause was on Calendar 2; upon the call of which, the whole cause, embodying this verdict and the material to support it, stood for full hearing and final decree of the Judge, sitting as chancellor. At such hearing on Calendar 2 the Judge, as Chancellor, could not have granted a motion for "judgment in accordance with the verdict," but could only, after a full hearing of the whole case, have granted or refused the relief demanded according to the view he may have taken of the verdict of the jury. He could affirm or disregard it according to his own convictions, and shape his decree accordingly.

We only speak of the Judge's powers and jurisdiction, and the practice in such cases, and design to say nothing which may restrain the Judge before whom this cause may come for further hearing on the circuit, in so far as

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his discretionary \*powers may be involved in the details of the hearing and adjudging of the cause. Our purpose has only been to reiterate our views upon the questions of jurisdiction and practice involved in this appeal, and place the action in its present stage in a proper attitude and status in the court below. The appeal of the defendants, which seeks to reverse the judgment below, and to obtain leave to enter up judgment for the appellants on Calendar No. 1, in accordance with the verdict of the jury, without further hearing, of the cause on Calendar No. 2, cannot be sustained.

Wherefore it is the judgment of this Court that the appeal be dismissed, and the action be remanded to the Circuit Court for a hearing in accordance with the principles herein announced.

17 S. C. 428

PRATT v. MCGHEE.

(April Term, 1882.)

[1. *Wills* ⇐552.]

In the statutory provision, "if any child should die in the lifetime of the father or mother having issue, any legacy given in the last will of such father or mother shall go to such issue" (5 Stat. 107, § 9; Gen. Stat. ch. lxxxvi, § 13), the word "legacy" is used in its technical sense, and does not include a devise of land, as appears from a comparison of this section with other sections of the same act.

[Cited in *Roundtree v. Roundtree*, 26 S. C. 469, 2 S. E. 474; *Brock v. O'Dell*, 44 S. C. 41, 21 S. E. 976; *Logan v. Brunson*, 56 S. C. 11, 33 S. E. 737.

For other cases, see *Wills*, Cent. Dig. § 1192; Dec. Dig. ⇐552.]

[2. *Wills* ⇐775.]

A devise of land to a son of testator lapses where the son dies before his father; and if the son leave issue who survive the testator, they do not take under the devise.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1997-2000; Dec. Dig. ⇐775.]

Before Fraser, J., Abbeville, November, 1881.

Hon. J. H. HUDSON, of the Fourth Circuit, occupied the seat of Mr. Justice McGOWAN, who had been of counsel in the cause.

Action by Louisa J. Pratt, Margaret Clinkscales, and others against Leonora McGhee, Claudia Ellis, John R. Ellis, and Robert Pratt, executor, for partition, account for advancements, etc. The opinion states the facts of the case.

The circuit decree, omitting its statement of facts, was as follows:

I find that all the portions given off by the

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testator to his \*children were given off anterior to the date of the will. I find it difficult to state accurately the amount and value of these portions, but the testimony shows clearly that the portions or advancements made to John R. Ellis were at least double what was given to either of the other children. The complaint alleges that there is not sufficient personalty to pay "the debts, funeral expenses, and pecuniary legacies." If there is anything in the testimony to show that any part of the pecuniary legacies will be paid out of the estate it has escaped me.

It is not easy to arrive at a satisfactory conclusion as to the proper construction of this Sec. 13, above referred to. If the words "when living" refer to the period after the date of the will, then the parties are all



equal, because the evidence shows that during this period the testator gave nothing to any of his children, unless it be held that the use of the plantation and stock by the son as above set forth was a portion to him. If the words refer to a period of time anterior to the date of the will, then John R. Ellis received a much larger portion than the other children. In this view of the facts it is not important to consider the dictum of Chancellor Johnston in *Pegues v. Pegues*, 11 Rich. Eq. 554, suggesting that this expression in the section ought to be construed to apply to portions given after the date of the will.

The most serious difficulty in the way of the claim made by the issue of John Robert Ellis in this case is that the section refers to "legacies," and the gift in this case is a tract of land. A gift of personalty in a will is called a legacy, and a gift of land is called a devise. The primary signification of the word legacy is a gift of personalty, and this word is never construed to include a gift of land in a will unless there is something in the context which shows that the testator did use it in this latter sense. The text writers, Jarman, Roper, and Williams, are very clear that this is the signification of the word "legacy." There is a very wide distinction between a legacy and a devise—a gift of personalty and a gift of land in a will. They are governed by different rules and have different values in the order of distribution and administration.

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\*Some of these distinctions are as follows:

1. When this Section 13 was first introduced into our statutes, personal property acquired after the date of the will would pass under it if covered by its terms—land acquired after the date of the will would not pass under it. It is true that has been changed, but the illustration remains the same.
2. Any legacy in a will, or as I hold the same any gift of personalty, could be adeemed by the testator standing in loco parentis by gifts of personalty, after the date of the will, when an intention to adeem appears—but a devise, or gift of land in a will, cannot be so adeemed—*Allen v. Allen*, 13 S. C. 512 [36 Am. Rep. 716].
3. All pecuniary legacies and specific legacies or gifts of specific property in a will are liable in the course of administration to be subjected to the payment of testator's debts before the real estate can be reached for this purpose.

When such distinctions as these exist between legacies and devises, or personal and real property passing under a will, I cannot hold that the legacy, which in its natural and ordinary sense means a gift of personalty only, when used in an act of the Legislature should be construed to include land unless there is something in the context to control it. I find nothing in this section which points to a different meaning—and the preceding and following sections show that these distinctions between the different kinds of prop-

erty were constantly in the mind of the Legislature.

It is therefore ordered and adjudged that a writ of partition do issue, etc.

The defendants, children of John R. Ellis, deceased, appealed, upon four grounds, all of which raised the point that his honor erred in his construction of the 9th section of the act of 1789, or if correct, that he should have decreed to them the personal property given to their father by his father's will.

Messrs. Noble & Noble, for appellants.

Messrs. Parker & McGowon, L. W. Perrin, contra.

June 3d, 1882. The opinion of the Court was delivered by

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\*Mr. Justice HUDSON. In 1872 John L. Ellis, late of the County of Abbeville, made and executed his last will and testament, and in 1879 departed this life, leaving the same unrevoked.

He left surviving him five children, who are the first-named plaintiffs, and six grandchildren, three of whom, children of a deceased daughter, Eliza McDaniel, are also plaintiffs, and three others, children of a deceased son, John R. Ellis, are defendants, joined with Robert Pratt, who is the sole executor of the said will. He left no widow. The chief object of the testator's bounty was his son, John Robert Ellis, to whom, in the first clause of his will, he gave his entire real estate, consisting of a tract of six hundred and ninety-three acres of land, and also, with slight exception, all his personal property, consisting of his household and kitchen furniture and live stock of all kinds. To each of his daughters he gave thirty dollars; to the children of Eliza McDaniel, deceased, thirty dollars betwixt them, and to his grandson, Robert N. Pratt, a watch. After the making of this will, but before the death of the testator, his said son, John R. Ellis, to wit, in 1873, departed this life, leaving a widow, Margaret Ellis, and three children, Leonora McGhee, Claudia Ellis, and John R. Ellis, the two last being minors.

In this complaint, which seeks a partition and settlement of the estate of their testator, the plaintiffs claim that the gift of land and personalty to the son, John R. Ellis, lapsed by reason of his having predeceased his father, and because he had been during life more than "equally portioned" with the other children; and hence they pray that the said land and personal property set forth in the devise and bequest to him, may be partitioned among the heirs-at-law of John L. Ellis as intestate property. This claim is resisted by the defendants, children of John R. Ellis, who contend that their father, in his lifetime, was not equally portioned with the other children of John L. Ellis, and that the gift to him under the first clause of the said will is saved from lapsing by sec. 13, chap.

lxxxvi, General Stat. 444, which is the re-enactment of sec. 9, act of 1789, 5 Stat. 107.

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\*The original section reads as follows: "That if any child should die in the lifetime of the father or mother leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally portioned with the other children, by the father or mother when living." In the re-enactment in the Revised Statutes this language is not changed.

The circuit judge found as a matter of fact, that John R. Ellis had been, while living, greatly more than equally portioned with the other children of the testator, John L. Ellis. He further held that the term "legacy" in the 13th sec. aforesaid cannot be construed to include a devise of realty, but must be construed to apply only to a gift of personalty, according to its legal technical meaning. Under this construction of the statute, and in view of the fact that John Robert Ellis had already been equally portioned with the other children, he held that the entire devise and bequest to him in the first clause of the will lapsed upon his predeceasing his father, and became after the death of the testator distributable among his heirs-at-law as intestate property. Accordingly he decreed partition to be made as craved by the plaintiffs. This judgment is appealed from by the children of John R. Ellis, who seek in this court a reversal of the construction by the circuit judge of the statute aforesaid, under and by virtue of which they claim that the gift to their father is saved from lapse and goes to them.

After a careful examination of the entire act of 1789, which contains many sections, and a like careful examination and comparison of chap. lxxxvi, Gen. Stat. 444, with its many clauses and sections, we are constrained to conclude that the Legislature used the word "legacy" in its technical legal sense, and no other. In the sections which precede and follow this clause, both in the old and new act, the terms "devise," "bequest" and "legacy" are used invariably in this strictly technical sense, the word devise being in each section made to refer to a gift of realty, and the words legacy and bequest to gifts of personalty. It thus appears that these words are nowhere in these acts used as synonymous terms, but always with an appropriate distinction and legal significance.

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\*The terms were well understood by the legislatures which, at the two periods separated by nearly a century, used them throughout with the closest regard to their respective differences and technical meaning. In no section of either act would the sense be retained by substituting one of these words for the other or by enlarging one so as to embrace the others. Why then should we conclude that in this single section the legislature inadvertently used the word, "legacy"

in an untechnical sense, and intended to imply thereby a gift of realty (a devise) as well as of personalty, when in all other sections the true distinction is carefully preserved?

We know of no canon of construction which, when brought to bear upon this entire act, will conduct us to such a conclusion. We are told that there is no reason why the legislature should intend to save a legacy from lapsing, which would not more strongly induce that body to likewise preserve a devise of real estate to the issue of a pre-deceased child; and that therefore we must conclude that by the term legacy in this clause a devise is likewise meant. But as the question is, not what the legislature ought to have intended, but what they did intend, we must examine the whole context of the act to ascertain that intention. Such examination demonstrates the fact that in every other clause of the act a gift of real estate is styled a devise, a gift of personal estate is called a legacy or bequest, and a gift of both real and personal property is entitled a devise and bequest. Had a joint gift of real and personal property been contemplated in the 13th section, it would have been likewise designated a devise and bequest, and not untechnically a legacy.

In the statute of Victoria upon this subject, and in the acts of the legislatures of all those States of the Union which have made similar provision against the lapsing of gifts to pre-deceased children, the terms "devise and bequest," or others equally unequivocal and comprehensive, are employed. The fact that our legislature for nearly a century has adhered to the simple word "legacy," with a full knowledge of its appropriate and limited signification, is evidence of an intention to save only a gift of personalty from lapsing.

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To cover realty as well as personalty, in its terms, will require further legislation. The courts cannot supply the place of legislation by enlarging the meaning of a word of limited purport, which the legislature has used knowingly and advisedly.

If this clause of the act stood alone as a separate enactment the argument that, in the reason and nature of things, the legislature could not have intended to save from lapse perishable personal property, and to suffer the more valuable real property to pass from the issue of a pre-deceased child might have been urged with special force, and would probably induce the Court to widen the meaning of the term "legacy" so as to embrace all gifts, whether of land or goods. But controlled in the context of this Act, as it must be, by the language that precedes and follows it, the term must be restricted to its legal sense.

Numerous cases have been cited by counsel from the law books both of England and America, where in last wills and testaments, the use of the term legacy by the testator,



the Courts have held to be synonymous with, or as comprehensive as, the terms "devise and bequest." But an examination of these cases will discover the fact that the testator in each instance, used the word in a popular sense, and clearly intended thereby to embrace both real and personal estate. Without thus enlarging the meaning, the will was either unintelligible, or the clear intent of the testator would be defeated. Hence, in order to carry into effect the interest of the testator apparent from the context, the courts have very properly construed the word legacy to include land as well as personal property in many cases. As authority for this construction, see 1 Jarm. Wills, *Note*, 145 1; 1 Redf. Wills, (3rd ed.), \*617; Ladd v. Harvey, 21 N. H. 528; Brady v. Cubitt, 1 Doug. 31-39. Decisions to the like effect in construing wills are numerous, the controlling guide in each case being the manifest intention of the testator. But just as in these numerous instances it was manifest that the testator intended by the word "legacy" to embrace land as well as goods and chattels in his gift, so in the case now before the Court, resting upon the statute in question, it is equally clear that the legislature used the term in its technical sense.

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\*Wherefore, we concur with the Circuit Judge in his construction of the statute, and nothing in the brief submitted, appears as evidence to show that the son, John Robert Ellis, was not equally portioned with the other children. The Circuit Judge found that he was greatly more than apportioned, and in this we see no error. He concludes that under the statute and the evidence, the whole gift, both of land and personal property, lapsed, and in this view we concur. We deem it unnecessary to notice other minor points not urged in argument, and not affecting the case.

It is the judgment of this Court that the judgment of the Circuit Court be affirmed, that the cause be remanded to the Circuit Court to have the decree below carried into effect, and that the appeal be dismissed.

## 17 S. C. 435

FINLEY v. ROBERTSON.

(April Term, 1882.)

[1. *Infants* ⇨89.]

Under the statute, an infant is incapable of making himself a party to an action by accepting service of the summons so as to be bound by a judgment therein.

[Ed. Note.—Cited in *Genobles v. West*, 23 S. C. 160, 166; *Riker v. Vaughan*, 23 S. C. 189; *Whitesides v. Barber*, 24 S. C. 376; *Tederall v. Bouknight*, 25 S. C. 276.

For other cases, see *Infants*, Cent. Dig. § 266; Dec. Dig. ⇨89.]

[2. *Infants* ⇨87.]

Infants are not bound by a judgment rendered in a cause in which they were not represented by guardians ad litem, appointed under

the proceedings to that end prescribed by the statute law.

[Ed. Note.—Cited in *Riker v. Vaughan*, 23 S. C. 187, 188; *Turner v. Malone*, 24 S. C. 406; *Tederall v. Bouknight*, 25 S. C. 283; *Harrison v. Lightsey*, 32 S. C. 295, 10 S. E. 1010; *Robertson v. Blair & Co.*, 56 S. C. 96, 106, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see *Infants*, Cent. Dig. § 250; Dec. Dig. ⇨87.]

3. *Bulow v. Witte*, 3 S. C. 308, considered.

[4. *Judicial Sales* ⇨32.]

Adult defendants having accepted service of an irregular summons issued by the Court of Probate, and made no resistance to the further proceedings, or to a sale made thereunder, are estopped in action against the purchaser to recover the land, from denying the validity of the sale or the jurisdiction of the court.

[Ed. Note.—Cited in *Beasley v. Newell*, 40 S. C. 25, 18 S. E. 224.

For other cases, see *Judicial Sales*, Cent. Dig. § 69; Dec. Dig. ⇨32.]

[5. *Executors and Administrators* ⇨333.]

Whether a Court of Probate has jurisdiction of an action by a creditor for the sale of land in aid of assets—raised but not determined.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1372-1375; Dec. Dig. ⇨333.]

[6. *Wills* ⇨836.]

So also of the question, whether a fee conditional passes to the heirs of the body per formam doni as assets for the payment of all the ancestor's debts, or as charged only with the liens and incumbrances imposed upon the land by him during his tenancy.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2139, 2140, 2150-2155; Dec. Dig. ⇨836.]

[This case is also cited in *Fields v. Watson*, 23 S. C. 54; *Crocker v. Allen*, 34 S. C. 462, 13 S. E. 650, 27 Am. St. Rep. 831; *Hendrix v. Holden*, 58 S. C. 528, 36 S. E. 1010, and distinguished therefrom.]

Before Aldrich, J., Laurens, September, 1881.

Hon. J. H. HUDSON, of the Fourth Circuit, sat in the place of the CHIEF JUSTICE, who had been concerned in the cause.

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\*Action by John R. Finley et al. against V. B. Robertson. The opinion makes a full statement of the case.

Messrs. Brown & Tribble, for appellants.

Messrs. Ball & Watts, contra.

June 10, 1882. The opinion of the court was delivered by

Mr. Justice HUDSON. In 1851 John Finley was seized in fee simple of a tract of 547 acres of land in the County (then District) of Laurens, called the homestead tract, on which he lived. In 1852 he died, leaving of force his last will and testament, in which, among other provisions, he devised as follows: "I give to my son James Finley, and the heirs of his body, after the death of my wife, Polly Finley, my homestead tract of land whereon I now live." The testator nominated his said son, James Finley, executor of his said will, the administration of which

he undertook, and in 1864 his accounts were passed upon by the ordinary of Laurens District, who directed him to reserve until the proper time a legacy of \$2000.00 specially bequeathed by the testator to his granddaughter, Mary Francis Finley, child of Hampton G. Finley, and to pay to her and to each of four residuary legatees the sum of \$4697.75 found to be due to them respectively.

In 1861, Polly Finley, the widow of testator, died, and in 1871 James Finley died, leaving the present plaintiffs surviving heirs of his body. John R. Finley administered upon the estate of his father, James; and in 1875, Mary Francis Finley, who had intermarried with Thomas Langston, joined her said husband in an action in the Court of Probate for the County of Laurens, against John R. Finley as administrator of the estate of James Finley, deceased executor of John Finley, to recover of him the pecuniary legacies bequeathed to Mary Francis in the will aforesaid. The judgment recovered in this action was for the total sum (principal and interest) of \$10,951.29.

Subsequently the said Fannie Langston and Thomas Langston, her husband, as cred-

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itors of the estate of James Finley, \*entered suit in the said Court of Probate in the nature of a creditors' bill to marshal the assets of the estate of James Finley, and to sell his land in aid of the personality to pay debts. To this action the administrator aforesaid of James Finley and all and singular the children who were the heirs of his body were made parties defendant by the acceptance of service of a summons signed neither by the attorneys of the plaintiffs, nor by the Probate Judge, but with it a complaint which was duly signed by counsel. Except as to the signature the summons was in due form, and the complaint, of which service was likewise accepted, clearly set forth the object of the suit. Of the defendants thus accepting service, all were adults except Margaret T. Finley and Thomas R. Finley, who were aged respectively about sixteen and eighteen years.

On October 5th, 1877, W. H. Langston, father of the plaintiff, Thomas Langston, was appointed by the Probate Court guardian ad litem of these two minor defendants, but the record fails to show that any notice of the application for the appointment was given to the minors or that they in any manner assented to or asked for the appointment, or had any knowledge thereof. None of the adults answered, nor have we any record of an answer for the infants. Fannie Langston died pending suit, leaving a will, and her executor, her husband, Thomas L., became sole plaintiff.

The action was then prosecuted to judgment, and on October 8th, 1877, three days after the order appointing W. H. Langston guardian as aforesaid, the court decreed a sale of the land of James Finley devised as

aforesaid, and directed the proceeds to be applied to the debt due Mary Francis Langston, deceased. Accordingly the land was sold in November, 1877, at public outcry, and was purchased by V. B. Robertson, for the sum of \$4225, and he received titles from the Probate Court. No defence was made by the adult children of James Finley nor by the guardian of the minors to these proceedings, nor was any appeal taken; and no objection to the sale was interposed by any of them. In December, 1877, V. B. Robertson ousted the family of James Finley, defendants to that action, and took possession of the land; and thereafter, to wit, on September 7th,

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\*1880, they began this action in the Court of Common Pleas for Laurens, to recover of the said V. B. Robertson possession of the said land with rents and profits and damages. The defendant, Robertson, relies in his defence upon the deed under the sale by the Probate Court.

At the term of the court for Laurens, September 26th, 1881, the cause came on for trial before Judge A. P. Aldrich and a jury. In support of their claim the plaintiffs proved the death of John Finley, and his last will and testament, in which this land was devised to James Finley and the heirs of his body; the possession of the land by James after the death of his mother, Polly, the birth of the plaintiffs as lawful children of James, and his death, leaving them surviving him and in possession of the land; the ouster by the defendant, his occupation, and the value of rents and profits, and rested.

The defendant Robertson, in support of his title, then offered in evidence his deed and the proceedings in the Probate Court under and by virtue of which his title was acquired against the present plaintiffs. To this evidence the plaintiffs objected upon the ground that the Court of Probate had no jurisdiction of the subject-matter of that action. This objection was overruled by the presiding judge, and the deed and record having been introduced, and the land identified, the defendants rested. In reply the plaintiffs offered to prove by Thomas R. Finley that no copy of summons and complaint was served on him, and no papers whatever in the action were ever served on him, nor notices received, and that at that time he was living at Honea Path in Anderson County. After he had so testified the testimony was ruled out at the instance of the defendant, and the evidence was closed.

In the argument the counsel for the plaintiffs urged upon the court: 1. That the Court of Probate has no jurisdiction to entertain an action by a creditor to marshal the assets of an insolvent estate. 2. That the proceedings are fatally defective in that no summons was signed by counsel nor the clerk of the Probate Court. 3. That minors cannot be made parties to an action by accept-



ance of service, nor can a guardian ad litem be appointed to represent them except in the

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mode prescribed by statute. 4. That the devise to James Finley of this tract of land by the testator John Finley created in him a fee conditional, which descended to the plaintiffs per formam doni free and discharged of the debts of the tenant in fee conditional except as to liens and incumbrances specially created; and that the sale thereof by even a court of competent jurisdiction to pay debts other than such liens and incumbrances is void. 5. That the simple acquiescence of the plaintiffs in a void sale does not conclude their rights.

Such is the substance of the argument of the plaintiffs' counsel, and the same was by way of requests to charge formulated into various propositions, and submitted to his honor, the presiding judge. All were overruled, and the defendant's title was held to rest upon proceedings before a court of competent jurisdiction and regular in form. The jury rendered a verdict for the defendant, and the plaintiffs on appeal renew these propositions before this court.

We feel no hesitancy in holding that the judgment of the Court of Probate of October 8th, 1877, decreeing a sale of this tract of land, is not binding upon the minors, and does not conclude their rights. The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed. An infant is incapable of making himself or herself a party to an action by accepting service, so as to be bound by a judgment therein. All the formalities prescribed by statute must be complied with.

Equal care must be observed in the appointment of a guardian ad litem, the prerequisites to which appointment are likewise clearly enacted. The record of this inferior court fails to show that the law has been complied with in that action, either in making the infants parties, or in the appointment of a guardian ad litem; on the contrary it shows that the proper steps were not taken; and the parol testimony of Thomas R. Finley, which the judge erroneously ruled out, proves that the most essential steps to make him a party and to have him represented by a guardian ad litem were never taken. Thomas

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\*R. Finley and his sister Margaret are not concluded by that judgment, and are not barred thereby of the right to their share of this land.

Even under the law and the practice prior to 1868, when the exact method of making infants parties to actions, and securing for them guardians ad litem, was not fixed by statute, but depended upon established rules of practice in the courts, we search in vain

for a decision of a tribunal of law or of equity sustaining a judgment against infants brought in and represented as these were. The case of Bulow v. Witte, 3 S. C. 308, which perhaps relaxes the rule in such cases as much if not more than any other decision, wants much of sustaining the proceedings in the case now under review. An examination of that case discloses the fact that the greatest caution and care were exercised by the chancellor and master in having the infants represented by a guardian ad litem duly appointed, and one by nature disposed to be zealous and watchful of the welfare of her own children. In the present instance the guardian was most irregularly appointed, and was a person by natural relations inclined to be friendly to the plaintiff, his son and daughter-in-law, and antagonistic to the infants.

Now as to the adults who were defendants in that action the case is very different. Being sui juris, they are responsible for their conduct and must abide the consequences of a failure to defend their rights at the proper time. They accepted service of the summons and complaint, and thereby became presumed aware of the nature, scope and object of the proceedings begun in the Court of Probate. Having this knowledge, they entered no appearance, filed no answers, made no defence, and took no steps to have a higher court to correct the judgment of the inferior court, nor in any way to interfere therewith by any of the proceedings known in law and available.

Furthermore they raised no objection to the sale of the property, and thus indirectly if not directly encouraged the defendant to lay out and expend his money in buying their property. By this conduct they are estopped to deny the validity of the sale or the juris-

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diction of the court. They cannot now be admitted to question the title of the defendant, Robertson, to that property which was sold under proceedings to which they were parties, and to which they made no objections. Having the opportunity to defend against the informality of the summons and the powers of the court, they neglected to do so, and the rights of a third party having intervened, the door is now closed against a defence which they should have availed themselves of at the proper time.

The very interesting question of jurisdiction of the Probate Court over actions by creditors to marshal the assets of an insolvent need not here be determined, because, under the facts and circumstances of this case, we hold that the plaintiffs in this action who were adult defendants in the action before the Court of Probate are estopped whether that court had jurisdiction or not, and the two who were then infants are not estopped, regardless of the question of jurisdiction, for the reason that they were not parties thereto.

For the same reason we deem it unnecessary to decide whether an estate in fee conditional, descending as it must per formam doni to the heirs of the body of the tenant in fee conditional, carries with it in its descent only the liens and incumbrances imposed by the ancestor, or whether it became in the hands of the heirs of his body assets for the payment of his debts generally. This question can avail the plaintiffs no more than the serious question of jurisdiction. The adults cannot raise it, and the infants need not.

The verdict and judgment below must stand as against all the plaintiffs except Thomas R. Finley and Margaret T. Finley, as to whom there must be a reversal. It is therefore ordered and adjudged that, in favor of these two plaintiffs, the said verdict and judgment of the Circuit Court be set aside and a new trial be had; and that the said two plaintiffs have leave to amend their complaint so as to ask for a partition of the said land in the possession of their tenant in common, V. B. Robertson, should they be so advised; and that the appeal of the remaining plaintiffs be dismissed.

17 S. C. \*442

\*VAUGHAN v. HEWITT.

(April Term, 1882.)

[1. *Judgment* ¶437.]

A complaint that seeks the equitable jurisdiction of the court to set aside a judgment alleged to have been obtained against the plaintiff here by the unauthorized withdrawal of her answer and defence in that action by the attorney then representing her, but makes no allegation of fraudulent collusion between her attorney and the plaintiff in such judgment, does not state facts sufficient to constitute a cause of action.

[Ed. Note.—Cited in *Fraser & Dill v. City Council of Charleston*, 19 S. C. 403; *Ex parte Roundtree*, in re *Michalson v. Roundtree*, 51 S. C. 411, 29 S. E. 66.

For other cases, see *Judgment*, Cent. Dig. § 827; Dec. Dig. ¶437.]

[2. *Execution* ¶244.]

A person having transferred her interest in a tract of land cannot afterwards maintain an action against a purchaser at Sheriff's sale of her interest in such land, to set aside the sale and the judgment under which it was made.

[Ed. Note.—Cited in *Sullivan v. Shell*, 36 S. C. 582, 15 S. E. 722, 31 Am. St. Rep. 894.

For other cases, see *Execution*, Cent. Dig. § 673; Dec. Dig. ¶244.]

Before Wallace, J., Darlington, September, 1881.

Action by Elizabeth Vaughan against C. W. Hewitt and E. Keith Dargan, commenced in July, 1881. The opinion states the case.

Mr. R. K. Charles, for appellant.

Messrs. Boyd & Nettles, Dargan & Dargan, contra.

July 3, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff in her complaint alleges: 1. That on December 4th, 1872, she made a contract with Adrian and Vollers, for the purchase of a certain tract of land, on which she paid one third cash and secured the balance by her two notes, whereupon said Adrian and Vollers gave her a bond for titles. 2. That on March 28th, 1876, "the said notes having been fully paid, the said Adrian and Vollers did execute to plaintiff titles for the said tract, in accordance with the terms of said bond, at which time the notes were past due." 3. That said notes were not then delivered up to plaintiff, the same having been placed in the custody of one Ragsdale for safe keeping. 4. That said Ragsdale subsequently informed plaintiff that the notes were subject to her order. 5. That plaintiff neglected to obtain said notes from Ragsdale, "supposing they were sufficiently cancelled." 6. That at some time (when is not stated), an action was brought against

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plaintiff by C. W. Hewitt, one of the defendants herein, upon said notes. "Plaintiff thereupon employed counsel to represent her, to wit, George D. Rollins, Esq., and delivered to him all the papers in the action and all information to make her defence of payment as aforesaid, and the said attorney did file an answer on her behalf. That the case came on for trial, and the said attorney, without notice to plaintiff, abandoned her defence, withdrew her answer, and suffered judgment by default to go against her. That the said action of her attorney was unauthorized by plaintiff, totally to her surprise, and operated as a fraud upon her; and she again alleges, that no part of said notes was due, and that her defence could have been successfully made." 7. That judgment was accordingly entered up against her on October 23d, 1879, under which a certain tract of land was sold, as her property, on March 7th, 1881. 8. That the land was bid off by the defendant, E. K. Dargan, who paid the purchase money and took titles from the Sheriff. 9. That upon receiving information of the same, and before the money was paid out by the Sheriff, as she is informed and believes, this plaintiff caused notice to be given to him of her proposed action to set aside the judgment aforesaid, and she is well informed and believes that he does still hold the purchase money subject to the judgment of the court." "That previous to the date of said sale, plaintiff herein conveyed away all her right, title and interest in the said lands, by warranty deed, to E. H. Vaughan." Wherefore, she demands "that the said judgment be vacated and set aside, and the deed of the Sheriff, together with all other proceedings thereunder, be declared void, and that all parties be put back into their previous condition, and for such other and further relief as this court may deem lawful, and to justice and equity may pertain.



To this complaint the defendants separately demurred, on the ground that it does not state facts sufficient to constitute a cause of action, which demurrers were sustained, and the plaintiff appeals.

First as to the demurrer filed by the defendant Hewitt. The appellant contends that

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this is an action seeking equitable relief, and the question therefore is, whether the facts stated in the complaint furnish any ground for such relief. It will be observed that the ground upon which the judgment is assailed is that the attorney employed by the present plaintiff to defend the action in which the judgment was recovered, when the case came on for trial, without notice to her, "abandoned her defence, withdrew her answer, and suffered judgment by default to go against her." Whether this would constitute a sufficient ground to set aside the judgment, if presented in any form, or whether the only remedy would not be against the attorney who had abused the trust confided to him, need not be considered here, inasmuch as the question here is, whether this will constitute such a ground as will warrant the exercise of the equity powers of the court. *Southern Porcelain Manufacturing Co. v. Thew*, 5 S. C. 5. In this case there is no charge of any fraudulent collusion between the attorney and the plaintiff in that action; and indeed there is no direct charge of fraud even against the attorney, and certainly none affecting the plaintiff in that case.

There is an allegation that the action of the attorney was unauthorized, "and operated as a fraud" upon the plaintiff herein, who was the defendant in the former action. But even if this could be construed as an allegation of fraud, as against the attorney, there is certainly nothing in it by which to connect the plaintiff in that action with such fraud. It is not even alleged that such plaintiff was aware, at the time he took his judgment, that the attorney was acting without authority in withdrawing the defence. On the contrary, he doubtless supposed, as he had a right to do, that the attorney was acting by authority, inasmuch as it is the constant practice for an attorney to withdraw a defence, without question from the opposite party or from the court as to his authority so to do.

Again it will be observed, that facts sufficient to show that the plaintiff herein had a valid defence to the action in which the judgment in question was recovered, are not stated in the complaint. It is true that the plaintiff alleges "that her defence could have been successfully made," but that is a mere statement of a legal opinion, and she does not even

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allege that she had been advised by counsel, after a full and fair statement of the facts, that she had a valid defence. Whether the notes upon which the judgment was recovered were negotiable or unnegotiable, or whether

they were transferred before or after due, does not appear, though from the language used in the second paragraph of the complaint, as well as from the terms of the original contract with Adrian and Vollers, the inference would be that they were negotiable, and might have been transferred before due; and if so the conduct of the attorney in withdrawing the answer might have been justified upon the ground that no valid defence could have been made.

Be that as it may, however, the mere fact that the attorney of a defendant has, without any special authority from his client, withdrawn the answer, and suffered judgment by default to go against the defendant, without some allegation of fraudulent collusion between the attorney and the plaintiff in the action, furnishes no ground for the exercise of the equitable jurisdiction of the court in setting aside the judgment. The code (§ 197) affords ample remedy for the relief of a party "from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," or, what is the same thing, the mistake, inadvertence, surprise or excusable neglect of his counsel; and if a party fails to avail himself of the remedy thus provided within the time prescribed, he cannot afterwards invoke the aid of the equity powers of the court unless he can show some recognized ground of equitable jurisdiction; and this, we think, the plaintiff has altogether failed to do in this case. The demurrer filed by the defendant Hewitt was therefore properly sustained.

As to the defendant Dargan, it is very manifest that the plaintiff has stated no cause of action whatever against him. For in addition to what has been said, the plaintiff, if she ever had any cause of action against him, could not have any now, inasmuch as she had conveyed to another all her right, title and interest in the land prior to the sale under which the defendant Dargan claims, and which alone connects him with the case. He manifestly stands as a purchaser

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for valuable consideration without notice, holding the legal title, and is entitled to the benefit of his purchase. No equity is alleged sufficient to constitute a cause of action against him, and his demurrer was properly sustained.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

17 S. C. 446

Ex parte CARROLL.

(April Term, 1882.)

[1. *Judgment* ⇨ 50, 301.]

A description of the note without a statement of the indebtedness for which the note was given is insufficient to sustain a confession of judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 76, 589; Dec. Dig. ⇨ 50, 301.]

[2. *Judgment* ⇨49.]

A confession insufficient in the statement required by the statute is not irregular merely but invalid, and may be assailed by a junior judgment creditor.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 74, 79; Dec. Dig. ⇨49.]

[3. *Judgment* ⇨301.]

And being invalid, it cannot be corrected by amendment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 589; Dec. Dig. ⇨301.]

[4. *Judgment* ⇨69.]

Motion is a proper proceeding on the part of the junior judgment creditor to set aside such invalid confession.

[Ed. Note.—Cited in *Crocker v. Allen*, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see *Judgment*, Cent. Dig. § 115; Dec. Dig. ⇨69.]

[5. *Judgment* ⇨69.]

And it should be set aside under the motion, notwithstanding property of the judgment debtor has been sold under the confession, and purchased by the plaintiff in that judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 115; Dec. Dig. ⇨69.]

[6. *Judgment* ⇨67.]

And such motion is not barred by lapse of time, when made within five years after the confession of judgment was entered, especially where the moving party has not been guilty of laches. This case distinguished from *Clark v. Porcelain Manufacturing Company*, 8 S. C. 22.

[Ed. Note.—Cited in *Kohn v. Meyer*, 19 S. C. 198; *Ex parte Gray*, 48 S. C. 566, 569, 26 S. E. 786.

For other cases, see *Judgment*, Cent. Dig. § 112; Dec. Dig. ⇨67.]

[7. *Judgment* ⇨707.]

A judgment may be valid as between the parties, and yet void as to third persons.

[Ed. Note.—Cited in *Woods v. Bryan*, 41 S. C. 78, 79, 19 S. E. 218, 44 Am. St. Rep. 688.

For other cases, see *Judgment*, Cent. Dig. § 120; Dec. Dig. ⇨707.]

Before Pressley, J., Edgefield, June, 1881.

Petition by James P. Carroll, in re, L. R. Tompkins against D. H. Tompkins. The order of the Circuit Judge setting aside the judgment was as follows:

This is a motion to set aside a judgment of said court by L. R. Tompkins v. D. H. Tompkins by confession before the Clerk on November 6th, 1876, on which the judgment was not duly signed and recorded until November 6th, 1878. Under execution on said judgment defendant's land was levied on by the Sheriff of said county, and on the first

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Monday of January, 1880, it was sold and purchased by plaintiff in said judgment. The party making this motion is a junior judgment creditor of D. H. Tompkins, and his motion is based on the insufficiency of the statement in writing, which section 400 of the Code requires of the defendant in such cases. This statement simply sets out a promissory note as the basis of indebtedness, stating no other facts out of which it arose. The motion is opposed on the grounds that the defect of statement, if any, is a mere ir-

regularity, which may be amended, and that third parties cannot move to set aside the judgment for such irregularity; that the right to make the motion is barred by lapse of time, and that the sheriff's sale under said judgment has vested a right in the purchaser of the land which cannot be properly decided on mere motion, and yet would be affected by the granting it.

The only point in the case which has seriously troubled me is that last named. I am clear that said statement is defective; that it is matter of substance, nor mere form, which could be amended, and as such is not a mere irregularity, but affects the validity of the judgment, as against other judgment creditors. I am further satisfied that said judgment was not such a record of the court as to be notice to other creditors until November, 1878, and therefore the objection of lapse of time cannot be sustained. As to the question of the rights acquired under the sale by the sheriff, my conclusion is that it is not involved in this motion, and would not be affected by any decision thereon. It is therefore ordered and adjudged that the said judgment, and the execution thereon, be set aside, for want of the statement in writing by defendant, as required by law.

From this order Mrs. L. R. Tompkins appealed upon the grounds stated in the opinion.

Messrs. Ernest Gary, E. B. Gary, for appellant.

Mr. J. E. Bacon, contra.

July 4, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. This was a motion, made by James P. Carroll, a junior judgment creditor of D. H. Tompkins, to set

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\*aside a judgment by confession in favor of L. R. Tompkins against D. H. Tompkins, upon the ground that the "statement" required by the Code, sec. 400, was insufficient. The Circuit Judge granted the motion, and Mrs. L. R. Tompkins, the plaintiff in such confession of judgment, appeals on various grounds, which substantially are as follows:

1st. That the proceeding by motion was not the proper remedy. 2d. Because the application came too late, and was barred by the statute of limitations and lapse of time. 3d. Because the alleged defect in the statement upon which the judgment is based is a mere irregularity, and cannot be taken advantage of by third parties. 4th. Because rights have become vested under said judgment, and such rights cannot be attacked in a collateral proceeding. 5th. Because the Circuit Judge erred in holding that the said judgment could not be amended. 6th. Because judgment was good between the parties, and was not, therefore, void.

It will be observed that no question is



made in any of the grounds of appeal as to the insufficiency of the statement upon which the confession of judgment was based, and indeed, it seems to be well settled that a statement like the one in the present case, that the indebtedness grew out of a note given by the defendant to the plaintiff, without stating a consideration of the note, or what it was given for, will not be sufficient. *Chappel v. Chappel*, 12 N. Y. 215; *Dunham v. Waterman*, 17 N. Y. 15, cited with approval as to this point in *Weinges v. Cash*, 15 S. C. 44.

We proceed then to the consideration of the various grounds of appeal, not, however, in the order in which they are stated in the record, but in the order in which we have stated them above. As to whether the relief sought could be obtained by motion:—In New York, from whence the provision of our code upon the subject of judgments by confession has been borrowed, it seems to be settled that the proceeding by motion is proper. *Chappel v. Chappel* and *Dunham v. Waterman*, *supra*. See also *Freeman on Judgments*, sec. 558. This seems to be in accordance with the practice long prevailing in this State. *Mooney v. Welsh*, 1 Mill Con. R. 133; *Barns v. Branch*, 3 McC. 19.

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\*The next inquiry is whether the application came too late. There was some controversy at the bar as to the time when the judgment in question was actually entered up, but, to say nothing of the fact that it is the duty of a party claiming a benefit from lapse of time to show clearly and beyond dispute that the required time has actually elapsed, from the view which we take we do not think it material to determine whether the appellant or the respondent is correct as to the true date when the judgment was entered, because even if it was at the time contended for by the appellant, we do not think that this motion comes too late. There is no statutory limitation in this State as to the time within which a motion to set aside a judgment must be made, except in those cases provided for by sec. 197 of the code. In *Mooney v. Welsh*, *supra*, five years was suggested as the limit, in analogy to the statute of limitations, in actions for the recovery of real estate, then of force, and as that period had not elapsed from the time when the appellant insists that the judgment was entered, to the time when notice of this motion was given, we do not think that the application came too late, especially as the facts stated in the affidavit of the moving party negative any laches on his part.

The case of *Clark v. Porcelain Manufacturing Company*, 8 S. C. 22, relied upon by the appellant, does not support the position contended for, that four years will bar such a proceeding; for as matter of fact the judgment was entered in that case March

18th, 1871, and notice of the motion to set aside was served March 2d, 1875, so that the proceeding there was commenced within four years, and hence the decision could not have rested on the ground that four years would be a bar. But in addition to this, the motion in that case was not made by a third party, but by the defendant in the action, and was based, not upon any substantial defect in the judgment, but upon a mere irregularity in the summons capable of being rectified by amendment, and upon the allegation that the president of the defendant corporation had omitted through accident and excusable neglect to make a defence to the action; and the court simply held that after the lapse of nearly four years, a motion based upon such grounds

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could not be sustained, and did not \*hold that four years would bar a motion to set aside a judgment, made by a junior judgment creditor upon the ground of a substantial defect in such judgment. For the court after alluding to the facts showing laches on the part of the company, uses this language: "In the face of these facts, can their omission to defend the action be attributed to accident, inadvertence, and mistake, or, at the least, to excusable negligence on the part of their president?" showing clearly that the court regarded the motion as a proceeding under sec. 197 of the code, the time for bringing which is expressly limited to one year. And as to the irregularity in the summons the court said: "If the exception now taken to the summons had been made on appearance and in regular form, leave would have been granted to amend. \* \* \* The respondents are not to be placed in a worse condition because, by the neglect of the company, no appearance or defence was made." It is quite manifest, therefore, that this case does not affect the question now under consideration.

For a third ground of appeal, the appellant insists that the alleged defect in the judgment is a mere irregularity, and cannot be taken advantage of by third parties. The judgment in question derives its origin from a special statutory provision, and to make it valid the requirements of the statute must be strictly complied with, *Freeman on Judgments*, sec. 543. In the recent case of *Weinges v. Cash*, above cited, we have had occasion to consider the meaning of this part of the code, and from the authorities therein cited as well as from what is said in that case, it is quite clear that this ground cannot be sustained. The object of the statement required by the code is to protect creditors against fraudulent confessions of judgment, by giving them such information as will enable them, by inquiry, to ascertain whether the alleged indebtedness is bona fide or pretensive and fraudulent, and if the statement fails to furnish

such information, then the judgment based upon it must be regarded as fraudulent and void as to other creditors, even though it may be valid as between the parties to it, who may be estopped from questioning its validity.

The next ground of appeal raises a ques-

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tion which was not \*passed upon by the circuit judge, and is not properly before us for decision. The only question which we are called upon to determine is whether there was any error on the part of the circuit judge in granting the motion to set aside the judgment. What is to be the effect of his order upon rights which may have previously vested cannot now be considered. If the judgment was not a valid judgment as against a junior judgment creditor, then there was no error in granting the motion to set it aside; and if the plaintiff in the judgment, who is the party resisting that motion, happens to be a purchaser under that judgment, claiming rights acquired by such purchase, that should not deter the court from deciding a question properly presented for decision, even though the result may be to prejudice her rights as purchaser.

The fifth ground of appeal alleges that the circuit judge erred in holding that the judgment could not be amended. This ground cannot be sustained. The defect in the judgment is substantial, not of form merely. If the statement required by the code was not made, then there was no authority to enter the judgment, and so far as third persons are concerned, it was without any validity and absolutely void.

The only remaining ground taken by the appellant is that, as "the judgment was good between the parties," it could not "therefore, be void." We are unable to perceive the force of this ground. A deed may be good as between the parties, and yet absolutely void as to creditors, and we see no reason why the same may not be said of a judgment.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

17 S. C. 451

TRUETT v. RAINS.

(April Term, 1882.)

[1. *Appeal and Error* ¶957.]

This court cannot review an order of the Circuit Court opening a default on affidavits and motion noticed within two months after judgment rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3823; Dec. Dig. ¶957.]

[2. *Appeal and Error* ¶957, 1024.]

If the motion was made under section 197 of the code of procedure, it was a matter within the discretion of the Circuit Court, and therefore not appealable; if made under the act

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of 1869 (Gen. Stat. ch. cv. § 2) \*it depended upon issues of fact and upon proof which was to be satisfactory to the presiding judge, and therefore this court cannot review his conclusions.

[Ed. Note.—Cited in *Ex parte Roundtree*, In re Michalson v. Roundtree, 51 S. C. 409, 29 S. E. 66; *McDaniel v. Addison*, 53 S. C. 224, 31 S. E. 226; *Ex parte Carolina National Bank*, 56 S. C. 21, 33 S. E. 781; *Duncan v. Duncan*, 93 S. C. 496, 76 S. E. 1099.

For other cases, see *Appeal and Error*, Cent. Dig. § 3823; Dec. Dig. ¶957, 1024.]

Before Wallace, J., Darlington, September, 1881.

This was a motion by J. G. Rains to open a judgment by default obtained against him by John C. Truett. The brief gives no explanation of the delay in the hearing of the motion. The opinion states the case.

Mr. Elihu C. Baker, for appellant.

Mr. J. J. Ward, contra.

July 15, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case an action was brought on a note, and no answer having been put in, judgment was rendered in open court on October 27th, 1874, for one hundred and sixty-eight dollars and forty-five cents. In December following, a notice was served by the defendant upon the plaintiff's counsel, to the effect that on the first Wednesday after the first Monday of February term next ensuing, the defendant would move the court to vacate the judgment entered in the above case, upon affidavits annexed.

The motion was docketed and came to a hearing at the September term of the Court of Common Pleas for Darlington County, Sept. 24th, 1881, before Judge Wallace, presiding. Upon the affidavits submitted showing the defence claimed by the defendant and why it had not been interposed at the proper time, and those of plaintiff contra, Judge Wallace ordered the judgment to be set aside, and that the defendant Rains have twenty days from the date of the order to file and serve his answer on the plaintiff's attorney. From this order this appeal has been taken.

The argument of the appellant is based upon an alleged insufficiency in the evidence submitted by the defendant to sustain the facts upon which the motion below was founded. We do not think we can go into

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this question. It does not distinctly appear whether the motion below was made under sec. 197 of the code or under the Act of 1869. Section 197 invests the court with power in its discretion, and upon such terms as may be just, at any time within one year after notice thereof to relieve a party from a judgment order or other proceeding



taken against him, through his mistake, inadvertence, etc. The Act of 1869, now repealed, gave power to the presiding judge of the circuit to vacate and set aside judgments \* \* \* upon satisfactory proof being made to said judge that said judgment is erroneous and ought to be set aside \* \* \* provided the motion be made within two years after the judgment is rendered. If the motion below was made by virtue of section 197 of the code supra, it will be observed from the express language of the section that it was a motion addressed to the discretion of the judge.

As a general rule, where a court or judge is invested with power to be exercised at discretion, such power is absolute, and when exercised it is final. From the very meaning of the term and the nature of the power, discretion is unlimited. It is bounded by no rule except the good sense and integrity of the party empowered to exercise it, and, in the absence of an express right to appeal, it necessarily follows that its exercise is unappealable. *Gibbes v. Elliott*, 8 S. C. 50.

If this motion was made under the Act of 1869 the same result must follow. This act provides that the presiding judge of the circuit may, upon satisfactory proof made to him, vacate erroneous judgments. \* \* \* Now, when under this act a circuit judge has ordered a judgment to be vacated, we must assume in the language of the act that this has been done upon satisfactory proof, and therefore is final. It might be upon an examination of the evidence submitted in a case, this court might conclude that the testimony ought not to have been satisfactory. We might differ from the circuit judge as to the deduction to be drawn therefrom. The vacation, however, of the judgment does not depend upon the conclusions of this court, but upon the effect of the evidence submitted on the mind of the circuit judge. The Legislature has seen proper to invest the circuit

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judges with this power, and it would be an unwarranted assumption of authority in this court if it should undertake to review its exercise.

Besides, the act certainly contemplated that such applications should be made upon some error involving questions of fact, as will be seen from the language employed, to wit, "upon satisfactory proof." These terms are applicable to facts, and not to questions of law. The powers of this court do not extend to facts except in appellate cases. Our opinion is that where the proof is satisfactory to the circuit judge, the conditions required by the act have been complied with, and there the matter must end. *Garvin v. Garvin*, 14 S. C. 639; *Hill v. Watson*, 10 S. C. 269.

In some cases a question of law might arise, as where the fact alleged as ground of

error in the judgment, even if true, would not in law render the judgment erroneous. In such case an error in the ruling of the circuit judge might possibly be reviewed. But this question is not raised here, and therefore need not be considered.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 454

WALLACE v. JOHNSON.

(April Term, 1882.)

[1. *Husband and Wife* ⇨149.]

Under the act of 1877 (16 Stat. 264), which authorized a distress for rent to be levied upon any property found upon the premises, without regard to its ownership, household goods of the wife were distrained for rent due by the husband. *Held*, that the wife could not claim the exemption of such property under a homestead law which exempted her property from levy and sale for her own debts, but not for the debts of another.

[Ed. Note.—Cited in *Harley v. Weathersbee*, 21 S. C. 243.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 573, 574; Dec. Dig. ⇨149.]

[2. *Husband and Wife* ⇨167.]

But the seizure was in violation of Article XIV., Section 8, of the Constitution, which protects her property from levy and sale for her husband's debts.

[Ed. Note.—Cited in *Holtzclaw v. Gassaway*, 52 S. C. 553, 30 S. E. 399.

For other cases, see *Husband and Wife*, Cent. Dig. § 654; Dec. Dig. ⇨167.]

[3. *Husband and Wife* ⇨171.]

By leaving the property in her husband's house—their common home—the wife cannot be held to have made a voluntary pledge of the goods to the payment of her husband's rent for the premises, and no contract to such effect can be thereby implied.

[Ed. Note.—Cited in *Ex parte Knobloch*, 26 S. C. 335, 2 S. E. 612.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 671-683, 721, 950, 951; Dec. Dig. ⇨171.]

Before Kershaw, J., Newberry, December, 1880.

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\*Action by Jane E. Wallace against William C. Johnson and R. B. Holman, commenced February 5, 1878. The opinion states the case.

Messrs. Suber & Caldwell, for appellant.

It being conceded that the husband has had no exemptions of real or personal property set apart to him, and that the goods distrained are worth less than \$500, the act of 1874 (15 Stat. 589) is sufficient to exempt this property to the wife. But Article XIV., Section 8, of the Constitution seems to be conclusive of the question. "Levy and sale" include distress for rent. 4 McC. 378; 4 Strob. 365.

Mr. T. S. Moorman, contra.

The homestead provisions of the constitution and statutes exempt property only to the head of a family out of his own property and as against his own debts. The provision as to married women gives them no more rights than other persons have in their own property, or than they would have if femmes sole. Indeed, there is a restriction in the proviso to this section. The property here distrained was therefore exempt as his property, but was entitled to no greater privileges than the property of other persons, if found on these leased premises. They could therefore be distrained. 10 S. C. 474; 1 Bail. 502.

July 15, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Andrew Wallace having failed to pay the rent of a certain house leased to the said Wallace by W. C. Johnson, a distress warrant was issued by a trial justice at the instance of the said Johnson, which was levied by the constable Holman, upon the personal property of Mrs. Wallace, the wife of the tenant, being the household and kitchen furniture on the premises and in the use of the family. This action was brought by Mrs. Wallace to recover possession of this property, the landlord and the constable being defendants.

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\*There is no contest as to the title of the property. This is conceded to belong to Mrs. Wallace, but the defendants claim that being found on the premises of the tenant, it was liable to be distrained for the rent in arrears. The remedy by distress for rent in arrears, which had been abolished by Section 20 of the Act of 1868 (14 Stat. 106), was restored by the Act of June, 1877 (16 Stat. 265). *Mobley v. Dent*, 10 S. C. 471. This act was amended by the Act of March, 1878 (16 Stat. 511), so as to restrict the right of distress to such property as belonged alone to the tenant in his own right; so that the question involved here cannot hereafter arise. The seizure of the property in this case by the constable Holman, however, took place in January, 1878, just before the Act of March, 1878, and while the Act of June, 1877, was of force, unaffected by the restriction in the Act of 1878. The question raised therefore is a pertinent one in this case.

The plaintiff claimed that the property was exempt from distress upon two grounds: First, under the Homestead Act of 1874, 15 Stat. 589; and secondly, under Art. XIV., Section 8, of the Constitution of this State, in reference to the property of married women. The right of trial by jury having been waived, the case was heard by the presiding judge, who dismissed the complaint, and ordered the property seized to be sold, and the proceeds applied to the rentals due and costs.

The appeal rests upon the two grounds above mentioned, and calls for the judgment of the court thereon.

The Homestead Act of 1874, *supra*, provides that in case any married woman having a separate estate shall be married to the head of a family who has sufficient property to constitute a homestead as hereinbefore provided, shall be entitled to all the provisions of the Act and to the exemptions of her property from levy and sale for her debts and of her contracts. It will be seen that by the terms of this act, the exemption is limited to her debts, and of her own contracting, while therefore if this levy was made by virtue of a debt of the appellant, a debt of her own contracting, this act might be interposed by the plaintiff successfully; yet made under the circumstance surrounding this case and not for her debt, but the

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debt of her \*husband, in our opinion it does not apply. The distress warrant was executed upon appellant's property not by virtue of appellant's debt for the rent, but by virtue of the law of distress which authorized its levy upon any property found on the premises, without regard to the ownership. The Act of 1874 as to married women was intended to afford protection in a limited class of cases. This case does not fall within that class, and the act cannot be extended by construction so as to cover it. Such being our view as to the extent of the act, it will not be necessary to consider the question of its constitutionality raised in appellant's argument, because whether constitutional or not, it does not apply to the facts of this case. Its further consideration may therefore be dismissed.

We are of the opinion, however, that appellant's second ground must be sustained. She has the right to stand upon the constitutional provision which she invokes. Article XIV., Section 8, provides that the real and personal property of a woman held at the time of her marriage, or that which she may acquire thereafter, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried. Here is an inhibition positive and direct. It is in the organic law of the State, and it overrides all other laws. It is not pretended that the rent in this case is due by the appellant; on the contrary it is acknowledged and well understood by all parties, that it is the debt of the husband. Such being the fact, the distress warrant levied upon this property is an effort on the part of respondent to bring to sale the property of the wife for the debt of the husband, which is in direct conflict with the constitutional inhibition referred to above.

It may be urged that the wife knowing the



law of distress, and leaving her property on the premises, it became subject to the operation of that law, by her consent; that this amounted to a voluntary pledge on her part for the payment of her husband's debt, which under the recent decisions she had a right to make, and that she cannot now re-

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pudiate this implied contract. This would be stretching the doctrine of implied contracts beyond all reasonable limits. The property here was household and kitchen furniture, in the immediate use of the wife, no doubt at the head of this department of the household affairs. This property was hers, as it is admitted, and living with her husband, where else could it have been kept and used, but on the premises which he provided for their home?

By keeping the property there, we do not believe that she intended to pledge it for the payment of the rent, nor did a contract either express or implied to that effect arise out of the facts; so that at last the case turns upon the question, shall the constitution, which expressly inhibits the sale of the wife's property for the debt of the husband, prevail, or shall the law of distress, which allows any property found on the premises to be sold for rent in arrears, control in this case? The Constitution is the paramount law of the State; certainly no act passed since its adoption can override its provisions, nor any principle of the common law which is in conflict therewith.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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### 17 S. C. 458

CARTER v. EVANS.

(April Term, 1882.)

[*Mortgages* ⇐621.]

The court having found that an absolute deed to land, of which the defendant had seized the possession, was intended for a mortgage, the mortgagor, who instituted the action, is entitled to an order of reference to have the debt due ascertained, and to have the premises sold for its payment—the surplus, if any, to be paid to the plaintiff.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1865; Dec. Dig. ⇐621.]

Before Wallace, J., Chesterfield, September, 1881.

Action by George W. Carter against W. A. Evans. The opinion states the case.

Messrs. Prince & Ravenel, for appellant.

Messrs. Hough & Kennedy, contra.

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\*July 15, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff appellant in January, 1874, obtained from the defendant \$663. At the same time he ex-

cuted to the respondent a paper which he alleges he understood at the time to be a mortgage, intended to secure the payment of this sum, but which afterwards, as he learned, was claimed by respondent to be an absolute deed. Some time after the execution of this paper, the respondent obtained possession of the premises by forcibly ejecting appellant.

This action was commenced on August 11th, 1880, the plaintiff appellant alleging the above facts, and claiming that the paper in question, though absolute on its face, was understood and intended by the parties to be a mortgage; that the sum borrowed had been refunded to the respondent by the sale of portions of the land to other parties by the respondent, with plaintiff's consent, and by other creditors; that respondent had subsequently agreed in writing to reconvey the land to the plaintiff, but had failed to do so, respondent claiming to hold the land for the payment of a store account against the plaintiff. Upon these allegations the complaint prayed specific performance by a reconveyance of the unsold portion of the land, damages for the forcible ejectment, and general relief. The answer put in issue all of the material allegations of the complaint.

The case was heard at the September term of the Court for Chesterfield County. The presiding judge submitted certain issues to a jury, which with their findings will be found in the decree, as follows:

"The above stated case having been brought to trial, and the following issues of fact having been submitted to a jury, to wit: First. Was the conveyance from the plaintiff to the defendant intended or understood by the parties to be a mortgage or conditional conveyance, or security for the repayment of money received from defendant? Second. Did defendant agree to convey the same to plaintiff or any part thereof upon the payment of a sum of money to him? Third. Has

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the \*plaintiff performed his part of the contract by making the payment in any manner? Fourth. Did plaintiff rent the land from defendant after the conveyance to defendant?"—and the jury having found upon the first issue as follows, "We consider it a conditional sale or conveyance," and upon the second issue as follows, "Yes;" upon the third "No;" and upon the fourth issue "He did;" and the court having fully concurred with the jury in their findings of fact, it is therefore ordered, adjudged and decreed that the complaint be and the same is hereby dismissed with costs."

The plaintiff asked his Honor for an order of reference to ascertain the amount still due on the mortgage debt, or that a sale of the land be ordered, the surplus after the payment of the mortgage to be paid to the plaintiff, and for such other order as the justice of the case might require to protect the plain-

tiff's rights in the premises—which he declined.

The plaintiff appealed on the following grounds: 1. Because his Honor erred in dismissing the complaint, after the finding of the jury that the conveyance was a mortgage for the security of the debt. 2. His Honor erred in refusing a reference to ascertain what was due. 3. His Honor erred in refusing a decree to protect the plaintiff's right in his equity of redemption. 4. His Honor erred in refusing any relief to the plaintiff after agreeing with the jury in their findings. 5. His Honor erred in allowing the conveyance to stand and to operate as an absolute conveyance when the jury found it was only a mortgage. 6. His Honor erred in not rendering a judgment for specific performance of defendant's agreement after proof of part performance by plaintiff. 7. His Honor erred in not granting the relief to which the plaintiff in justice and equity was entitled."

The two prominent facts found by the jury and concurred in by the judge are as follows: First. The fact that the paper under which the defendant claims was understood by the parties to be a mortgage or conditional sale for the security of the debt of plaintiff. Second. That the mortgage debt has not been fully paid. From these facts it follows, that the relation between the parties is that of mortgagor and mortgagee. They stand before the court in that attitude, and

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the proper \*proceeding for the adjustment of their respective rights under ordinary circumstances would be a proceeding by the mortgagee for the foreclosure of the mortgage. Here, however, the mortgagee is in possession. How he obtained it, does not clearly appear, but he is in possession, and being satisfied has no inducement to institute foreclosure proceedings; and unless the mortgagor, who is plaintiff here, can obtain redress by becoming the actor, he is without remedy.

Under the findings of fact by the circuit judge, the land stands pledged for the payment of the plaintiff's debt, and is subject to sale for that purpose, the proceeds to be applied first to the debt—the surplus, if any, to go to the plaintiff. Can the respondent, by getting possession of the land and declining to take proceedings himself, prevent the enforcement of plaintiff's right to the surplus, if any? There is no doubt that a portion at least of the debt has been paid; in fact it seems much the larger portion, and the land in possession of the respondent is probably worth more than the balance of the debt now due. The respondent's right under the mortgage is not to take and hold the land, but it is to have it sold and the proceeds applied; and if he was now before the court as plaintiff seeking redress, such no doubt would be the decree. Cannot such decree be passed as the parties now stand?

It is true that the court, unless under peculiar circumstances, would not entertain a complaint by a mortgagor to have the mortgage foreclosed and the mortgage debt paid. There is no precedent for such a case, nor any general principle under which it could be sustained as an independent proceeding. But where other equities intervene entitling the mortgagor to appeal to the equity jurisdiction of the court, the court having assumed jurisdiction will generally go through and enforce all the equities involved.

Here the primary question of contest between the parties was as to the character of the deed executed. The defendant was in possession of the land under this deed, claiming it as an absolute deed of conveyance. The plaintiff denied that it was a conveyance, and claimed it to be a mortgage. The jury found it to be a mortgage. This enti-

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tled the plaintiff to appeal \*to the court below for redress, by having the deed declared a mortgage, and the land surrendered, either for sale in payment of the debt, if any due, or to the plaintiff, as the equity of the parties might demand, upon the facts as proved.

We think, therefore, upon the facts found, an inquiry should have been had by reference, or otherwise, as in the judgment of the circuit judge might have been best, as to the precise amount due by the plaintiff to the defendant, and a sale of the premises ordered, the proceeds to be applied in payment of the debt—the surplus, if any, to be paid to the plaintiff.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded, for such proceedings as may be necessary to carry out the principles herein announced.

17 S. C. 462

STATE v. HAMILTON.

(April Term, 1882.)

[*Criminal Law* ¶915, 970.]

Where the proof does not sustain a material allegation of the indictment under which the defendant has been found guilty, an order for new trial is the proper remedy. Such a variance furnishes no ground for arresting the judgment.

[*Ed. Note.*—Cited in *State v. Syphrett*, 27 S. C. 34, 35, 2 S. E. 624, 13 Am. St. Rep. 616.

For other cases, see *Criminal Law*, Cent. Dig. §§ 2157, 2461; Dec. Dig. ¶915, 970.]

Before Aldrich, J., Abbeville, January, 1882.

Indictment against Sam Hamilton, for stealing cotton from the field. There were no requests to charge, and no exceptions to the charge as made, and no motion for new trial. Other matters are stated in the opinion.



Mr. M. L. Bonham, Jr., for appellant.  
Mr. Solicitor Orr, contra.

July 15, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. At the January term, 1882, of the Court of General Sessions for Abbeville County, the defendant appellant was indicted, tried, and convicted

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of larceny in stealing seventy-five pounds of seed cotton, alleged in the indictment to be the proper goods and chattels of one Prue P. Benson. Upon conviction, the appellant moved in arrest of judgment, upon the ground that the property laid in the indictment to be the property of P. P. Benson, was, in fact, the property of another party, to wit, that of Louisa Miller, as shown by the testimony in the case, and therefore that the indictment is fatally defective.

The defendant has appealed upon two grounds as follows:

1st. Because, the indictment laid the possession of the property alleged to have been stolen in P. P. Benson, and the proof adduced by the State itself shows it was the property of Louisa Miller.

2d. Because his Honor, it is respectfully submitted, erred in holding that the question of possession was for the jury.

Arrest of judgment is the proper remedy, where there is some defect in the indictment, and on its face "as for the want of sufficient certainty, in setting forth either the person, the place or the offence." 4 Black. Com. 376. It is never applicable to raise the question of sufficiency of evidence to sustain the allegations in the indictment. It affords no relief whatever, where there is simply a conflict between the allegata and probata. In such cases the proper proceeding is a motion for a new trial, and not in arrest of judgment. This can be invoked only in cases of the character first above mentioned.

In this case the indictment alleged the property in question as the proper goods and chattels of P. P. Benson, and the trial proceeded upon that issue. Whether this allegation was true or not, was a question of fact. It was material to the conviction of the defendant upon the indictment undergoing trial, but it was no defect in the indictment itself. It was a distinct charge which the State intended to make as a question of fact, and its truth was entirely for the jury, dependent upon the testimony to be introduced. The judge properly submitted it to the jury as a question of fact, and they have solved it against the appellant. In this the jury may have been in error, but this court would have no jurisdiction to correct that error, even if it was apparent. In cases at

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law both civil and criminal we sit for the

correction of errors of law, not of facts; the constitution has wisely left the solution of facts to juries.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 464

KENNEDY v. MOORE.

(April Term, 1882.)

[1. *Alteration of Instruments* ¶5.]

The addition of words to a sealed note, after its execution, converting it from a simple interest into an annual interest obligation, renders the note void as to obligors not assenting to the alteration.

[Ed. Note.—Cited in *Powell v. Pearlstine*, 43 S. C. 409, 21 S. E. 328; *Gunter v. Addy*, 58 S. C. 183, 36 S. E. 553.

For other cases, see *Alteration of Instruments*, Cent. Dig. § 24; Dec. Dig. ¶5.]

[2. *Alteration of Instruments* ¶27.]

Where a note appears upon its face to have been altered in a material part, it is incumbent upon the party producing it to explain the appearance, or show that the alteration was rightly made.

[Ed. Note.—Cited in *Addison v. Duncan*, 35 S. C. 169, 14 S. E. 305; *Franklin v. Atlanta & C. A. L. Ry. Co.*, 74 S. C. 337, 54 S. E. 578.

For other cases, see *Alteration of Instruments*, Cent. Dig. § 244; Dec. Dig. ¶27.]

[3. *Alteration of Instruments* ¶27.]

Where defendant admits that he signed a note for the amount and of the date mentioned in the complaint, but denies that the note is correctly described, and alleges that alterations have been since made without his knowledge or consent, the plaintiff must prove his note.

[Ed. Note.—Cited in *McConnell v. Kitchens*, 20 S. C. 433, 47 Am. Rep. 845; *Carroll County Savings Bank of Uniontown v. Strother*, 22 S. C. 557; *American Button-Hole, Overseaming & Sewing Mach. Co. v. Hill*, 27 S. C. 166, 3 S. E. 82.

For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 230-247; Dec. Dig. ¶27.]

[4. *Principal and Surety* ¶145.]

Nothing contained in proceedings under an adjudication of bankruptcy of the maker of a note is proper evidence in a subsequent action by the payee against a surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 397; Dec. Dig. ¶145.]

Before Pressley, J., York, October, 1881.

Action by R. B. Kennedy, administrator, against S. R. Moore, executor. The opinion states the case.

Mr. W. P. Good, for appellant.

Messrs. Wilson & Wilson, contra.

July 21, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. This action, which was commenced on June 12th, 1881, was brought by the plaintiff as administrator de bonis non of N. P. Kennedy, against the defendant as executor of John S. Moore, de-

ceased, on a note of which the following is admitted to be a copy:

\$1015—Twelve months after date we or either of us promise to pay to the order of George Steele, Admr. of N. P. Kennedy, dec'd, one thousand and fifteen dollars with interest

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for \*value received, witness our hands and seals this the 29th December, 1853. In- Jas. G. Lindsey, [Seal.]  
terest to become prin- John S. Moore, [Seal.]  
cipal annually if not J. F. Lindsey, [Seal.]  
paid.

J. G. Lindsey.

In his complaint the plaintiff alleged: "That on the 29th day of December, A. D. 1853, John S. Moore, together with Jas. G. Lindsey, made and delivered their note under seal to George Steele whereby each of them promised to pay to the said George Steele, as administrator of N. P. Kennedy, deceased, the sum of one thousand and fifteen dollars, with interest thereon from the said 29th day of December." The defendant in his answer admitted "that on the 29th of December, 1853, a sealed note signed by Jas. G. Lindsey, John S. Moore, and J. F. Lindsey, was executed to George Steele, as administrator of N. P. Kennedy; but defendant denies that said note is correctly described or set forth in plaintiff's said complaint." For a further defence it was alleged that Jas. G. Lindsey was principal and John S. Moore one of his sureties on the note referred to, and that said note was materially altered, after it was executed by said Moore, by the addition of the words, "Interest to become principal annually if not paid," without the knowledge or assent of said Moore, whereby the said note became void as to him.

When the case came on for trial the court ruled "that as to the proof of the note the affirmative of the issue was on the plaintiff." Thereupon the plaintiff offered the note in evidence, the signature being admitted, and rested. There were several credits indorsed on the note, the last of which was dated April 18th, 1872; but there was no evidence as to who made the payments evidenced by these credits. The defendant then offered testimony tending to show that the note had been altered after it was executed. In reply the plaintiff offered in evidence "the record of the Bankrupt Court in the matter of J. F. Lindsey, Petitioner in Bankruptcy, containing a schedule of all debts due by the petitioner, amongst which was the note in issue; also an affidavit as to the existence and correctness of a debt by sealed note held by the

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firm of John \*S. Moore & Sons, made by a member of the firm; also the proof of the debt evidenced by the note in issue by W. E. Erwin, administrator of George Steele, deceased." The court ruled that this record from the Bankrupt Court was not competent evidence in this issue, and this ruling con-

stitutes the basis of one of the exceptions.

Whether Moore was principal or surety on the note, and whether the alleged alteration was made before or after the maturity of the note, were not, according to our view of the case, inquiries material to the issue presented. We deem it unnecessary, therefore, to consider the several exceptions as to these points.

The rule is well settled that any alteration of a note in a material part, after its execution, without the assent of the maker, renders it void. *Stagg v. Pepoon*, 1 N. & McC. 102; *Mills v. Starr*, 2 Bail. 359; *Vaughan v. Fowler*, 14 S. C. 355 [37 Am. Rep. 731]. There can be no question but that the alleged additional words constituted a material alteration of the terms of the note as originally written, for by these words the note is converted from a note bearing ordinary simple interest into a note bearing interest payable annually. The only questions, therefore, were whether such alleged alteration had in fact been made, and if so, whether it was done with the assent of Moore, the defendant's testator. These questions were properly left to the jury, who have by their verdict solved them in favor of the defendant. When on the production of a paper it appears to have been altered in a material part, it is incumbent upon the party offering it in evidence to explain this appearance. *Vaughan v. Fowler*, supra; 1 Greenl. Evid. § 569. This he may do, either by the internal evidence derived from the paper itself, as in *Wicker v. Pope*, 12 Rich. 387 [75 Am. Dec. 732], or by any other competent evidence. In this case the note upon its production did appear to have been altered by the addition of the words, "Interest to become principal annually if not paid," and it was the duty of the plaintiff to satisfy the jury that these words were added before the note was signed by Moore, or that they were subsequently inserted with his assent, and this he failed to do, as shown by the verdict.

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\*It is contended by the appellant that the Circuit Judge erred in holding that the affirmative of the issue was with the plaintiff, because the defendant had admitted in his answer the execution of the note sued on. This position is based upon a mistaken view of the pleadings. The defendant while admitting that his testator did sign a note to Geo. Steele as Admr. of N. P. Kennedy, in effect denied that he signed the note sued upon; so that in addition to what has already been said, it is manifest that there was no error in holding that the affirmative of the issue was with the plaintiff.

The only remaining question is whether the record from the Bankrupt Court was competent evidence in this case. It seems to us very clear that it was *res inter alios acta*. How any proceedings had in the Bankrupt Court under the petition of J. F. Lindsey, to



which the testator, John S. Moore, was not a party, could be competent evidence against his executor in this issue, we are at a loss to conceive. The most formal and solemn admission by J. F. Lindsey of the validity of the note in suit could not be any evidence against Moore or his executor, and certainly the fact that this note was proved in the Bankrupt Court as against J. F. Lindsey, cannot be used as evidence to fix a liability upon the estate of Moore.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

17 S. C. 467

STATE v. TRAPP.

(April Term, 1882.)

[1. *Burglary* ⚭22.]

In a case of burglary, the dwelling house was occupied by husband and wife, but leased by the wife, who had a separate estate, and the goods in the house belonged to the wife. *Held*, that the indictment properly laid the ownership of the house in the wife.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 57; Dec. Dig. ⚭22.]

[2. *Indictment and Information* ⚭182.]

The ownership might properly have been laid in either husband or wife.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 564; Dec. Dig. ⚭182.]

Before Cothran, J., Fairfield, February, 1882.

To the statement of the case contained in the opinion of this court should be added so much of the report of the presiding judge as is not there stated. It was as follows:

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\*It was earnestly contended by the prisoner's counsel that the offence charged in the indictment was against the habitation, and as such affected the matter of possession rather than the right of property; that the constitution of 1868 touching the rights of married women as to property held or acquired by them separately, as well as the Act of Assembly upon the subject, do not operate upon or affect the family relation, which remains as at common law; that the possession being joint, and the husband's domiciliary right being thus unquestioned, as the head of the family he has not only the right to fix and determine but to control the matter of family domicile. The purpose of this report, and of the appeal which it is intended to forward, is to present sharply the single matter hereinbefore set forth.

It presents a case of novel impression in this State, and the motion made in behalf of the defendant is not without strong reasons for its support. In other States of the Union, where similar changes in the organic law as to the marital relations have long existed, there are not wanting judicial decisions that hold the doctrine contended for here. Nevertheless, to have granted the motion in this case would have had the effect of turning

loose upon the community (without a precedent in this State to sustain it), upon a mere technicality, one convicted of a most daring and atrocious crime; and having instructed the jury to resolve all doubtful questions of fact in favor of the defendant, I determined to resolve a doubtful question of law in favor of the State, and refused the motion for a new trial, to which the defendant, by his counsel, duly excepted.

Mr. J. E. McDonald, for appellant.

Burglary, like arson, is an offence against the habitation, the residence, the domicile, and regards the possession rather than the property. 2 Bl. Com. 220, 223; 1 Bish. Crim. Law, §§ 104, 559; 1 Russ. Crimes, 797; 2 Whart. Crim. Law, §§ 1555, 1566; 29 Conn. 342; 26 Mich. 106. Being such, it is an offence against the domiciliary proprietor, the head of the family, who is the husband. 1 Bouv. Inst. 62, 96, 98, 115, 116; 2 Wait Act. & Def. 635, 638; Tyler Inf. & Cov. 312; 2 Bish. Mar. Wom. § 157; 1 Russ. Cr. 807-9;

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2 East P. C. \*500-4; 2 Whart. Cr. Law, §§ 1577, 1582; 38 E. C. L. R. 175. The constitution and acts enlarging the rights of married women have not modified the common law rule in this respect. The husband still has a right to fix, determine and control the family domicile, and to be the legally recognized head of the family. Tyl. Inf. & Cov. 789; 12 Casey, 410; 2 Bish. Mar. Wom. § 24; 12 Md. 108; 124 Mass. 30; 26 Mich. 106.

Mr. Solicitor Gaston, contra.

July 22, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant having been convicted of burglary, moved the circuit judge for a new trial, upon the ground that the indictment alleged that the house which was broken into was "the dwelling house of Mrs. Mary Ladd," whereas it should have alleged the house to be that of her husband, A. W. Ladd. "The testimony of Mrs. Ladd and of her husband, which was not contradicted, showed that Mrs. Ladd had a separate estate; that she had leased the premises occupied by them; that the goods in the house belonged to her, and that her husband acted as her agent." The circuit judge refused the motion, whereupon this appeal was taken, which presents the single question, whether the allegation of ownership of the house was sufficient.

This question, as is said by the circuit judge, is one of novel impression in this State, and therefore we are not bound to follow the technical rules which formerly embarrassed the courts in determining questions of this character, under the principles of the common law. Indeed an examination of the various cases in which such questions have arisen would show that it would be quite difficult, if not impossible, to reconcile

them, or to extract from them any well-defined rule. As is said in 2 Bish. Crim. Prac. § 109: "It is not easy to lay down, in a single sentence, a rule by which the ownership is, within the principles pertaining to this department of our law, to be determined. Probably in some cases the ownership may be laid in one person or another, at the election of the pleader. Thus where a gardener liv-

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ed in a house of his master, quite \*separate from the dwelling house of the latter, and the gardener had the entire control of the house he lived in, and kept the key, it was held that on an indictment for burglary, the gardener's house might be laid either as his or his master's," citing *Rex v. Rees*, 7 C. & P. 568.

So in 2 East P. C. 499, it is said: "It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment. And here it is to be lamented that the same rule does not prevail in this case as in arson, which is considered as an offence against the actual possessor, by whatever title he may hold possession. But in burglary the rule is much more complex, the ownership being neither referable altogether to the legal title nor to the possession, but partaking sometimes of one, sometimes of the other, as well as of both. If the rule by which to ascertain this ownership may be compressed, with sufficient discrimination, into a small compass, I should say, generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabit it, either by himself, his family or servants, or even by his guests, the indictment must lay the offence to be committed against his mansion."

So far as we can perceive, there are only two reasons for requiring the ownership of the house to be stated in an indictment for burglary: 1st. For the purpose of showing on the record that the house alleged to have been broken into, was not the dwelling house of the accused, inasmuch as one cannot commit the offence of burglary by breaking into his own house. 2d. For the purpose of so identifying the offence, as to protect the accused from a second prosecution for the same offence. Hence when the ownership is alleged to be in a person who is not the accused, and that allegation is proved upon the trial, the reasons of this requirement seem to be fully met.

In this case the allegation of ownership has been shown by the evidence to be strictly true; that the wife not only had the legal title, but that she actually resided in the house at the time; and the fact that it may, at the same time, have been the residence of her husband as well as of herself, cannot

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affect \*the question. If her right to reside in the house in question depended solely upon the marital relation, then a different question would be presented; but where, as in

this case, she not only had the right to reside there by virtue of her marital relation, but also by virtue of being the legal owner of the premises, and did actually reside in the house at the time of the alleged burglary, we think the allegation of ownership in her was strictly true in point of fact, and was quite sufficient to sustain the indictment.

It is true that burglary is an offence against the habitation of some other person, but it is very clear that it is not essential that such habitation shall be alleged to be that of the person who actually occupies—inhabits—the house at the time it is broken into, for there are quite a number of cases in which indictments alleging ownership in the master have been sustained, where the house was, at the time, not occupied by the master, but by some other person as his servant or agent. In *Rex v. Atthea*, Ry. & Mood. C. C. 399, cited in 2 Arch. Cr. Pl. & Prac. 296, it was held that a house, the joint property of partners in trade, and in which their business was carried on, might be described as the dwelling house of all the partners though only one of them resided in it.

Some of the old English cases went very far in cases of married women, but that was because the common law ignored the separate existence of a married woman, so far as property rights were concerned, and regarded the wife as nothing more than the servant of the husband. Hence in *Rex v. French*, Russ. & Ry. 491, where a dwelling house in which a wife lived separate and apart from her husband, the rent of which was paid out of her separate estate in the hands of trustees, was broken into, the court held that the indictment properly laid the ownership of the house in the husband, although he had never been in it, saying "it was the dwelling house of some one; it was not that of the trustees, for they had nothing to do with it; it was not the wife's, because, at law, she could have no property; it could then only be the husband's." It is very manifest that this case and others of a like character cannot now be regarded as authority, based as

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they are upon the incapacity of a \*married woman to hold property, when such incapacity has been entirely removed.

The case of *Snyder v. The People*, 26 Mich. 106, much relied on by the appellant, we do not think is in point. In that case the husband was indicted for arson in burning the dwelling house of his wife, which was owned by her as her separate property, though it was occupied by them jointly as a residence. The court held that the indictment would not lie, inasmuch as it could not be said that the husband had violated the statute making it a penal offence wilfully and maliciously to burn, in the night time, "the dwelling of another," the house burned being his dwelling place, and not "the dwelling of another." The court used this language: "The property is hers alone, but the residence is equally his;



the estate is in her, but the dwelling house, the domus, is that of both." Care was taken, however, to reserve the question as to what would have been the result if it had appeared that the husband was not actually occupying the house, as a residence, when it was burned; the court saying: "There is much reason for holding that the wife's dwelling house can be considered that of the husband, only while he makes it such in fact, and that there is no such legal identity as can preclude her house being considered, in legal proceedings against him, as the dwelling of 'another,' when it is no longer his abode."

In the case now before the court it was conceded that the wife was the legal owner of the premises, and as long as they were jointly occupied by herself and husband as their dwelling, we say in the language of Judge Cooley, *supra*: "The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling house, the domus, is that of both." Hence in this case an allegation of ownership in either husband or wife would have been sufficient, inasmuch as either allegation would have been sustained by the evidence and would have been sufficient to show upon the record that the accused was charged with breaking into the dwelling house of another, and would have so identified the offence as to protect him from another charge for the same offence.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

#### 17 S. C. \*473

#### \*STATE v. COLEMAN.

(April Term, 1882.)

##### [1. *Criminal Law* ¶1056.]

Exceptions to refusals to charge not considered, the requests so to charge appearing in the brief only in the exceptions themselves.

[Ed. Note.—Cited in *Sloan & Son v. Courtenay*, 54 S. C. 345, 32 S. E. 431.

For other cases, see *Criminal Law*, Cent. Dig. § 2668; Dec. Dig. ¶1056.]

##### [2. *Homicide* ¶137.]

On motion in arrest of judgment, an indictment for murder that did not state where the deceased died, was held bad as well at common law as under those statutes that provide for cases where the wound was inflicted in one jurisdiction and death ensued in another. These statutes considered.

[Ed. Note.—Cited in *State v. Burbage*, 51 S. C. 291, 28 S. E. 937.

For other cases, see *Homicide*, Cent. Dig. §§ 229; Dec. Dig. ¶137.]

##### [3. *Indictment and Information* ¶110.]

An indictment under a statute must closely follow the terms of the statute.

[Ed. Note.—Cited in *State v. Stewart*, 26 S. C. 127, 1 S. E. 468; *State v. Turner*, 82 S. C. 282, 64 S. E. 424.

For other cases, see *Indictment and Information*, Cent. Dig. § 289; Dec. Dig. ¶110.]

##### [4. *Criminal Law* ¶824.]

[The trial court is not required to give instructions on particular points, in a criminal case, where no request therefor is made.]

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1996; Dec. Dig. ¶824.]

Before Pressley, J., Laurens, February, 1882.

This was an indictment against Neel Coleman for the murder of his son by cruel treatment. The opinion states the case. There was no report by the presiding judge.

Messrs. Ball & Watts, for appellant.  
Mr. Solicitor Duncan, contra.

July 22, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. Under an indictment for murder, the appellant was convicted of manslaughter, and moved in arrest of judgment because there was no allegation in the indictment of any place where the deceased died. The motion was refused by the circuit judge, whereupon this appeal was taken, alleging error in such refusal. The defendant also appeals upon the ground that the circuit judge refused to charge certain propositions of law, but as it does not appear from the "Case" as presented for argument here that any request was made to charge these propositions, or any exception taken to the refusal so to charge, these grounds are not properly before us for consideration, and indeed were not urged in the argument here.

The only question, therefore, presented by this appeal is whether the omission to state in the indictment the place where the deceased died is a fatal defect. There can be no doubt that such an omission would have

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been fatal at common law, \*and the question then is narrowed down to the inquiry whether there are any statutory provisions which render such an allegation unnecessary. The statute relied on for this purpose is the Act of 1859 (12 Stat. 822), incorporated into the General Statutes (Chap. 128, Sections 19, 20 and 21), as amended by the Act of December 21st, 1880 (17 Stat. 336).

It will be observed that these statutory provisions do not purport to make any change in the rules of criminal pleading, but are simply designed to prescribe a place of trial in certain cases, where, as the law then stood, it was at least doubtful as to where would be the proper place of trial. They do not declare in general terms that, no matter where the death ensues, the accused may be indicted and tried where the injury causing the death was inflicted, but they specify particularly that where death ensues in a particular place, from an injury inflicted in another place, then the accused may be indicted and tried in a certain place, and so on. We

do not see, therefore, how these statutory provisions can be regarded as having the effect of altering the established rules of criminal pleading, especially in cases not falling within any of the classes provided for by these statutes.

There are four classes of cases embraced within these statutory provisions: 1st, Where the injury causing the death is inflicted within the limits of this State, and the death ensues beyond the limits of the State. 2d, Where the injury is inflicted by a person who, at the time, is within the limits of the State, upon a person who, at the time, is beyond the limits of the State, or vice versa, where the injury causing the death is inflicted by a person who, at the time, is beyond the limits of this State, upon a person who, at the time, is within the limits of the State. 3d, Where the injury causing death is inflicted by a person who, at the time, is within the bounds of one county, upon a person who, at the time, is within the limits of another county. 4th, Where the injury causing the death is inflicted in one county, and death ensues therefrom in another county; but these provisions do not embrace a case in which the death ensues in the same county where the injury causing it was inflicted, and therefore an indictment,

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in such a \*case, must be framed in accordance with the established rules of criminal pleading, altogether unaffected by these statutory provisions.

The indictment in the case now under consideration cannot be regarded as framed under any of these statutory provisions, for there is no rule better settled than that, in framing an indictment under a statute, care must be taken to follow the terms of the statute closely, in order that the indictment may show on its face that the offence charged comes within the class provided for by the statute, and in this case the indictment does not show that the offence charged comes within any one of the four classes provided for by these statutes. There is an allegation that the injuries causing the death were inflicted in Laurens County, upon the deceased while in that county, but there is no allegation as to where the death ensued from such injuries—whether within or without the State, or whether within or without the county of Laurens. The indictment, therefore, cannot be regarded as a good indictment under these statutory provisions, inasmuch as it does not state a case provided for by these statutes, and it cannot be sustained as a good indictment at common law, because it omits an allegation essential to the validity of a common law indictment.

The judgment of this court is that the judgment of the circuit court be reversed, and that the motion in arrest of judgment be granted.

17 S. C. 475

STEFFENS &amp; WERNER v. WANBOEKER.

(April Term, 1882.)

[Attachment  $\hookrightarrow$  179.]

Where two attachments are levied upon personal property of the same debtor at different hours of the same day, the one first levied has no priority of lien, but the two take rank together.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 540; Dec. Dig.  $\hookrightarrow$  179.]

Before Witherspoon, J., Darlington, March, 1882.

This was a rule on the sheriff in the case of Steffens & Werner against Isaac Wanboeker. The opinion states the case.

Mr. R. K. Charles, for appellant.

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\*Messrs Dargan & Dargan, contra.

August 8, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a rule on the Sheriff to show cause why the proceeds of certain attached personal property should not be applied towards the satisfaction of plaintiffs' execution. The Sheriff made return, that on the morning of March 31, 1881, the plaintiffs lodged in his office a warrant of attachment against Isaac Wanboeker, and he sent a deputy to execute it. A few hours afterwards, on the same day, Cohen & Loeb lodged another warrant of attachment, and he went in person to execute it. When he reached the store of the defendant he found that his deputy had executed the first warrant, and he levied the same warrant upon the same property—personal property, it being a stock of goods. The warrant of plaintiffs bore date March 30, and was levied at 9.30 a. m.; that of Cohen & Loeb bore date March 31, and was levied at 11 a. m. of the same day. Judgments were obtained in both cases on the same day, and the proceeds of the property are not sufficient to satisfy both. The circuit judge ordered that the proceeds of sale be applied pro rata to the judgments, and Steffens & Werner, the plaintiffs in the attachment first levied, appeal to this court, upon the ground that the whole proceeds should be applied to their case.

The general rule certainly is, that in regard to the entry of process, the law does not regard fractions of days. Ex parte Staggs, 1 N. & McC. 405. This, however, is always subject to be controlled by positive enactment. To this general rule there was, prior to 1870, an exception as to attachments, to which, coming from the custom of London, the practice of the custom was applied, which was that the first executed had the first lien; and in determining priority not only fractions of days and hours were considered, but even minutes.

But, as we understand it, the law in that



particular was changed by the code of procedure. Section 255 provides "that the Sheriff or Constable to whom such warrant is directed shall immediately attach all the real estate of such debtor and all his personal es-

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tate, etc., which he shall safely \*keep to be disposed of as hereinafter directed;" and after directing the manner of attaching real estate, proceeds as follows: "Said attachment shall be a lien, subject to all prior liens, and bind the real estate attached from the date of lodgment: Provided that all attachments lodged upon the same day shall take rank together." As the latter part of the section treats of attachments especially on real estate, and the words as to the lien are "and bind the real estate attached," it might seem that the proviso was limited to real estate, but the words are general—"Provided that all attachments lodged upon the same day shall take rank together."

Such was manifestly the view of the court in *Bachman v. Sulzbacher*, 5 S. C. 62. That was a question of priority of executions on personal property under sec. 316 of the code, which declared that executions should bind personal property only "by actual attachment or levy thereon," and the court held that "where the executions are levied by the Sheriff on personal property on the same day but at different hours, the first levied is not entitled to preference, but the liens of both attach as if levied at the same instant of time." In delivering the judgment of the court, Chief Justice Moses said: "If the term [attachment] is to be there understood as referring to the process provided against absent debtors who have property subject to the jurisdiction of the court, its lien now 'ranks' not from the hour, but 'from the day' when it is lodged with the Sheriff." Code, § 255.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 17 S. C. 477

## RUSSELL v. ARTHUR.

(April Term, 1882.)

[1. *Contracts* ¶176.]

Where a contract was made wholly by letter, the court must construe the contract, and it is error to leave its construction to the jury.

[Ed. Note.—Cited in *De Camps v. Carpin*, 19 S. C. 124; *Arnold v. Bailey*, 24 S. C. 497; *Holmes v. Weinheimer*, 66 S. C. 22, 44 S. E. 82; *Black v. Atlantic Coast Line R. Co.*, 82 S. C. 485, 64 S. E. 418.

For other cases, see *Contracts*, Cent. Dig. § 767; *Dec. Dig.* ¶176.]

[2. *Master and Servant* ¶40.]

Where a party stands upon his strict legal right and sues for services not rendered, the onus rests upon him to prove what the contract was, and to show that he is not in fault; still,

if the contract was in writing, the court must construe it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 47; *Dec. Dig.* ¶40.]

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[3. *Trial* ¶191.]

\*In charging the jury that they must not consider defendant's counter-claim because he had offered to pay plaintiff \$50 after the date of the alleged indebtedness, the presiding judge erred in taking a question of fact from the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 423; *Dec. Dig.* ¶191.]

Before Aldrich, J., Kershaw, February, 1881.

Action by John M. Russell against William L. Arthur, commenced January 1, 1879. The opinion states the case.

Messrs. J. D. Kennedy, J. T. Hay, for appellant.

Messrs. Leitner & Dunlap, contra.

August 8, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by the plaintiff against the defendant Arthur, a merchant of Camden, for \$334, balance of \$800, salary for a year as book-keeper and general assistant, commencing in July, 1877, and extending to the same month in the next year. The plaintiff served the defendant, receiving his pay monthly, from July, 1877, to February 26th, 1878, when he was discharged by the defendant. The plaintiff claims that his contract with the defendant was for a whole year, and being discharged without fault, he is entitled to recover the salary for the whole year. The question is, what was the proper construction of the contract between them? It seems that the plaintiff was in Wilmington, North Carolina, and the agreement was made by letter. The plaintiff offered no evidence, except two letters of the defendant, one employing him, and the other dismissing him. The first letter contained an offer in the following words: "I don't know as I can offer you a sufficient salary, as the business of county towns does not warrant me in paying much. At the same time expense is light, as I can procure you good board for \$20.00 per month. If you feel warranted in coming for \$800 per annum, I shall be pleased to have you right away. We can make the arrangement for the winter months, and if all is agreeable then for a longer period."

Upon the receipt of this letter the plaintiff entered the service of defendant, and remained with him, receiving his salary

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\*monthly at the rate of \$800 per annum, until February 26th, 1878, when he received another letter from the defendant saying in substance that he had no further use for him; that he regretted to part with him, "for with the exception of a few trifles, you have been attentive to your business and

quick at your work. I send you herewith a letter of character, etc." The defendant denied that the contract was for a year, insisting that it was only for the winter months, and that he had performed his contract fully, although the plaintiff was negligent of his business in the absence of defendant, and set up a counter-claim for a store account of \$38.65. Defendant upon cross examination stated that he offered to give plaintiff \$50 after his discharge, not because he owed him anything, but because he was away from home, etc.

The defendant requested the judge to charge that the contract was only for the winter months and did not bind defendant for a longer time, and that defendant having retained plaintiff in his employment during the winter months was no longer liable on the contract. The judge declined so to charge or to construe the contract at all, but left it to the jury to say what was the contract. He also told the jury that "they must not consider the counter-claim set up by defendant, because he testified that he offered to pay plaintiff fifty dollars after his discharge, and he would not have done so if plaintiff was indebted to him." The jury rendered a verdict for the plaintiff for amount claimed, \$334, and the defendant appeals to this court substantially upon two grounds: First. Because his Honor refused to construe the contract, the same being in writing, as to the rights and liabilities of the defendant thereunder, but left the construction of said contract to the jury. Second. Because his Honor told the jury that they must reject the counter-claim of defendant, on the ground that the evidence showed that defendant had offered money to plaintiff after his discharge, whereas the defendant explained why he had made such an offer, and the matter should have been left to the jury.

The request to interpret the contract in a particular manner, was substantially a request that the court and not the jury should construe the contract. There was no evi-

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dence of the \*contract except the defendant's letter of July 18th, 1877, and we think it was error in the circuit judge to refer the construction of that letter to the jury instead of construing it himself. The fact that it was obscure and inconsistent in its different parts, making it difficult to understand, could not alter the rule that the court and not the jury should construe a contract in writing. The jury had no special information unknown to the court by which they could give proper weight to the expression, "We can make the engagement for the winter months, and if all is agreeable, then for a longer time."

The general rule is that the onus is on the plaintiff. If his proof is obscure or doubtful, it is his misfortune. This is especially true where the claim rests upon strict legal right. Where one sues for services not rendered, it is necessary, in order to recover, that he should make it clearly appear not only that the contract was an entirety for the whole year, but that he was dismissed without cause.

Whether or not there was a contract might be a question for the jury, but when there was no doubt about the existence of a contract, and the only question was about the meaning of that contract, which was in writing, then the construction was a question of law for the court. "The construction of a written contract is a question of law for the court, and it is error to submit such question to the jury. \* \* \* The rule that the obligation is upon the court to expound a written contract exists in as full force when the contract rests in a number of letters and answers as when it is embodied in a single instrument. \* \* \* The obligation of the court to expound the meaning of written instruments to the jury, and not to submit such questions to them, embraces every species of writing, contracts, records, deeds, wills, and all others." *Thomp. Charg. Jur.* 16, 17; *Union Bank v. Heyward*, 15 S. C. 296; *Mowry v. Stogner*, 3 S. C. 253. In this last case cited, the court said: "The submission to the jury of the whole question of the instrument, as depending upon parol testimony of what the parties said and did in regard to the subject-matter of the deed, was clearly erroneous."

Whether the counter-claim of the defendant was established or not was a question of fact exclusively for the jury, and upon

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\*that question it was competent for the plaintiff to show that the defendant offered him fifty dollars after he was discharged, but the force and effect to which that evidence was entitled was for the jury alone. It was error for the judge to take that question away from the jury by saying to them, "That they must not consider or allow the counter-claim set up by the defendant, because he offered to pay plaintiff fifty dollars after he had discharged him." The fact referred to may have been very strong evidence against the recovery of the counter-claim, yet still it was a matter exclusively for the jury, and should not have been withdrawn from them.

The judgment of the court is that the judgment of the Circuit court be reversed, and the case remanded for a new trial.



## 17 S. C. 481

## BOYCE v. LAKE.

(April Term, 1882.)

[1. *Insane Persons* ¶94.]

In action on a note the answer alleged that the plaintiff was a lunatic; at the trial plaintiff's attorneys admitted this allegation and moved, without previous notice, for the appointment of a guardian ad litem for the plaintiff, and the appointment was made. *Held*, that the amendment was within the discretion of the presiding judge, and this discretion was properly exercised.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 164; Dec. Dig. ¶94.]

[2. *Trial* ¶25.]

It is only when the defendant so fully admits the plaintiff's case as to entitle plaintiff, in the absence of affirmative defence, to his judgment, that the defendant is entitled to open and reply.

[Ed. Note.—Cited in *McConnell v. Kitchens*, 20 S. C. 433, 47 Am. Rep. 845; *Sanders v. Sanders*, 30 S. C. 209, 9 S. E. 94; *Addison v. Duncan*, 35 S. C. 170, 14 S. E. 305.

For other cases, see *Trial*, Cent. Dig. § 50; Dec. Dig. ¶25.]

[3. *Bonds* ¶130.]

The lapse of twenty years raises a presumption of payment as to sealed notes and bonds, which, though not a presumption of law, is a presumption of fact that has acquired an artificial force subject to be rebutted by such facts only as would revive an unsealed note barred by the statute of limitations. There must be in rebuttal something more than mere belief deduced from the weight of testimony; the stay law, the war and the lunacy of plaintiff are not circumstances sufficient to rebut this presumption.

[Ed. Note.—Cited in *Tobin v. Myers*, 18 S. C. 328; *Shubrick v. Adams*, 20 S. C. 50, 51; *Strickland v. Bridges*, 21 S. C. 26; *McNair v. Ingraham*, 21 S. C. 73; *Roberts v. Smith*, 21 S. C. 465; *Langston v. Shands*, 23 S. C. 153; *Colvin v. Phillips*, 25 S. C. 233; *Sartor v. Beaty*, 25 S. C. 305; *Dickson v. Gourdin*, 26 S. C. 398, 2 S. E. 303; *McKinlay v. Gaddy*, 26 S. C. 576, 2 S. E. 497; *Nobles v. Hogg*, 36 S. C. 328, 15 S. E. 359; *Latimer v. Trowbridge*, 52 S. C. 197, 29 S. E. 634, 68 Am. St. Rep. 893.

For other cases, see *Bonds*, Cent. Dig. § 226; Dec. Dig. ¶130.]

Before Kershaw, J., Newberry, November, 1880.

The case is fully stated in the opinion.

Messrs. Suber & Caldwell and J. Y. Culbreath, for appellants.

Mr. J. H. Rion, contra.

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\*July 15, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case the plaintiff brought action upon a joint and several sealed note executed March 10, 1857, by E. P. Lake and James S. Spearman for \$815.77, payable twelve months after date, to Chancellor Job Johnstone, or bearer or order, with a credit indorsed of \$500 on March 9, 1858. Chancellor Johnstone, who had been the guardian of the plaintiff, died

in 1862, and Carver Randall became his successor. This note fell into the possession of Randall, and by him was turned over to the plaintiff, who attained her majority in November, 1865, as a part of her estate.

Under these circumstances the plaintiff, on August 17, 1879, brought this action against Lake and Elizabeth Spearman, the executrix of James S. Spearman, who had died in 1878. The case came on for trial at the November term, 1880, for Newberry County. The defendants admitted the execution of the note, but insisted that the plaintiff was a lunatic and incompetent therefore to sue; also averred that the note being joint could not be sued, as to Spearman, the surety, he being dead, and relied on the lapse of time as evidence of payment.

At the trial it was admitted that the plaintiff was a lunatic and had been since 1868, and the counsel of plaintiff moved without previous notice for the appointment of a guardian ad litem, which motion was granted, against the protests of the defendants, and Silas Johnstone, Esq., was appointed. The defendants insisted that having admitted the execution of the note, they were entitled to open and reply on the trial. This was overruled. The case then went to trial, the defendants relying principally upon the defence of payment arising out of the lapse of time, twenty years and some months having elapsed since the credit of the \$500, and the estate of Spearman having been proved to be solvent all this time.

On the question of payment the judge charged that the presumption of payment of a sealed note arising from the lapse of twenty years from its maturity, or new promise or part payment, can be rebutted by circumstances without positive proof of non-payment. "That the stay law of 1861-66,

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and the lunacy of the plaintiff, were circumstances to be taken into consideration by them in determining whether the note had been paid or not." That from all the facts as brought out in the case, they should base their verdict upon their belief whether the note as a matter of fact had been paid or not. His Honor refused to charge that the presumption of payment arising from the lapse of twenty years could be rebutted only by positive proof of non-payment.

The jury found for the plaintiff the sum of \$817.52.

The appeal involves three questions of law: 1st. Was it error in the judge to allow the amendment at the trial as to the appointment of the guardian ad litem? 2d. Were the defendants entitled to open and reply? 3d. Was it error to charge that the presumption of payment arising from the lapse of twenty years could be rebutted by proof of facts and circumstances, such as the stay law, the war, the lunacy of the plaintiff, etc., without positive proof of non-payment?

The motion to amend by the appointment of a guardian ad litem was made upon the facts appearing in the pleadings. The lunacy of the plaintiff was set up in defendant's answer, and the necessity for the guardian ad litem appeared from that fact, which was admitted by plaintiff's counsel. There was no necessity for affidavits as to this fact, or as to any matter dehors the record affecting this motion. The defendants were not taken by surprise, nor did any right of theirs demand delay, nor could they be prejudiced by prompt action as to this matter.

Section 196 of the Code provides "that the court may before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of the party, or mistake in any other respect." \* \* \* This gives the court a wide latitude as to amendments, and while the power should not be exercised indiscriminately or to the surprise and prejudice of opposing parties, nor generally without giving the defendant the opportunity to resist and to answer the pleadings as amended, yet this matter must be left somewhat to the discretion of the presiding

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judge, \*and this court will not disturb the exercise of that discretion unless manifest injustice has been done. In this case we can see no reason whatever why the motion was objectionable because made without previous notice, or why time should have been given to answer. The material facts of the case, those upon which the matters at issue depended, were in no way altered by this amendment, and no new facts were needed by way of reply nor was there any surprise to the defendants. We think the power to amend was authorized by Section 196 of the Code, and that it was properly exercised here by the circuit judge.

The second ground of appeal is equally untenable. The 49th rule of the Circuit Court entitles the defendant to open and reply when he admits the plaintiff's whole case; when the admission is so full, as upon that alone in the absence of other defense, the plaintiff would be entitled to judgment. It will be observed that the admission here was not of this full character. It is true the execution of the note sued on was admitted, but the admission stopped at that point. The answer denies the right of plaintiff to sue, because a lunatic, and it averred that Spearman's estate could not be sued. In these denials there were involved questions both of fact and of law material to the plaintiff's case, not admitted. The 49th rule of the Circuit Court, therefore, does not apply.

This brings us to the consideration of the third and last ground of appeal, which presents the real question in the case. As to the character of the testimony necessary to

overthrow the presumption of payment of a sealed note, which, it is admitted, the lapse of twenty years raises, the Judge seems to have laid down the rule that this was a question of belief on the part of the jury, and depended, as other facts, upon the weight of the testimony. That the lapse of twenty years would presume payment; but, after that period, this was an open question for the jury, the burden being upon the plaintiff to show to the satisfaction of the jury that the note had not been paid, which fact the jury was to determine as they would the truth of any other alleged fact, to wit, by the weight of the testimony bearing upon that question. In other words, the only

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\*effect of the lapse of twenty years is to change the position of the parties as to the question of payment.

Ordinarily and within the twenty years, the possession of the note by the plaintiff entitles him to judgment, unless the defendant shows payment. After the twenty years the burden is shifted, and the plaintiff is then required to show non-payment, or he will fail in his suit, which fact the Judge held was a question of belief by the jury, dependent upon the force and effect of the whole testimony, and requiring no special evidence—but that it did not require positive proof of non-payment.

This is a very important question, and demands the gravest consideration of its underlying principles and of the decided cases affecting it. Until 1870 our statute of limitations, the statute of James I., made of force here, did not embrace sealed notes, nor was there any positive limitation here or in England as to such instruments or as to bonds. The seal was supposed to give such papers peculiar force and value, and to impart to them peculiar vitality. This idea, however, has since been exploded, and now, in this State, such instruments stand on the same plane in almost every respect with unsealed contracts.

In all civilized countries where the law is administered as a science having reference to the peace, quiet, and progress of society, as well as to the protection of individual rights, it has been thought wise that there should be some limit to litigation, some boundary beyond which contests or matters open to contests should be regarded as settled. Hence, early in England and in this country, in cases outside of the statute, the courts had resort to presumption to take the place, in many cases of evidence and frequently of belief, as a general common law principle. It was said by Lord Erskine, in *Hillary v. Walter*, 12 Ves., 267, "Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief."



In the absence of positive statutory limitation as to sealed notes and bonds, they were

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early brought under the operation \*of this principle, and the doctrine that twenty years would presume payment firmly established. Mr. Angel says: "By analogy to the statute of limitations, an artificial presumption has long been established, that when payment of a bond or other specialty was not demanded for twenty years, and there has been no circumstance to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years. This doctrine has been so often recognized that it is not requisite to cite any of the countless authorities to sustain it." Angel *Lim.*, § 93.

This doctrine, for the same reason that originated it, as to the first class of cases to which it was referred, has been applied to various other classes. Thus, in *Bowers v. Newman*, 2 McM. 486, an executor's assent to a legacy of freedom to a slave was presumed from the lapse of time; and in *Miller v. Reigne*, 2 Hill, 592, a deed of manumission to a slave under the act of 1800 was presumed. Lapse of time will presume a deed, grant, or any conveyance necessary to complete title to one in possession. *Gray v. Bates*, 3 Strob. 500. Letters of administration will be presumed, although the evidence is directly to the contrary; *Willingham v. Chick*, 14 S. C. 103; and there are countless cases where the payment of bonds has been presumed under similar circumstances.

As was said by Chancellor Harper in *Riddlehoover v. Kinard*, 1 Hill Eq. 380, "These presumptions are not founded upon actual belief." The belief may in fact be distinctly the other way, yet the presumption exists. Judge Wardlaw, in the case of *Stover v. Duren*, 3 Strob. 450 [51 Am. Dec. 634], conveys the idea of the force and effect of this principle better than can be found elsewhere, and we copy his exact language. He says: "The subject of presumptions is a good deal confused by the various terms which have been used to distinguish the different kinds. The presumption of payment, which, in reference to debts not embraced by the statute of limitation, arises after the lapse of twenty years, is not a presumption of law, that is, a rule which the Court itself may apply, but is a presumption of fact, recognized by the law, from which a conclusion ought to be deduced by a jury. It is, however, one of

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those strong \*presumptions which shift the burden of proof, which, from frequent occurrence, have become familiar to the Courts, and which, being constantly recommended to juries from motives of policy, have acquired an artificial force, and become as important as presumptions of law. Although the Court itself cannot make such presumption,

a new trial will usually be granted if a jury disregard it. Lord Ellenborough, in *William v. Gorges*, 1 Camp. 217, thought that, after the lapse of twenty years, the presumption that a judgment had been paid was not rebutted by the circumstances of the absence of the defendant and his insolvency, and, therefore, he directed the jury to find for the defendant."

Judge Wardlaw said, further: "But, when by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in the place of belief, an admission that the payment has not in fact been made cannot of itself destroy the effect which considerations of policy have given to a certain period of time, whether payment has or has not been made." Chancellor Harper said in *Riddlehoover v. Kinard*, supra: "The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage, or judgment, of the grant of a franchise, or the payment of a legacy, or almost anything else that is necessary to quiet titles to property. After twenty years a bill of review will not lie. This is the general equitable bar."

Now, while it is true that cases may be found among the decisions in our own State and elsewhere in which it is stated in a general way that this presumption may be rebutted by any circumstances showing non-payment, yet, in the face of these strong opinions, pronounced by such distinguished jurists as Wardlaw, and Harper, and Lord Ellenborough, and in the absence of a statement of the distinct character of those circumstances, we cannot but conclude, notwithstanding the other cases referred to, that this presumption, though rebuttable, has a much stronger foothold than to be overthrown by a mere balance of probabilities or by an adverse conclusion or belief deduced simply from the weight of testimony. Such

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a pre\*sumption is not founded simply upon belief. It is based upon public policy and necessity, and is frequently in direct opposition to belief. It was originally admitted in analogy to the prevailing statute of limitations, and in considering admissions which rebut it, the same principles are applicable as in considering admissions which take a case out of the statute.

But when, by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in place of belief, it should not be overthrown simply by a contrary belief deduced from circumstances. This would fritter the doctrine away and render it useless, leaving sealed notes and bonds always open. The better opinion seems to be that these circumstances should be accompanied with some acknowledgment by the debtor of an exist-

ing liability, as that expressed in the quotation from Angel, *supra*, where he says: "And there have been no circumstances showing that it was still acknowledged to be in existence." And as that found in the opinion of Judge Wardlaw, *supra*, where he says: "An admission simply that it has not been paid will not be sufficient unless it be an admission amounting to an acknowledgment of a subsisting liability like that which would renew a debt barred by the statute." Or, as was strongly expressed by Chancellor Harper, in *Riddlehoover v. Kinard*, *supra*, where he said: "Presumptions must be made against the well-known truth of the fact. If twenty years have elapsed without payment of interest, or any acknowledgment of a bond, we must presume it paid, notwithstanding the fullest conviction that it never has been paid." In *McQueen v. Fletcher*, 4 Rich Eq., 152, the court held that in considering admissions relied on to rebut the presumption of payment in such case, the same principles are applicable which apply when admissions are relied on to take a case out of the statute of limitations. "When an acknowledgment has been made in writing by the debtor charging him in direct terms, or by his agent, or if there has been a part payment, or part satisfaction of interest then due, the action must be brought in twenty years next after the time of such acknowledgment, part payment, or part satisfaction. But such special matter must be replied, and in confession and avoidance." Best Presump., § 188.

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\*Our conclusion is that the lapse of twenty years raises a presumption of payment as to sealed notes and bonds, which, though not a presumption of law, and therefore not conclusive, yet is a presumption of fact which has acquired an artificial force; subject to be rebutted, it is true, but the facts relied on for this rebuttal must be stronger than mere belief deduced from the weight of testimony being on that side. They must be of a character which would revive an unsealed note barred by the statute of limitations. We think this follows from the principles laid down by Judge Wardlaw and Chancellor Harper in the cases referred to and in the case of *Williaume v. Gorges*, where Lord Ellenborough directed a verdict for the defendant when the proof was that the debtor had been absent and insolvent. In the case before the court the circumstances as to the belief were no stronger than those before Lord Ellenborough. He must have thought that something more was necessary than simply a belief on the part of the jury of non-payment.

It is the judgment of this court that the judgment of the Circuit Court be reversed on the last ground of appeal, and that the case be remanded for a new trial.

17 S. C. 489

## NATIONAL BANK OF CHESTER v. GUNHOUSE &amp; CO.

(April Term, 1882.)

[1. *Mortgages* ¶151.]

A mortgage to secure future advances is postponed to a mortgage of later date given for a present consideration, as to all indebtedness contracted under the security of the first mortgage after notice had by the first mortgagee of the second mortgage.

[Ed. Note.—Cited in *Norwood v. Norwood*, 36 S. C. 343, 15 S. E. 382, 31 Am. St. Rep. 875.]

For other cases, see *Mortgages*, Cent. Dig. § 334; Dec. Dig. ¶151.]

[2. *Appeal and Error* ¶993.]

In cases of equitable cognizance the findings of fact by a Circuit Judge, deduced from testimony taken orally before him, or from evidence submitted in writing, will not be disturbed unless clear error is shown by reason of an entire absence of evidence to support such findings, or because the manifest weight of the testimony in the cause is the other way; and the burden of showing this is upon the appellant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3900; Dec. Dig. ¶993.]

[3. *Bills and Notes* ¶23.]

The indebtedness of the drawer of bills of exchange, which are accepted by the drawees for accommodation only, is not a contingent, but a primary liability.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 31; Dec. Dig. ¶23.]

[4. *Bills and Notes* ¶430.]

Renewal notes are not payment unless it is shown by the party alleging payment that there was an express agreement that they should be so received, or unless they produce payment.

[Ed. Note.—Cited in *Sloan v. Gibbes*, 56 S. C. 491, 35 S. E. 408, 76 Am. St. Rep. 559.]

For other cases, see *Bills and Notes*, Cent. Dig. § 1251; Dec. Dig. ¶430.]

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\*Before Pressley, J., Chester, October, 1881.

Action commenced February 9, 1881, by the National Bank of Chester against I. L. Gunhouse, Myer Wachtel and Samuel Gunhouse, constituting the firm of I. L. Gunhouse & Co., and Fanny Kaufman, for foreclosure of mortgage. The plaintiff's mortgage is stated in the opinion; the mortgage held by Fanny Kaufman was to secure the repayment of money advanced by Moses Strauss on the two notes of \$5000 each, described in that mortgage. Other facts, and also the Circuit decree, appear in the opinion.

Fanny Kaufman appealed on the following exceptions:

1. Because His Honor erred in finding "that the officers of the bank prove that in July, 1876, Gunhouse & Co. was indebted to the bank upwards of \$35,000, when he should have found that said sum of \$35,000 was only a contingent liability of I. L. Gunhouse & Co. as drawers of fifteen inland bills of exchange, duly accepted by responsible parties.

2. That His Honor erred in finding that all



transactions of a new character between plaintiff and Gunhouse & Co. were duly settled and the old debt secured by mortgage was reduced by payments from time to time to the sum of \$14,815.46, when the inland bills of exchange, a contingent liability of I. L. Gunhouse & Co. for \$35,000 on the 12th of July, 1876, the day the plaintiff's mortgage was given, were all finally paid by the acceptors of said bills of exchange, by notes of other parties duly paid at maturity, or by inland bills of exchange on other parties duly accepted and paid.

3. That His Honor erred, as matter of law, in not finding that any settlement or transactions between the National Bank of Chester and I. L. Gunhouse & Co. could not affect the rights of Fanny Kaufman, the first endorser on the notes secured by the second mortgage.

4. That his Honor erred in not finding, as matter of law, that the fifteen inland bills of exchange, the original liability of I. L. Gunhouse & Co., on the 12th July, 1876, constituted a contingent liability only and were paid, and have no connection with the present debt to the bank.

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\*5. That His Honor erred in holding that the sum of \$15,636.48 is the remainder of the original liability of \$35,000 secured by the mortgage to the bank 12th July, 1876; but he should have held that the said sum of \$15,636.48 arose from advances made by the bank subsequent to the second mortgage.

6. That His Honor erred in not finding, as matter of law, that the indebtedness of I. L. Gunhouse & Co. to the bank on the 1st of April, 1880, claimed to be the mortgage debt as shown by the six inland bills of exchange one memorandum check and an overdraft of \$1200 in 1879 put in evidence by the bank and claimed as the balance due on their bond and mortgage, arose from advances made by the bank subsequent to the second mortgage of Fanny Kaufman.

7. That His Honor erred in not finding as matter of law, that the mortgage debt claimed by the bank being advances to I. L. Gunhouse & Co. made subsequent to the second mortgage, the bank having actual notice of the second mortgage, and the bond secured by the mortgage being intended to cover future advances, that the lien of the mortgage of the bank was postponed to the lien of Fanny Kaufman's mortgage, and that she is entitled to the proceeds of the sale of the mortgaged premises, to be applied to the satisfaction of her debt in priority to the mortgage of the bank.

8. Because His Honor erred in not finding that the paying of the memorandum checks of I. L. Gunhouse & Co. by the bank to an amount exceeding one hundred thousand dollars, after the execution of the second mortgage, was a loan by the bank and created the indebtedness which it is now claimed the

proceeds of the sale of the mortgaged premises shall be applied to.

9. That His Honor erred in not finding, as matter of law, that the extravagant advances by way of loan on memorandum checks, subsequent to the second mortgage, were in fraud of the rights of Fanny Kaufman under said second mortgage.

10. Because His Honor erred in not finding that the bank was guilty of gross laches in connection with the six inland bills of exchange, which are claimed as part of the

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mortgage \*debt, and in fraud of the rights of Fanny Kaufman under the second mortgage.

11. Because His Honor erred in finding that there was any admission, on the part of Moses Strauss, during the time he owned the second mortgage, as to the time when the mortgage debt now claimed by the bank was created, but he should have held that there was no evidence whatever of such fact.

12. Because His Honor erred in finding that the mortgage of the bank was made by I. L. Gunhouse & Co. in good faith for debts previously contracted, when he should have found that the said mortgage was in violation of the National Bank Law, and therefore void.

13. Because His Honor erred in not finding that the proceeds of the sale of the mortgaged premises should be first applied to the debt of Fanny Kaufman upon her two notes.

Messrs. S. P. Hamilton, A. G. Magrath, for appellant.

Messrs. J. & J. Hemphill, contra.

July 15, 1882. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. I. L. Gunhouse & Co., formerly merchants in the town of Chester, on July 12th, 1876, executed a bond in the penal sum of \$15,000 to the National Bank of Chester, with mortgage on valuable real estate in said town to secure the same. The condition of the bond was as follows, to wit: "Whereas the said I. L. Gunhouse & Co. stand indebted to the National Bank of Chester, aforesaid, in certain large sums of money, either as makers, payers, or endorsers of notes, or as drawers or acceptors of bills of exchange, as well as memorandum checks. And whereas the said I. L. Gunhouse & Co. may hereafter, from time to time, become indebted to the said National Bank of Chester by other notes, bills of exchange, or otherwise. Now the condition of the above obligation is such that if the above bound I. L. Gunhouse, Meyer Wachtel, and Samuel Gunhouse, our heirs, executors and administrators, shall and do well and truly pay or cause to be paid unto the above-named National Bank of Chester, its certain attorneys, successors, or assigns,

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the full and \*just sum due upon all our obligations of any and every kind to the said the National Bank of Chester, as the same severally mature and become payable, including as well those hereafter contracted as those now existing, as also any and all renewals, consolidations and substitutions of any said obligations, without fraud or further delay, then the above obligations to be void and of no effect, or else to remain in full force and virtue."

Afterwards, to wit, on November 21st, 1876, the said Gunhouse & Co. gave two notes for \$5000 each to the defendant, Fanny Kaufman, with a second mortgage on the same property as that embraced in the mortgage to the bank to secure said notes. These notes and mortgage were transferred to one Moses Strauss, but subsequently were returned to Fanny Kaufman by assignment, who at the time of this action was the owner and holder.

Gunhouse & Co. finally failed in business. At the time of the failure the bank claimed that they were indebted to it in the sum of \$14,815.46. This amount on April 1st, 1880, was consolidated into three notes, one for \$4815.46, one for \$5000, and the third for \$5000, making in the whole the \$14,815.46. This sum appears to have been made up of the following evidences of debts, then in the possession of the bank, to wit: five drafts on Strauss Bros., two of December 26th, 1877, for \$1581.00 each, one of January 2d, 1878, for \$3387.86, two of January 9th, 1878, for \$3461.88 and \$305.51, respectively; a draft on A. J. Salinas & Son, February 5th, 1879, for \$2500; balance memorandum checks, \$771.72; and overdraft, \$1226.49.

On February 9th, 1881, this action was commenced, alleging the indebtedness of the defendant Gunhouse & Co. to the bank as above stated in the sum of \$14,815.46, claiming that this amount was due under the penalty of the bond for \$15,000 and the balance secured by the mortgage referred to herein above, and the complaint prayed judgment for that sum, a sale of the mortgaged premises, and for the deficiency.

It appearing to the court that Moses Strauss had assigned his interest in the second mortgage to Fanny Kaufman, she was made a party by order of the court, dated March 25th, 1881. Fanny Kaufman answer-

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ed, and the real contest in the case is \*between the bank and this defendant, the contest being which of the two mortgages shall have priority over the mortgaged property. On March 28th, 1881, Judge Fraser referred the case to a special referee, "to take the testimony on the issues of fact presented by the pleadings in the case, and to make his report of the same to the court." This report was made, embracing a mass of testimony, and the cause came on for hearing before

Judge Pressley, who in January, 1882, pronounced a decree sustaining the bank, ordering the property to be sold for its benefit, and forever barring the defendants, and Fanny Kaufman, and all persons claiming under her or them, of all right, title, interest, and equity of redemption in the mortgaged premises so sold, or any part thereof.

The defendant, Fanny Kaufman, has appealed upon numerous exceptions. It will be found, however, that the case hinges upon one general question, and that it is a question of fact, to wit: Was the debt now claimed by the plaintiff, and upon which the action rests, contracted before the execution of the second mortgage held by Fanny Kaufman and set up in her answer as a security for two notes presented by her? There is little or no controversy as to the principles of law involved and applicable to the case. It is not denied that the bank had knowledge of the execution of the second mortgage, and if the debt sued on was contracted after this mortgage, all the authorities agree in the proposition that in such case the senior mortgage will be postponed to the second. *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Seaman & Moore v. Fleming*, 7 Rich. Eq. 283; *Shirras v. Caig*, 7 Cranch, 34 [3 L. Ed. 260]; *Truscott v. King*, 6 N. Y. 147; *Jones Mort.* § 3, 74.

The appellant does not deny that the amount sued for is due, and it is admitted in appellant's argument that if this debt is a renewal of a previous indebtedness existing prior to the second mortgage, that it must rank as of the previous debt and be protected by the deed which secured its payment; so that, as has already been stated, the material question is, Was this debt of the bank in existence when the second mortgage was executed? Judge Pressley has expressed himself in the decree very decidedly upon this question. He says that the officers of the

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bank \*prove that in July, 1876, when the senior mortgage was executed, Gunhouse & Co. were indebted to the bank upwards of \$35,000, and therefore the mortgage was taken to secure said indebtedness and future advances. He further says that all transactions of a new character between plaintiff and Gunhouse & Co. were duly settled, and the old debt secured by mortgage was reduced by payments from time to time to the sum of \$14,815.46. For that amount Gunhouse gave new notes, and frequently thereafter acknowledged the correctness of said settlement, and still acknowledged it; and further, "I am satisfied that said amount, with interest, is yet due to the plaintiff on the old debt secured by the mortgage, and that no debt incurred after the date of said mortgage is included in said amount. The referee to whom the taking the testimony was committed has filed the testimony, showing that \$15,636.48 was due to plaintiff on said bond and mortgage on November 16th, 1881." Upon



these facts he ordered the land to be sold and the proceeds applied to the amount thus found due.

The first matter for consideration is how far these findings of fact by Judge Pressley are controlling upon this court. The cases upon this subject will be found collected by the reporter, Mr. Shand, in 12 S. C. 613 to 617. The citations there made embrace all of the cases on this subject decided by this court up to that date. The principle upon which the court has acted appears to be, that in appeals in cases of equitable cognizance the findings of fact by a Circuit Judge deduced from testimony taken orally before him, or from evidence submitted in writing, as in this case, will not be disturbed, unless clear error is shown, by reason of an entire absence of evidence to support such findings, or because the manifest weight of the testimony in the cause is the other way, and the burden of showing this is upon the appellant. These cases have not been directly overruled since, and on the principle of stare decisis, and to preserve that uniformity and harmony which should always exist in the administration of justice, and which alone can give confidence and satisfaction to litigants, and to the people, in my opinion these cases until overruled should be followed. They should not be made to apply in one case and disre-

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garded in another. I shall therefore regard them as authority, and under their light proceed to examine the decree.

The testimony clearly shows, that at the date of the mortgage to the bank, to wit, July 12th, 1876, the bank held fifteen inland bills of exchange drawn by I. L. Gunhouse & Co., on and accepted by various parties and business houses, amounting to \$35,000; that the mortgage in question was executed to secure the ultimate payment of this indebtedness either as an original indebtedness, as well as all renewals, consolidations, and substitutions, and also any future advances. The fact that the bank held these bills as an original indebtedness, and that the aggregate thereof amounted to the sum mentioned, is not denied. It is admitted in the 4th exception of appellant.

It is, however, claimed that it constituted only a contingent liability, and not a primary debt of Gunhouse & Co.

It is apparent that these bills were not drawn against funds; on the contrary, they were accommodation paper, the money being advanced to Gunhouse & Co. to enable them to carry on their business; and although it was advanced on accepted drafts and bills, yet it was understood all the time that Gunhouse & Co. were the real debtors. Why else did Gunhouse & Co. execute the July bond and mortgage? To what other indebtedness did they refer in the following language found in the bond: "Whereas the said I. L. Gunhouse & Co. stand indebted to the Na-

tional Bank of Chester, aforesaid, in certain large sums of money, either as makers, payers, or endorsers, or as drawers or acceptors of bills of exchange as well as memorandum checks"? Now this language could have referred to nothing else, as the bank at that time held no other claim upon this firm.

It is true that an accommodation acceptor may be sued primarily, and when sued, he cannot deny his primary liability; but it is well understood that the debt is the debt of the drawer, and he may be treated with for payment in the first instance. 1 Dan. Neg. Inst. 433. This course seems to have been pursued here, not only in the execution of the bond and mortgage on July 12th, 1876, but also upon the final settlement, when the three notes forming the basis of this action

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were given. Gunhouse & Co. recognized their liability in both of these transactions, also in their failure to answer the complaint, wherein it was expressly charged that the amount sued for is the balance of the debt secured by the mortgage described in the complaint. It is too late now to take the position found in exceptions 1 and 4, that this is only a contingent liability. These exceptions are overruled.

Exceptions 2, 3, 5, 6, 7, and 8 claim in different forms that it was error in the judge to find, that the amount now due was the balance of the original indebtedness, and submit that he should have found that it was a new debt, contracted after the execution of the second mortgage, and therefore should have been postponed to that mortgage. Let us examine the testimony upon this subject.

John J. McLure, sworn as a witness, said: "I am the president of the National Bank of Chester, and have been continuously since its organization in 1871. July 12th, 1876, I was president; I knew the firm of Gunhouse & Co.; on July 12th, they were indebted to the plaintiff in drafts, bills of exchange, and notes in a sum exceeding \$30,000; the Board of Directors were not satisfied with the condition of the debt, upon an examination made a short time before, and they requested Gunhouse & Co. to give additional security, which they furnished in the bond and mortgage set forth in the complaint." "It was then understood that the bank would not increase their indebtedness, but would carry it, they reducing it as rapidly as possible, and so long as they would keep it in active bankable form." He said further that the notes sued on show the balance of the indebtedness of I. L. Gunhouse & Co. to the plaintiff—the aggregate remainder or balance of the original debt due July 12th, 1876; that I. L. Gunhouse & Co. had no open running account in the bank other than the usual cash deposit account. He said he knew the amount sued for is the balance of the old indebtedness, and that his knowledge was derived not altogether from the books, but from his own

knowledge of the business of the bank; that Gunhouse & Co. had repeatedly acknowledged this debt as being the balance of the old debt.

The book-keeper of the bank and the cash-

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ier corroborated \*the statements of the president, and did not hesitate to say that the debt now sued was the balance of the old debt secured by the mortgage, these statements being based upon information derived from the books, and from their official connection with the business of the bank. To this is added a statement of the new account of Gunhouse & Co., beginning November 27th, 1876, and running to January 18th, 1878, inclusive, from which it appears that on the day first named Gunhouse & Co. had nothing to their credit; and although during that period they made very large deposits, amounting to something over \$100,000, yet upon the last-named day the credits and debits balanced exactly; besides, these accounts were balanced uniformly by the week, showing that no large indebtedness could have originated in this way.

The facts relied on contravene, first, that the items going to make up the present indebtedness had not been traced back, through the books, to the original drafts, notes, and bills of exchange, by the officers of the bank; that all of the original bills, notes, etc., had disappeared, and there was no direct connection between them and the notes now in suit; that as to one of the original drafts on Strauss Bros., to which the book-keeper had traced one of the items of the present debt, Strauss proved that this had been paid; that this was the character of the evidence relied on by the plaintiff.

It is true there was some conflict in the testimony and some uncertainty in tracing the connection between the different papers, but we cannot say, after a careful review of the whole case, that there was an entire absence of testimony in support of the findings of the Circuit Judge, or that the manifest weight of the testimony is against them. We feel constrained therefore to affirm his decree, notwithstanding the appeal has been pressed with great zeal, force, and confidence by the learned counsel for appellant. To do otherwise on our part, would be to disregard precedents, override the Circuit Judge without authority, set up the arbitrary rulings of this court, instead of law as the principle upon which cases are to turn, and render the administration of justice uncertain, perplexing, and wholly unsatisfactory.

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\*There is no ground for the position that the renewals must be regarded as payment of the old debt. The rule on that subject is, that a note or other promise to pay is never considered as payment of a precedent debt, unless there be a special agreement to that effect, or unless it actually produces payment, and the onus is upon the party alleging such

payment to prove it. Costelo v. Cave, 2 Hill, 528 [27 Am. Dec. 404]; Bank v. Bobo, 9 Rich. 31; Adger & Co. v. Pringle, 11 S. C. 547; Thomas v. Kelly, 3 S. C. 214 [16 Am. Rep. 716]; Fraser v. Hext, 2 Strob. Eq. 258.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 499

TRIMMIEB v. VISE.

(April Term, 1882\*)

[Mortgages  $\Leftrightarrow$  295.]

Where a mortgage covers three parcels of land, one of which is sold by the sheriff under an execution junior to the mortgage and purchased by the mortgagee at an under value, the proportion which the true value of the parcel purchased bears to the whole mortgaged property, and not the bid at the sheriff's sale, is the proper credit on the mortgage debt; and the mortgagee may then foreclose his mortgage on the unsold parcels for the balance remaining unpaid.

[Ed. Note.—Cited in Devereux v. Taft, 20 S. C. 559; Norman v. Norman, 26 S. C. 46, 11 S. E. 1096; Bleckley v. Branyan, 26 S. C. 428, 2 S. E. 319; Hull v. Young, 29 S. C. 70, 71, 6 S. E. 938; Bradford v. Buchanan, 39 S. C. 246, 17 S. E. 501; Foster v. Glover, 46 S. C. 539, 24 S. E. 370; Brown v. Bank of Sumter, 55 S. C. 73, 32 S. E. 816; Powell v. Patrick, 64 S. C. 192, 193, 41 S. E. 894; Ex parte Powell, 68 S. C. 325, 47 S. E. 440; Hutchinson v. Turner, 88 S. C. 331, 70 S. E. 410, 806.

For other cases, see Mortgages, Cent. Dig. § 826; Dec. Dig.  $\Leftrightarrow$  295.]

[This case is also cited in Greenwood Loan & Guarantee Ass'n v. Childs, 67 S. C. 253, 45 S. E. 167, and distinguished therefrom.]

Before Fraser, J., Spartanburg, June, 1881.  
Action by F. M. TrimmieB against M. S. Vise and the National Bank of Spartanburg. The opinion states the case.

Messrs. J. S. R. Thomson, G. W. Nicholls, for appellant.

Messrs. Bobo & Carlisle, contra.

July 27, 1882. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. The defendant Vise, in 1878, executed a mortgage of two tracts of land, one containing five acres and the other eighty-five, and also of a valuable lot in the town of Spartanburg to the plaintiff, TrimmieB, to secure the payment of a promissory note for \$900, payable January 1, 1879, with interest from its date. The

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town lot was after\*wards levied upon and sold by the sheriff under a judgment junior to the mortgage. At this sale the plaintiff, mortgagee, to whom the judgment had been previously assigned, became the purchaser at the price of \$556.

This action was then commenced by the plaintiff to foreclose his mortgage on the two tracts of land remaining. The complaint con-



tained the usual prayer for foreclosure and for judgment for any deficiency remaining unpaid after the sale of the land. The answer interposed as a defence that the sale of the town lot and its purchase by the plaintiff, mortgagee, satisfied his note and mortgage, thereby releasing the other lands from its lien. The Circuit Judge decreed adversely to the defendant's position.

The material facts of the case are as follows: The note sued on was given for the town lot. This lot was said to be worth \$1,000 when it was bid off by the plaintiff at the sheriff's sale. The plaintiff had paid only a portion of this bid, and action was pending for the balance. No titles had been executed to the plaintiff. The National Bank of Spartanburg held a judgment against Vise junior to the mortgage, and, as a defendant, claimed that plaintiff's mortgage had been extinguished by his purchase of a portion of the mortgage property, and therefore that the two tracts of land should be left undisturbed and subject to its judgment.

The Circuit Judge, while recognizing the general doctrine that where a mortgagee purchases the entire property embraced in his mortgage, otherwise than at a foreclosure sale, he thereby extinguishes the mortgage debt, (*Allen v. Richardson*, 9 Rich. Eq. 56; *McLure, Brawley & Co. v. Wheeler*, 6 Rich. Eq. 344; *Schnell v. Schroder*, Bail. Eq. 338;) yet knowing of no case where this rule had been applied, where only a portion of the mortgaged property had been bought by the mortgagee, as in this case, he overruled the defence and ordered the mortgage of plaintiff foreclosed by sale of the two tracts referred to in the complaint: the proceeds to be paid to plaintiff's debt, costs and expenses of suit; then to the National Bank; and the balance, if any, to the defendant Vise. He further ordered "that the plaintiff have no leave to

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apply for judgment for any deficiency unless he shall consent that the town lot bid off by him shall be sold by the order of this Court as a part of the mortgage property. If such consent is given, either party may apply at the foot of this decree for such orders as may be necessary and proper."

From this decree the defendant Vise has appealed, assigning error: 1st, Because his Honor erred in not holding that the plaintiff's debt was extinguished by his purchase of the town lot at the sheriff's sale; 2d, If not extinguished, that the town lot should have been ordered to be first resold for the satisfaction of the mortgage debt, and only the balance, if any, should be enforced against the other real estate; 3d, That at least the plaintiff should have accounted for the true value of the town lot before selling the other lands.

The main question involved is the first. The authorities in this State are direct to the point that where a mortgagee purchases

the entire mortgaged property at any other sale than a regular foreclosure sale, such purchase will extinguish the mortgage debt. The purchase of the equity of redemption unites the equitable title under the mortgage and the right to redeem in the same person; and where there is no intervening claim, merger is the result, and the mortgagee becomes the owner in fee, with nothing left for the mortgage to operate upon. See the cases referred to above.

In addition to this, the right of the mortgagor to redeem being the only interest that can be sold by a judgment junior to the mortgage, the purchaser at such sale, whether he be the mortgagee or a stranger, is supposed to give the amount of his bid for that interest, over and above the mortgage debt, leaving the land, when purchased by a stranger, still subject to be sold for the mortgage debt, and, when purchased by the mortgagee, to be applied in satisfaction of his debt, which by operation of law is thereby extinguished. As we have already said, this is the admitted doctrine where the entire property has been purchased by the mortgagee.

The difficulty here is, Does it apply in this case, where only a portion of the mortgaged property has been bought by the mortgagee? As far as we have been able to discover, this

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is \*the first case where this question has been raised directly, either in this State or elsewhere. The abstract justice in such case would seem to demand that a mortgagee purchaser should occupy the same position that a third person would occupy under the same circumstances. He ought not to claim any better position than a stranger, nor is there any sound reason why he should be placed in a worse. He has the same right to bid at sheriff's sale as any other party, and he should occupy the same position that any other purchaser would, buying under similar circumstances.

In the case of *Moss v. Bratton*, 5 Rich. Eq. 3, the Court held that Bratton, who bought at sheriff's sale under an execution junior to the mortgage, obtained his title encumbered with the lien; and though he did not become personally liable for the mortgage debt, yet the land in his hands was specifically bound, so far as it might suffice for the payment of the debt. The only interest sold was the right of the mortgagor to redeem. No doubt Bratton supposed that the land was worth the amount he bid for this interest and the mortgage debt besides. If it turned out upon a resale for foreclosure that he was mistaken, this was an error of judgment on his part, and his misfortune, to which all men are liable; on the contrary, if his estimate was right, he could lose nothing, as a re-sale would, at least, pay the mortgage debt and refund to him the amount paid out and possibly something more.

An outside purchaser under such circumstances buys at this risk; why should not the mortgagee when he becomes the purchaser be subjected to the same? He certainly should not be allowed to take a portion of the mortgage property at simply the value of the mortgagor's right to redeem, a nominal value perhaps, and detracting that portion from the mortgage, then collect his whole debt out of the remainder of the land, thus applying no part of the land bought by him to the mortgage, yet retaining possession. No principle which works such a result can be sound. It would be unjust and oppressive to the debtor in the extreme, in direct conflict with every principle of natural justice, and, in fact, little short of robbery.

On the other hand, it would be equally as

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unjust to the mortgagor to say that, under all circumstances, where he purchases a portion of the mortgaged property, whether in value sufficient to pay his debt or not, that nevertheless his debt should become extinct. There should be some medium line. Where the mortgagee buys the entire property, there is some reason for the position, that his debt should be regarded as satisfied. When the debt was contracted he took this property as his security, and where he buys the whole of it, at the sale under a junior lien, he may be well supposed, as was said in *Moss v. Bratton*, supra, to estimate the mortgagor's right to redeem, which is the only interest that can be sold at such sale, to be worth the amount of his bid over and above the mortgage debt, and therefore, in effect, to contract to take the property at his bid and pay the debt besides; and there would be no hardship in such case that he should be held to his contract by applying his bid to the judgment debt and the land to the extinguishment of the mortgage. But where he buys only a portion of the mortgaged property, should this presumption arise to the full extent of extinguishing the entire debt, or should only such proportion of the debt be extinguished as the property bought bears to the whole embraced in the mortgage? This would be the justice and equity of the case; can it be sustained by authority?

It is stated in *Jones on Mortgages* that where one who has purchased a part of the premises subject to a mortgage takes an assignment of the mortgage, although it may operate as a merger in respect to the part of the premises bought by him, it would not have this effect in respect to the part not bought. Section 849, referring to *Wilhelmi v. Leonard*, 13 Iowa, 330; *Casey v. Buttolph*, 12 Barb. 637; 12 Allen (Mass.) 472. Nor is there merger when a mortgagee becomes a devisee of an undivided half of the mortgaged premises. *Id.*, § 849; 42 Barb. 606.

The assignee of a mortgage covering two separate tracts of land having purchased one of them, can collect only the ratable propor-

tion from the other. *Jones on Mortgages*, § 877, referring to *Cotton v. Cotton*, 3 Philadel. Rep. 24. And so, if the assignee of a mortgage take a conveyance of the equity of re-

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\*demption of one half of the mortgage premises described as one lot, this operates to extinguish only a part of the mortgage debt, leaving the assignee at liberty to foreclose for the residue. *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Jones*, § 871. These principles are founded in natural justice, and in the absence of all counter authorities in this State we are disposed to adopt them.

In our opinion, the purchase of the right of redemption by the mortgagee of the town lot in question here devolved upon him the duty of extinguishing the mortgage debt to the extent of the ratable proportion of the value of said lot, leaving the other lands subject to foreclosure for the remainder of the debt. In other words, each part of the land mortgaged should be made to bear its ratable proportion in the payment of the debt, and to this end an inquiry should be had, either by reference or otherwise, as to the Circuit Judge shall be deemed most advisable, to ascertain the true value of said lot and what proportion thereof, when compared to the value of all the property mortgaged, should be applied as a credit on the mortgage debt; which being done, the other land should be sold for the remainder with costs and expenses, and if any surplus, this to go as ordered in the Circuit decree.

It is the judgment of this Court that the judgment of the Circuit Court be reversed and the case be remanded to be enforced in accordance with the principles herein.

Mr. Justice McIVER concurred; Mr. Justice McGOWAN absent at the hearing.

17 S. C. 504

McFALL v. SULLIVAN.

(April Term, 1882.)

[1. *Wills* ⇨ 758.]

A testator specified and valued the property at that time and previously given to his children, and devised and bequeathed the balance of his property to his wife for life, and after her death to be appraised in lots and "the property taken into the general estimate and divided accordingly." He further directed that "on a final settlement of my estate, that each legatee get the same, and in the division, if it so happen that one gets more than another, that he have one year without interest to refund it in, except C., who I give \$500 more than any

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of the rest." \*Held, that none of the children were required to account for advancements.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1958; Dec. Dig. ⇨ 758.]

[2. *Wills* ⇨ 759.]

Inequality in the advancements cannot raise an inference of an intention contrary to that expressed in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1961; Dec. Dig. ⇨ 759.]



[3. *Descent and Distribution* ⇐103.]

[Cited in *Miley v. Deer*, 93 S. C. 70, 76 S. E. 27, to the point that the statute as to advancements applies only to cases of intestacy.]

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. ⇐103.]

Before Fraser, J., Greenville, November, 1881.

This was an action by Jane C. McFall and others, children of John C. Sullivan, deceased, against William E. Sullivan, administrator of J. C. Sullivan and others, legatees and devisees under the will of the said J. C. Sullivan, commenced in 1881, for a settlement of the estate of the testator. The case depended upon the construction of the following will:

In the name of God, amen, I, John C. Sullivan, of the District of Greenville and State of South Carolina, being of sound mind and memory, and considering the uncertainty of life, do make, ordain, publish and declare this to be my last will and testament. That is to say:

First, After all my debts are paid, the residue of my estate, real and personal, I give, bequeath to, and dispose of as follows: I have given all my children something but my daughter Clarissa, who I now give eleven negroes, Sam, Ann and her two children, Dennis and Cinda and their five children, together with their future increase, during her life, and at her death to her children. Also, one tract of land containing three hundred and eighty-one acres, consisting of a part of the tract I bought of Joseph Sullivan, and the part of the Martin tract which I purchased, and which was laid off for my daughter Elizabeth, but she moved off and left it. One horse, saddle and bridle, with two beds and furniture, on which I have put the estimate of seven thousand five hundred dollars, which she is to hold during her life, and should she die without lawful heirs, or if heirs, and they should not live to become of age, then this property to be returned unto me if living, and if dead, unto my estate to be disposed of as my other property to my living children, or their legal representatives. I have already given my son John Dunklin Sullivan in land, negroes, stock and trade, horses, cattle, hogs, tools, both plantation and blacksmith's, amounting

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in all to five thousand eight hundred \*and fifty-six dollars, which can be seen by reference to my book of charges against my children; and, whereas, the stock I put in with him in the Grove store turned out to be an unprofitable concern after deducting what I and my family have taken out of it, I release and give up to him any balance of interest I may have to him without any charge for the same. I have already given my daughter Sarah F. Agnew, in negroes, cattle, one mare, household and kitchen furniture, provisions, with five hundred dollars in mon-

ey, making in all four thousand and eighty-three dollars, which can be seen by reference to my book of charges against my children. I have given my daughter Temperance E. Agnew, in negroes, cash, mules, cattle, hogs, household and kitchen furniture, with provisions, in all making the sum of forty-seven hundred and twenty-nine dollars, which can be seen by reference to my book of charges against my children. I have already given to my daughter, Jane C. McFall, in negroes, one horse, cattle, household and kitchen furniture, with provisions, making in all forty-three hundred and sixty-nine dollars, which can be seen by reference to my book of charges against my children. I have already given my daughter Emma A. Hardin, in negroes, cash, one horse, beds and furniture, the sum of forty-five hundred and sixty-five dollars, which can be seen by reference to my book of charges against my children.

Whereas, my daughter Martha Ann H. Sullivan married in 1855 with Adam L. Eichelberger and died the same year, after giving birth to a child, which died in January, 1856; I loaned them eight negroes with the express understanding that when I came to Florida in the fall I was to deed it in trust to my daughter, as I had the property of my other married daughters, but she died before I reached there, and Eichelberger refuses to give up the property, I intend instituting a suit against him, and if I do not live to carry it out, I set aside one thousand dollars, to be used by my executor in carrying out said suit in endeavoring to recover back said property; and for the base and unprincipled manner in which the said Eichelberger has acted, I leave him one cent as what I design for him out of my estate, and no more.

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\*The balance of my property of which I may die in possession, I leave to my wife during her life—all my slaves, lands, except the Florida lands, stock of every kind, crop, plantation and blacksmith tools, wagons and carriages, debts due me, all the household and kitchen furniture, except two beds and furniture for Clara, the dividend on my stock in the Hamburg Bank, every other species of property of which I may die possessed, after carrying out the other provisions of this my will.

Should my wife survive me, at her death I wish my property appraised in lots, and taken by my children, Sarah's and Temperance's children each to draw a full share, to go into the hands of their mother's trustee, to be given up to them by him when they become of age; and should any of them die before they arrive of age, the others to take its interest, and if both die of either set, then the property to be taken into the general estimate and divided accordingly.

As soon after my death as convenient, I desire my executor to have the will proven and qualify; have all the property apprais-

ed, and if he cannot collect enough out of the debts due me, with the crop, to pay my liabilities, he must sell enough to meet the debts; and if they cannot agree on a division after my wife's death, these will empower him to sell all or any part either personal or real estate, and execute bills of sale and deeds of land; and it is my desire on a final settlement of my estate, that each legatee get the same, and in the division, if it so happen that one gets more than another, that he have one year without interest to refund it in, except Clarissa, who I give five hundred dollars more than any of the rest. It is my desire that my son John D. Sullivan settle up our copartner farm in Florida. Should any of my children murmur or express any dissatisfaction at the disposition I have made of my property, I wish it expressly understood that they be cut off without anything more than they have already received. I desire no sale of anything, but valued and taken by my children. I likewise appoint, make and constitute my son John D. Sullivan executor of this my last will and testament.

In witness whereof, I hereunto subscribe

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my name and affix \*my seal, this the 7th day of January, eighteen hundred and fifty-seven.

John C. Sullivan, [L. S.]

Signed in presence of

S. S. Landers,

W. T. Shumate,

Hewlet Sullivan.

The Circuit decree was as follows:

I concur with the Master in his finding of facts that the eleven (11) slaves mentioned in the will as given to testator's daughter Clarissa (now Mrs. Cannon) went into her possession as her property during the lifetime of testator, and were not a part of his estate at his death. I do not regard this fact, however, as at all important. The language in which this gift to Clarissa is made imports not a gift in futuro to take effect at death, but a gift in presenti to take effect immediately. Testator says as to his other children, I have given, and as to Clarissa, I now give, and if she dies in his lifetime the property to come back to himself in certain contingencies. I am not sure that so much of this instrument is not a deed instead of a will. See Jarman on Wills (Jersey City Edition, 1880), \*26, where it is said that there is no objection to one part of an instrument operating in presenti as a deed and another in futuro as a will. If either by the words of the instrument itself or by any act of giving away this property after the execution of the will the title passed out of John C. Sullivan in his lifetime, it was no part of his estate and could not be included in any general words simply describing his estate. And if the will had directed that all the children should be made equal in the division of the whole property, that which had been given away and which thus passed out of the oper-

ation of the will could not be properly taken into the estimate. It is true that testator may refer in his will to such previous gifts, or even to some arbitrary standard of value as a guide in the distribution of his estate, but such directions must be plainly given in the will, and are not found in this instrument.

Again, I do not think it will change the

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situation if we hold \*that the property given to Clarissa passes under this instrument as a will, and did not come into her possession until after the death of John C. Sullivan, the testator. The gifts are specific even as to the real and personal property given to Clarissa, and unless controlled by the subsequent clause, are no part of the residue, or to be taken into any account with it on the final division. I do not think that this will can be properly construed so as to require the gifts to the other children, admitted to have been inter vivos, and these gifts to Clarissa, whatever they may be, to be taken into the account in making the children equal. The direction in the will is, "It is my desire, on a final settlement of my estate, that each legatee get the same, and in the division if it so happen that one gets more than another that he have one year without interest to refund it, except Clarissa, who I give five hundred dollars more than any of the rest." The equalization is to be made on "a final settlement" and in the division then made.

A division can be made only of property in which the parties are interested as joint-tenants or tenants in common, and there is no such interest in any of the other gifts to the children referred to. This clause stands by itself in the will and speaks for itself, and has no necessary reference to the other gifts. If the gifts to Clarissa in the previous part of the will are to be taken into the account in equalizing the shares, there is no reason why she should not be required to pay back a portion of the value (\$7500) if on final division the other children do not receive sufficient to bring them within \$500 of that amount. If she is to account for the gifts for one purpose, she must do so for all, and this is clearly not the intention of the testator as expressed in the will. If the testator intended these specific gifts to be brought into the account on final settlement, he would have expressed his purpose in plain language, and not used language which points to a different conclusion.

This is a case to which the doctrine of advancements does not apply. The loss of property in slaves is a common loss, and the estate must now be settled in the same way as if there had been a loss to this extent from any other cause. The share of each child in this property will now go to him or

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her, or to \*his or her representatives to be divided amongst them, and Sarah's children will take one share amongst them and Tem-



perance's children one share amongst them. This I take is the proper construction of the will, one full share to Sarah's children and one full share to Temperance's children.

It is therefore ordered and adjudged that out of the net proceeds of the sale of the land heretofore ordered to be sold in this case there be paid to Clarissa (now Mrs. Cannon) one full share and the sum of five hundred dollars, to Sarah's children one full share amongst them, to Temperance's children one full share amongst them, one full share to each of the other children of the testator, and where any of them have died, to their representatives as set out in the complaint.

Certain of the heirs of the testator appealed from this decree, upon the single ground that there was error in so much of this decree as holds that the will of John C. Sullivan, deceased, cannot be properly so construed as to require that the gifts to his children, including those to his daughter Clarissa, be taken into account in making his said children equal under the provisions of said will.

Messrs. Wells & Orr, for appellants.

Messrs. T. Q. Donaldson, M. F. Ansel, contra.

July 28, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Dr. Jno. C. Sullivan, late of Greenville County, died in 1864, leaving a last will and testament, in which, after providing for the payment of his debts, and stating that he had already given all of his children something, except his unmarried daughter Clarissa, afterwards Mrs. Cannon, he then proceeds to give her certain property consisting of slaves and a tract of land containing 381 acres, and some other personal property, which in all he valued at \$7500, upon certain terms and conditions. This bequest was referred to in the will as if the testator intended it as a gift in presenti. He then enumerates the property previously given off to his other children, ranging from \$4800 to \$5000 to each, closing

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\*as to each with these words: "which can be seen by reference to my book of charges against my children."

After some other unimportant directions, he leaves all the balance to his wife for life, directing that upon her death his property should be appraised in lots and taken by his children, the children of his two deceased daughters, Sarah and Temperance, each to draw a full share among them; but if they could not agree on a division, his executors were empowered to sell all or any portion for that purpose, expressing his wish that upon a final settlement that each legatee should get the same, further directing "that if in the division it should so happen that one gets more than another, that he should have one year without interest to refund, ex-

cept Clarissa, to whom he gave \$500 more than the rest."

His son, Jno. D. Sullivan, was appointed executor, who, after partially administering the estate, died, and William E. Sullivan, a son of John D., administered with the will annexed, *de bonis non*. W. A. McDaniel administered upon the estate of John D. The estate of Dr. Sullivan not having been settled, this proceeding was instituted for an accounting between the estate of the former executor, John D. Sullivan, and that of Dr. Sullivan, for the sale of the real estate of Dr. Sullivan, and for final settlement according to the rights of the parties.

The only serious question in the case is as to the liability of the children and especially of Mrs. Cannon to account for the property received by them as advancements. The case was referred to a referee to take the testimony, who reported as to Mrs. Cannon, that she went into the possession of the property bequeathed to her in the will previous to the death of her father. He also reported the amounts received by the others. The presiding Judge decreed that the settlement should be made without regard to the previous gifts, and that this should apply to Clarissa as well as to all the others, and this, too, whether Clarissa took her part under the will at the death of her father, or as a gift previous to his death. He held that there was to be no accounting. The appeal raises the question whether there was error in this ruling.

It was said in the case of McDougald v.

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King, Bail. Eq. \*154, that the law on the subject of advancements applies only to cases of intestacy. This is without limitation, except where the children have been advanced after the making of the will. Then it may be made a question whether such advancements are not to be taken in satisfaction of legacies given in the will, and especially will this be done if the advanced party consents to bring in his advancements. The doctrine of accounting for advancements as a legal principle comes from the statute, Genl. Stat. 440, and it applies exclusively to cases of intestacy. *Allen v. Allen*, 13 S. C. 513 [36 Am. Rep. 716]. But still it has never been denied that a testator might regulate the disposition of his property as he deemed best, so that in so doing he violated no established principle of law. Within this limit he can make his own law as to his own property, and the courts will respect and enforce it. In *Allen v. Allen*, supra, Mr. Justice McIver said: "The doctrine of advancements applies only to cases of intestacy, or when directed by the will."

Dr. Sullivan died testate, so that the question involved here must be determined upon the construction of his will. Did he intend that his children should account? and does that intent appear? There is certainly nothing in the will which directs such account-

ing in express terms, and if he had intended this, it is somewhat singular that the testator did not so declare in unmistakable language. He was evidently a man of more than ordinary intelligence. He had a large estate to dispose of, and no doubt knew full well how to express intelligently his purposes in reference thereto, and yet the will is silent as to any positive direction on that subject. This is a significant fact, and should have influence in endeavoring to reach the intent of the testator, which, as is often said, is the pole-star in the construction of wills. Can such intent be fairly inferred from the whole will, or from any portion of it?

The only portions of the will that refer to the division of his property among the children are the last two clauses. In the first of these two, after having given the balance of his property to his wife, he directs that, should his wife survive him, at her death it is his wish that his property be appraised in lots and be taken by his children. What

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property did he refer \*to in this clause? Evidently, that taken by his wife for life. He had none other undisposed of. After enumerating in his will the portions given off to all of his children, including that given to Clarissa, he then gave the entire balance of his estate to his wife during her life, and proceeds to direct that at her death his property should be appraised in lots, for his children.

Could any other property have been appraised and divided into lots except that in which he had reserved the power to dispose of, after the death of his wife? Could the executors, with the view to equalize these lots, have required the advanced children to bring into hotchpot their advancements? They certainly had no such power. The will was their guide and warrant of authority, and this gave them power only over such property as he might die possessed of with a life estate in his wife. This they were directed to appraise into lots for division, and having performed this, their powers and duties ended so far as this clause is concerned.

In the last clause the testator contemplated the possibility that the children might not agree on a division at the death of his wife. In such case he empowered his executor to sell all or any portion, either personal or real, to that end, expressing a desire that upon "final settlement each legatee shall get the same;" and in the division, if it should so happen that one legatee gets more than another, that he shall have one year without interest to refund it in, "except as to Clarissa, to whom he gave \$500 more than the rest."

In these two clauses the testator seems to refer entirely to the property left in the hands of his wife for life. This was to be divided equally, either by appraisal and allotment of the property itself as a whole,

if that could be done, otherwise by sale in whole or in part, as the necessities of the case might require. We see nothing in the language of either clause, or in the general scheme, which either by necessary implication or reasonable inference leads us to believe that the testator intended to embrace in this last division any of the property previously given off to any of his children.

The inequality of the previous advance-

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ments cannot raise \*such an inference. Testators have the right to dispose of their property as they may see fit, and while it is usual for parents to give each child an equal share, yet there is no law which requires this. Nor when a departure is made can any one demand the reason. No one but the parent himself knows the different advantages which have been received by his children respectively, the different services rendered by each, or the future necessities to be provided for. The law, therefore, wisely leaves all this to him, and to that parental attachment, which is universal, and which is the safest guaranty to parental justice. The law seeks only to know the intent. When that is reached by the proper application of the legitimate canons of construction, whatever this may be, if not inconsistent with well-established principles, the law will protect and enforce.

Seeing nothing in the will either express or necessarily implied which authorizes the construction that the testator intended that his children should account, and this being a case of testacy, it is the judgment of this Court that the judgment of the Circuit Court be affirmed.

#### 17 S. C. 514

#### MARS v. VIRGINIA HOME INSURANCE COMPANY.

(April Term, 1882.)

##### [1. Garnishment ⚡126.]

In an action on a policy of fire insurance issued by a Virginia company, the Circuit judge refused to admit in evidence a certified copy of proceedings in the courts of Virginia which showed that this debt had been attached in the hands of this defendant under an attachment there issued against this plaintiff. *Held* that this refusal was error.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 251; Dec. Dig. ⚡126.]

##### [2. Evidence ⚡244.]

The admissions by a local agent of the defendant company of the principal's liability to pay the loss were improperly received in evidence, it not having been made to appear that the local agent was authorized to adjust losses or had other powers that would make such admissions binding on his principal. And they were no part of the res gesta.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 924; Dec. Dig. ⚡244.]

##### [3. Evidence ⚡317.]

The declarations of a third person concerning a box left with him by plaintiff just before



the fire was clearly hearsay evidence, and therefore inadmissible.

[Ed. Note.—Cited in *Nelson v. Charleston & W. C. Ry.*, 92 S. C. 167, 75 S. E. 408.

For other cases, see Evidence, Cent. Dig. § 1178; Dec. Dig. ⚡317.]

[4. Insurance ⚡646.]

Where fraud is relied on in defence, it is incumbent on the defendant to show it, although the complaint alleged that there was no fraud.

[Ed. Note.—Cited in *Copeland v. Western Assurance Co.*, 43 S. C. 28, 20 S. E. 754.

For other cases, see Insurance, Cent. Dig. § 1660; Dec. Dig. ⚡646.]

Before Aldrich, J., Abbeville, February, 1882.

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\*Action by W. W. Mars against the Virginia Home Insurance Company, commenced July 2d, 1881. The complaint among other things, alleged that the fire "did not happen by any fraud, evil practice, or neglect of the plaintiff, or in any way excepted in the condition of said policy."

Besides proof of the fire, value of the house, stock, etc., plaintiff testified that a few days after the fire he submitted his affidavit of loss to W. T. Branch, the local agent of the company, to be sent on to the company; that soon afterwards Branch went to the place to adjust the losses, and required copy of the invoices, which were procured; that Branch afterwards gave plaintiff a blank to be filled, which was filled up particularly by detail and items, verified and delivered to Branch, who promised to deliver to the company; and that Branch told him several times that the loss would be paid. Two of plaintiff's brothers testified to the same effect. On the part of the defendant, W. T. Branch, the local agent of the company, testified that within a few days after the fire plaintiff brought up and handed him affidavits in relation to the loss, but that he told him they were not sufficient proofs; that he sent them on to the company right away; that he went down to plaintiff's to adjust the loss for the company; that he never told plaintiff or E. A. Mars the company would pay the loss.

Defendant then proved by J. W. Morrah that he saw at J. E. Caldwell's house a box, and offered to prove that J. E. Caldwell, who lived some distance from plaintiff, told him something about the box, plaintiff not being present, which he had in his possession just before the fire. Plaintiff objected, and the presiding Judge rejected the declaration on the ground that it was hearsay.

Defendant also offered in evidence an exemplification of the proceedings in the Circuit Court of Richmond, Virginia. Upon objection made by the plaintiff, the presiding Judge ruled it out.

The brief thus states the Judge's rulings:

"The presiding Judge held upon the argument of the law, that, if the plaintiff made and delivered to the defendant company

through its agent the proof of loss which he

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said he \*made, it was sufficient, and that the plaintiff could only be required to make such proof as would be reasonable, and could not be held to be in default only because the agent of the company said it was not satisfactory to them. Defendant objected to the admission in evidence of W. T. Branch's declarations as to what the company intended to do about paying the loss, but the presiding Judge overruled the objection.

On the question of fraud, the presiding Judge charged the jury that the complaint alleged that the fire occurred without fraud, negligence, or evil practice on the part of the plaintiff; that it was often difficult, sometimes impossible, to prove a negative; that it was incumbent on the plaintiff to make proof of the facts and circumstances of the burning; and that, having done that, unless it appeared from the evidence offered by the plaintiff that there was fraud, the burthen was shifted on the defendant company, and it was incumbent on them to prove that there was fraud on the part of plaintiff. His Honor charged the jury that, if they found the plaintiff was entitled to a verdict, they should add to the amount so found interest thereon from date of the burning of plaintiff's storehouse."

The jury, in accordance with this instruction, having allowed the plaintiff interest on his claim from the 3d day of January, 1881, the date of the burning of the plaintiff's storehouse, rendered a verdict for the plaintiff for the amount claimed with interest thereon from the date of the fire, being the sum of \$2265.37. When the plaintiff came to enter up his judgment, he entered a remittitur for the sum of \$27.56, being the interest allowed by the jury from January 3d, 1881, the date of the fire, to March 10th, 1881; this was done without defendant's consent.

The defendant appealed on the following exceptions:

1. Because his Honor refused to allow the defendant to introduce in evidence a properly certified copy of the proceedings of D. O'Neill & Sons against W. W. Mars, attaching in the hands of this defendant whatever amount of money the said defendant was due this plaintiff, said proceedings being a record in the Circuit Court of the city of Richmond, State of Virginia, a Court having full legal jurisdiction of said proceedings.

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\*2. Because his Honor ruled that it was incumbent on the defendant to show fraud, although the plaintiff's complaint alleged that there was no fraud.

3. Because his Honor ruled that proofs of loss were served by plaintiff more than sixty days before the commencement of plaintiff's action herein, although no evidence was introduced as to the contents of said alleged proofs.

4. Because his Honor allowed plaintiff to introduce evidence that W. T. Branch, after the fire, said that the company would pay W. W. Mars, whether the said W. W. Mars paid his debts or not.

5. Because his Honor charged the jury that if they found that the plaintiff was entitled to a verdict, they should add to the amount so found interest thereon from the date of the burning of plaintiff's storehouse; the jury, in accordance with this instruction, having allowed the plaintiff interest on his claim from the 3d day of January, 1881, the date of the burning of plaintiff's storehouse.

6. Because his Honor refused to allow the defendant to introduce in evidence declaration of J. E. Caldwell that the boxes of goods in his possession just before the fire belonged to W. W. Mars, plaintiff aforesaid.

7. Because the rulings and charge of his Honor were in all other respects contrary to law.

[For subsequent opinion, see 17 S. C. 590.]

Mr. Eugene B. Gary, for appellant.

Mr. Ellis G. Graydon, contra.

July 31, 1882. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. This action is against the defendant, a corporation under the laws of Virginia, upon a policy which covered a house and a stock of merchandise of plaintiff, located in Abbeville County, afterwards consumed by fire. Among other defences, the answer set up the fact that the defendant had been garnisheed in the State of Virginia, under attachment proceedings, by a creditor of the plaintiff, a citizen of Charleston, to the amount of \$340, and that

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this \*proceeding was pending in Virginia. To sustain this defence, the defendant offered as evidence a certified copy of the proceedings in the Circuit Court of the City of Richmond, a court of record, to which plaintiff had been made a party. This evidence was ruled out by the presiding judge.

In the course of the trial, the declarations of W. T. Branch, a local agent of the defendant, made after the fire, to the effect that the company would pay for the loss, were received in behalf of the plaintiff against the objections of the defendant. There were other objections not necessary now to mention. The verdict was for the plaintiff for \$2265.37.

We think there was error in the rulings of the Circuit Judge upon the two matters above referred to. Mr. Drake says "That the operation of an attachment against a garnishee is compulsory. He has no choice but to pay obedience to the judgment of the court to whose jurisdiction he has been subjected, and the exercise of that jurisdiction effects a confiscation, for the plaintiff's benefit, of the debt due from the garnishee to the defendant. In this proceeding it is an inviolable rule that the garnishee shall not be

prejudiced, or placed in any worse situation than he would have been in if he had not been subjected to garnishment. That is, if obliged, as garnishee, to pay to the plaintiff the debt he owed to the defendant, he shall not be compelled again to pay the same debt to the defendant. When, therefore, he is sued for that debt either before or after he has been summoned as garnishee, he must be allowed to show that he has been, or is about to be, made liable to pay, or has paid, the debt under an attachment against the defendant in which he has been charged as garnishee." Drake, § 700.

He then proceeds to show to what extent this defence will avail the defendant, and how he may take advantage of it both when the garnishment is prior to or pending the suit brought by the defendant in the attachment against the garnishee for the debt, and also after judgment rendered against the garnishee. The substance of which is, that while the garnishment is pending, it will operate at least as a "continuance, or suspension of the action, or if judgment be render-

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ed, a stay of \*execution, which can be removed afterwards, or made perpetual in whole or in part, as the exigency of the case may require. Where the action is brought after judgment rendered against a garnishee, the Court pronouncing the judgment having jurisdiction of the action and of the person of the garnishee, such judgment is conclusive against parties and privies, and constitutes a complete defence to any subsequent action by the defendant against the garnishee, for the amount which the latter was compelled to pay, and this, though the Court be a foreign tribunal." Drake, § 700 et seq., and numerous cases referred to in the notes. *Campbell v. Home Insurance Co.*, 1 S. C. 158.

These principles are founded in good sense, and have been adopted in many of our sister States in the administration of their attachment laws, and we think they should have been applied and enforced here. The defendant proposed to prove by a certified copy of the proceeding in a court of record of the State of Virginia the pendency of the garnishment against them in that State. What effect this testimony would have had, whether causing a continuance, or judgment with a stay of execution, or whether the court in Virginia had acquired jurisdiction, we cannot now say. All this would have been for the Circuit Judge to consider, at his sound discretion. But we think the testimony was competent, and should have been received.

Next, as to the declarations of Branch. Branch, it seems, was a local agent of the defendant. His declarations were admitted, we suppose, upon the ground, that being agent, they were in law the admissions of his principal. The correctness of this ruling must depend upon the fact whether the admissions were in reference to a matter with-



in the scope of his agency. It is well established that an agent can bind his principal within the limit of his agency as fully as the principal could himself, and no doubt the declarations and admissions of the agent within that limit would also be binding. But the agent is powerless outside of his agency. He is as complete a stranger as any one else, as to all matters except such as have been entrusted to his care and authority.

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\*Now, was Branch an agent entrusted with such full powers as to be authorized to admit the liability of the defendant for the losses incurred by the plaintiff in advance of any action by the defendant itself? There was no testimony before the Court, as appears from the brief, as to the character of Branch's agency. It is simply stated that he was the local agent of the defendant. Where the declarations of an agent are offered and objected to, the first step required to make them competent is to prove the agency, and to show that in its legitimate scope it embraces the very matter about which the agent proposes to speak.

No one can be presumed to be the agent of another in the absence of all testimony. Nor can the limit of an agency be determined without some evidence as to the subject-matter over which the agent has charge. It is the duty of a party relying upon declarations and admissions of an agent to furnish this information to the Court before asking that they shall be heard. We do not think that the declarations of Branch were competent in reference to all matters of interest to the defendant simply because it was understood that he was the local agent of the company.

The policy stipulated that payment for losses should be made sixty days after proofs required by the company "shall have been received at the office of the company in Richmond, Va., and the loss shall have been satisfactorily ascertained and proved," as required by its terms. There is nothing in the policy charging Branch with the duty of ascertaining and determining when the company should be liable. It does speak of certain facts which must be furnished to the company, or its adjusting agent, but it does not appear what the powers of an adjusting agent were, nor whether Mr. Branch occupied that position. Mr. Branch may have been simply an agent to insure and to pay in case of loss. This would not necessarily carry the power to admit liability. He is incidentally referred to by some of the witnesses as an adjusting agent, but the testimony on the subject does not seem to have been direct and express, and besides is quite meagre. These declarations were not admissible on the ground that they were part of the res

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\*gestæ. *Patterson v. Railroad Co.*, 4 S. C. 154; *Aiken v. Telegraph Co.*, 5 S. C. 369.

We see no error in the exclusion of the

declarations of J. E. Caldwell. He was no party to the action, nor had he any interest therein. He was a competent witness, and might have been put upon the stand to prove the facts referred to in his proposed declarations. The admissions of the declarations of this party would have been in direct conflict with the rule in reference to hearsay, and they constituted no part of the *res gestæ*. See the cases *supra*.

Nor do we think that the rulings of the Circuit Judge as to the question of fraud were erroneous. If fraud was involved in the case at all, it constituted a matter of defence and was no part of the cause of action.

The error assigned as to the sixty days involved a question of fact, and it does not appear that the finding of the jury on that subject is without testimony.

It is the judgment of this Court that the judgment of the Circuit Court be reversed on the two first grounds mentioned above, and that the case be remanded for a new trial.

## 17 S. C. 521

## CRAWFORD v. CRAWFORD.

(April Term, 1882.)

[1. *Appeal and Error* ⇨1017.]

This court has no power to review the findings of fact by a referee, in an action at law, confirmed by the Circuit Judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3997; Dec. Dig. ⇨1017.]

[2. *Executors and Administrators* ⇨265.]

While the rule of law is that a creditor is paid his debt when he becomes executor of his debtor's estate and as such receives assets applicable to such debt, yet this rule does not apply when the assets so received are Confederate money, unless the creditor was willing to receive it in payment.

[Ed. Note.—Cited in *Finch v. Finch*, 28 S. C. 171, 5 S. E. 348, 13 Am. St. Rep. 605.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1012–1022; Dec. Dig. ⇨265.]

[3. *Executors and Administrators* ⇨275.]

But where the executor received Confederate money with an intention of accepting such money in payment of his debt, and then paid out part of it to demands of a lower rank, the estate being solvent, his debt should be credited only with the balance left, at its nominal value.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1082; Dec. Dig. ⇨275.]

Before Aldrich, J., Abbeville, February, 1882.

Action by Cornelia E. Crawford against A. E. Crawford, and S. A. Crawford, executors

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of James F. Crawford. The opinion \*states the referee's report, the order of the Circuit Judge, and the facts of the case. The plaintiff excepted to the order of the Circuit Judge because it overruled the exceptions to the Master's report. Those exceptions alleged error in the findings of law and fact by

the Master, quoting the language of the report, and were otherwise as follows:

4. Because it is respectfully submitted said Master erred in not taking into the account the amounts which the executor paid other creditors whose debts were of equal rank with that of the executor.

5. Because it is respectfully submitted said Master erred in holding that Confederate currency, received by the executor, could work a payment by operation of law for the face value of said Confederate currency, Confederate currency not being at any time legal tender, and could not, under such circumstances, work a payment by operation of law for more than the value of said Confederate currency.

6. Because it is respectfully submitted said Master erred in making his calculations, even according to the principles laid down in his report.

Mr. Eugene B. Gary, for appellant.

Messrs. Rice & Smith, W. C. Benet, contra.

July 31st, 1882, the opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In April, 1861, James F. Crawford, since deceased, executed a sealed note to his brother the defendant, S. A. Crawford, for \$1936.64, payable one day after date with interest from the 1st day of January preceding. James F. Crawford died, or was killed during the war. He left of force a last will and testament in which he appointed his wife, the defendant, Anaryllis, and his brother, the said S. A. Crawford, executor and executrix, both of whom qualified.

The debts of the estate were not very heavy, and the only property which seems to have been sold, was a lot of cotton, which brought \$2000, and a few cattle for \$350.

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These sales \*were made in 1864, and were paid in Confederate money to S. A. Crawford, aggregating \$2350.00. This executor paid debts of the estate, and other expenses, and liabilities of the deceased, during the years 1863, and 1864 to the amount of \$1028, a large portion of which were upon simple contract debts. At the close of the war he claimed to have on hand \$2000 of his receipts above, in Confederate currency which had become valueless.

Some time in 1880, he transferred the note which is the basis of this action to his wife, who in March, 1881, brought this action against him and the executrix. He made default, but A. E. Crawford, executrix, answered, and resisted the claim of plaintiff upon two grounds. 1st. That S. A. Crawford being the payee of the note, and having been the owner during his executorship, and having had assets of the deceased debtor in his hands sufficient to pay this debt, it was by operation of law extinguished. 2d. At all events, S. A. Crawford should be required to

account for the estate of the debtor, so that whatever might be in his hands should be discounted against this sealed note before any judgment should be rendered in this action.

The case although a law case was sent to a referee, who reported his conclusions as follows: 1st. As matter of fact, "that the executor had had assets in his hands sufficient to pay the debt; 2d. "That the facts show evidence of his intention to receive said assets in payment of his debts." And as matters of law; 1st. "That the debt in suit was extinguished by operation of law, the executor having had in his hands assets sufficient to pay the same; 2d. "That upon the note being transferred after it was due, it passed to the plaintiff with all the equities to which it was liable in the hands of the payee." This report was confirmed by the Circuit Judge and the complaint consequently dismissed with costs.

The appeal renews the exceptions to the Referee's report, which were overruled by the Circuit Judge. These exceptions raise several questions of fact, as well as of law; the questions of fact we cannot consider; the action, although heard by a Referee and the Circuit Judge without a jury, is yet an

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action \*at law. It is an ordinary money demand, by summons and complaint on sealed note, and was strictly triable by a jury. In such case this court has no jurisdiction of the facts; these belong primarily to a jury subject to review by the presiding judge on motion for a new trial, but not within the powers of this court. The fact that the case was submitted to a referee did not change its character; it was still a case at law, the referee being substituted as to the facts in the place of the jury. This substitution, however, had no other effect; it certainly did not convert the case into a case in chancery with appellate privilege to this court. We must then take the facts found by the referee, as fixed and established; we have no power under the constitution to look behind them, and this would be so even if we were satisfied that they had been erroneously established, for the reason, that in cases at law our powers are expressly limited to the correction of errors of law only.

But the questions of law raised in the exceptions are subject to our review, which we will proceed to consider. 1st: Was it error in the Circuit Judge to hold that the debt in suit was extinguished by operation of law, the executor having had assets in his hands sufficient to pay the same.

The rule in such cases is laid down in Williams on Ex'rs \*1187, as follows: "If a debtor makes his creditor, or the executor of his creditor, his executor, this alone does not extinguish the debt, though there be the same hand to receive and to pay; yet if the executor has assets of the debtor, it is an extinguishment because then it is within the rule



that the person who is to receive the money is the person who ought to pay; the debt, in other words, is not extinct unless upon a supposition that the executor has assets which he may retain to pay himself." This is the rule in this State, as it has been repeatedly held. In *Montaigne v. Keith*, 2 Hill, 340, the court said: "There cannot be a doubt about the matter; the moment the defendant was in funds, the debt due himself was paid and extinguished, and would no longer bear interest."

Assuming the fact upon which the error of law is here assigned to be true in its full sense, we could not do otherwise than overrule this exception; but we cannot shut our

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eyes to the further fact that the assets which the referee found in the hands of the executor were Confederate money. Such being the fact, in the application of the legal principles involved in this exception, a subsidiary question of law must also be considered, to wit, whether in law Confederate currency can be held to be such assets as would in the hands of a creditor executor, extinguish his debt against the estate by operation of law, as in cases of gold or other legal tender. The referee must have so held and the circuit judge concurred.

There are two well established principles in reference to the payment of debts; 1st. Nothing is a legal tender except gold and silver, or such currency as may constitutionally be made so, and consequently no creditor can be legally required to receive payment, against his will, of a debt in anything else but legal tender currency; 2d. A creditor may receive anything whatever, oak leaves, grains of sand, or anything else in payment, if he is willing to do so, and when so received, in the absence of fraud, or deception, the claim will be satisfied beyond revival. It is needless to cite authorities in support of these propositions.

Now, Confederate currency did not constitute a legal tender, and no creditor of the estate of the deceased could have been forced to receive it in payment of his claim. Nor could the executor, occupying the relation of creditor as well as that of executor to the estate as he did, have been legally required to receive it. He had all the rights of other creditors, and could receive or reject as he saw proper. There was error in law, therefore, in holding that because the executor had Confederate money, nominally sufficient to pay his debt, that it was thereby extinguished, regardless of the fact whether he was willing to receive it or not.

The findings of fact, however, by the referee and concurred in by the circuit judge, went further. He found in substance that J. A. Crawford, executor, had agreed to receive this money. He states in the report,

"that the facts show evidence of his intention to receive said assets in payment of his debt." We do not suppose that by this was meant that S. A. Crawford intended to receive these assets in full payment, whether

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there was enough to satisfy his claim or not, but that he was to receive it at its nominal value, and apply so much as might not otherwise be used to his note at that value. The report of the referee is not full, and the decree of the circuit judge dismissing the complaint simply confirms the report, and we suppose that in concluding that the executor's debt had been extinguished by the assets received by him, he was not allowed any credit for amounts disposed of in payment to other creditors, especially to debts of lower rank than his own.

A creditor executor, it is true, has the right to retain funds for the payment of his own debt of equal rank with others, and generally it is his duty to apply collections first to sealed demands in preference to unsealed obligations, and if he pays debts of lower rank he will not ordinarily be allowed a credit for such payment; but this rule is not inflexible. It was held in *Hinton v. Kennedy*, 3 S. C. 459, "that where the administrator of an entirely solvent estate pays simple contract creditors out of their order, reserving ample funds for the payment of specialty debts, equity will relieve him from the legal consequences of the technical devastavit." This seems to be the rule, and it should be applied here. This estate was entirely solvent, but a small portion of the property had been sold to pay debts, (nothing but the cotton and a few cattle,) and we do not think that the executor should be held to have committed a devastavit because he has applied a portion of the proceeds derived from this sale to debts of a lower rank than his own, especially where the creditors were willing to receive the money. He should be credited with the full amount of his payments. Under all the circumstances, the case should be remanded.

The referee having found as matter of fact, that the executor had agreed to receive the Confederate money on his claim before its transfer to the plaintiff, the note of the plaintiff should be credited with the amount received by him, first deducting such sums as he may have paid out for the estate, and for such claims as he may have held against his brother—the credit to be made at the nominal value of the confederate money, and applied at the date of his receipts, with the right

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\*on the part of the plaintiff to proceed with her suit for the remainder, if any.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for a new trial under the principles herein above.

17 S. C. 527

## CANTEY v. WHITAKER.

(April Term, 1882.)

[1. *Trial* ¶68.]

The Circuit Judge, who has large discretion in the direction of a trial, committed no error in receiving further testimony after the case was closed and partly argued, especially as the omission to offer such testimony at the proper time was the result of a misapprehension.

[Ed. Note.—Cited in *Woody v. Dean*, 24 S. C. 502; *Rembert v. R. Co.*, 31 S. C. 313, 9 S. E. 968; *State v. Howard*, 35 S. C. 200, 14 S. E. 481; *State v. Symmes*, 40 S. C. 388, 19 S. E. 16; *State v. Lucker*, 40 S. C. 550, 18 S. E. 797.

For other cases, see *Trial*, Cent. Dig. § 161; Dec. Dig. ¶68.]

[2. *Witnesses* ¶148.]

In action for the recovery of land brought by a remote alienee of one deceased, the defendant is not prohibited by the letter of the proviso to section 415 from testifying to communications and transactions between herself and the deceased as to the land in question; and she is, therefore, a competent witness.

[Ed. Note.—Cited in *Colvin v. Phillips*, 25 S. C. 231; *Hutzler Bros. v. Phillips*, 26 S. C. 146, 1 S. E. 502, 4 Am. St. Rep. 687; *Blohine v. Lynch*, 26 S. C. 304, 2 S. E. 136; *Huff v. Latimer*, 33 S. C. 258, 11 S. E. 758; *Brice v. Miller*, 35 S. C. 537, 548, 15 S. E. 272; *Rapley v. Klugh*, 40 S. C. 143, 18 S. E. 680; *Holden v. Cantrell*, 100 S. C. 280, 84 S. E. 829.

For other cases, see *Witnesses*, Cent. Dig. § 650; Dec. Dig. ¶148.]

Before Cothran, J., Kershaw, September, 1881.

Action by Charlotte A. Cantey against Ann W. Whitaker, for the recovery of land, commenced December 30, 1880.

Defendant's attorneys, in argument before the jury, claimed a verdict upon the ground, among others, that plaintiff had failed to prove any title to the land in dispute, and had failed to show that the land in dispute was embraced in any of the deeds offered in evidence. The presiding Judge said that he thought it was understood that the land described in the deeds embraced the tract in controversy, and had so entered it on his notes. Defendant's counsel said there was no such understanding, and he did not admit that the deeds embraced the disputed portion of land. The Judge then said he would allow plaintiff to supply the requisite proof if she could, and at the conclusion of the argument of defendant's counsel, plaintiff called E. B. Cantey, who testified that "He knew the land described in the deeds, and that the tract occupied by defendant was embraced in them and in the land now claimed by plaintiff." His Honor noted the exception

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of defendant to the introduction of this \*evidence, and plaintiff's counsel closed the argument before the jury. All other matters are stated in the opinion.

Messrs. J. T. Hay, T. H. Clarke for appellant.

Messrs. Chesnut & Workman, Kennedy & Nelson, contra.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice McGOWAN. This was an action for a tract of land by metes and bounds in the neighborhood of the town of Camden. Some years ago the land was owned by one E. E. Adamson, from whom both parties claim. Whilst Adamson owned the land, about 1851, he gave the defendant, Mrs. Whitaker, permission to build on the "Peter Old Field (part of said land), and live there as long as he pleased." The neighbors helped Mrs. Whitaker to build a house upon it, and she has lived there continuously ever since the year 1852. She was sworn as a witness, and stated that her claim was twenty acres, which had been staked off to her by "a blazed line on two sides, a road on one side, and a branch on the other; that about six acres were under fence; that she had used the land as her own, cutting wood and preventing others from trespassing on it; and that she had paid taxes on it for a number of years, etc. She produced no paper title.

In November, 1857, Adamson sold the tract (including the land where Mrs. Whittaker lived), to James Dunlap, who, in 1861, conveyed the same to John Cantey, who being in debt, and judgments against him, the land was sold by the sheriff of Kershaw county as his property, May 24, 1881, and finally, the plaintiff, Charlotte A. Cantey, received titles for the same. In none of these conveyances was there any allusion to Mrs. Whittaker, or any reservations in favor of her or any one else. The plaintiff, finding the defendant living on and claiming title to a part of the land included within her boundaries, brought this action against the defendant to try the title.

The defendant claimed the land under the statute of limitations, and being on the stand as a witness, proposed to prove by her own testimony what was said and done at the time

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she \*went into possession by Adamson, who is now dead. The presiding Judge excluded this testimony, holding that Adamson being dead, Mrs. Whittaker could not state communications or transactions with him as against Mrs. Cantey, the alienee of the land then owned by Adamson.

Under the instructions of the Judge, the jury returned a special verdict, giving the land to the plaintiff "with the understanding that the defendant live on the twenty acres as long as she pleases, or during her life." The judgment was entered accordingly, and the defendant appeals to this Court upon the following exceptions:

1, "That his Honor erred in excluding testimony offered by defendant as to transac-



tions and communications had by defendant with E. E. Adamson in reference to the land in dispute herein."

\* \* \* \* \*

8, "Because after plaintiff had closed her case and failed to prove that any of the deeds proved by her embraced the land in dispute, and after defendant's attorneys concluded their argument before the jury, in which they claimed a verdict on the ground that plaintiff had failed to prove title, his Honor allowed plaintiff to prove that said deeds did cover the land in dispute, and that by incompetent evidence; and defendant respectfully submits that his Honor erred in so doing."

As to the last ground of appeal, it is only necessary to say that the object of all judicial proceedings is to administer justice according to the facts as they exist, and although it is absolutely necessary to observe some rules of procedure, it is always very desirable that all the facts of a case should come out and be considered. In directing a trial upon circuit, the Judge in the interest of justice, must have a large discretion. We see no error of law in his allowing testimony to be offered after the case was closed and partly argued, especially as the Judge, if not the counsel, had been under a misapprehension as to whether the fact was admitted. *Kairson v. Puckhaber*, 14 S. C. 627, and the authorities there cited.

As the case has to go back, it would not be proper now to consider the other grounds of

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appeal except the first, which alleges \*error "in excluding evidence offered by defendant as to transactions and communications had by defendant with E. E. Adamson in reference to the land in dispute herein." The old rule upon the subject was that no one was a competent witness who was interested in the event of the suit on the side of the party offering him. The tendency in modern times has been to enlarge the field of competency and to allow objections to go rather to the credibility than to the admissibility of witnesses.

The Code of Procedure, section 414, makes the sweeping provision that "no person offered as a witness shall be excluded by reason of his interest in the event of the action." This is the rule declared, and section 415 extends that rule even to the parties to the action, but at the same time makes some exceptions, "That parties shall not be examined in regard to any transaction or communication between such witness and a person deceased, insane, or lunatic as against a party then prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person," etc.

The plaintiff now owns and is suing to recover the land, which was owned by Adamson at the time of the alleged "transactions"

with him, as to which it is claimed that those "transactions" gave the defendant rights, and the said Adamson being now dead and unable to make his own statement, it would seem that the testimony comes within the principle of the rule which excludes testimony as against one suing as assignee of property in question. But whilst, as it seems to us, the plaintiff as alienee is within the mischief intended to be remedied by the exception, she is not within its express terms. She is third or fourth alienee of the land from the deceased person, but she is neither "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor" according to the terms of the exception, which enumerated those intended to be excepted, and this Court, whose only duty it is to declare the law, cannot amend it so that its terms will embrace a case, which we may suppose to be within the principle upon which the law was founded, but not within its express terms. *Guery, Trustee v. Kinsler*, 3 S. C. 426.

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\*In that case the plaintiff sued in the character of a trustee, succeeding by appointment the original trustee, Pearson, who was dead. The action was upon a bond given to Sarah Brown, testatrix, who had by her will appointed the first trustee. The defence was that the bond had been paid to the first trustee, and the obligor of the bond was offered to prove the payment, the person to whom the alleged payment was made being dead. The Court held that the principal obligor was competent to prove payment of the bond to the deceased trustee, "the general rule being that interested persons are competent witnesses, and the plaintiff not being a party against whom such evidence is excluded by the terms of sec. 415 of the Code of Procedure."

Chief Justice Moses, in delivering the judgment of the Court, said: "The section is in restriction of a general right, and we are not at liberty to extend it beyond its clearly expressed design. If there is doubt arising from any ambiguity of expression, it would be proper, if possible, to reconcile it with the intention of the legislature, if that could be ascertained by the means through which courts are permitted to reach it. Where, however, an exception is made by words of description, including only persons referred to as occupying particular relations, it would be transcending our authority and usurping the functions of another department to include others who, though they may be within the mischief, have not been so recognized and protected by the enactment. \* \* \* The New York Code contains a provision of the same character, though less extensive in the relations to which it applies. It has been held by the courts of that State that its operation must be restricted to the parties named in it, and cannot be extended to embrace

those who, though within its spirit, are not within its letter." *Hight v. Sackett*, 34 N. Y. (7 Tiff.) 447, and other authorities.

It is contended that if the evidence had been admitted it would only have proved an estate at will, and that could not have defeated the plaintiff's right to recover. We cannot tell in advance what the witness would have proved, and we do not undertake to say now what would be its proper legal

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effect, \*but we only hold that the plaintiff did not fall within the exceptions expressly enumerated in sec. 415, and that we cannot enlarge them by judicial construction, and therefore the testimony should have been admitted for what it was worth.

The judgment of this Court is that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

### 17 S. C. 532

Ex parte YOWN.

(April Term, 1882.)

#### [1. *Deeds* ⇨120.]

A deed conveyed land to "S., her heirs and assigns (for and during her natural life, should she die without issue) \* \* \* to have and to hold the said tract unto the said S., her heirs and assigns for and during her natural life as aforesaid. Should she die without bodily issue, the said tract to revert to the children of D., deceased. But should the said S. have a child or children, then the said land to rest in them absolutely." S. died without issue. *Held*, that, by this deed, S. took an absolute estate, which, at her death, intestate, passed to her heirs at law.

[Ed. Note.—Cited in *Smith v. Clinkscals*, 85 S. E. 1068.]

For other cases, see *Deeds*, Cent. Dig. § 440; Dec. Dig. ⇨120.]

#### [2. *Descent and Distribution* ⇨82.]

This deed purported to have been made in pursuance of a prior agreement, and such agreement recited that S., the widow of one D., and the five sons of D. by a former marriage, had agreed to divide the property, giving to "S. one-sixth in lieu of all claim of dower, the property coming to her under said agreement, she hereby agrees that she will take good care of, and if she should die without bodily heirs then she hereby agrees and covenants that, at her death, all the remaining property shall revert back to the heirs of D"; provided, the said sons took care of her while she lived if she became helpless or needy. The widow having become helpless and needy and not being assisted by the sons, *held*, that the condition stipulated as that upon which the land was to revert not having been performed, the fee remained in S. under this agreement, and it mattered not that the sons were ignorant of her needs.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 318; Dec. Dig. ⇨82.]

#### [3. *Trusts* ⇨30.]

There was nothing in this agreement or deed in the nature of a covenant to stand seized to uses.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 39, 40; Dec. Dig. ⇨30.]

#### [4. *Descent and Distribution* ⇨82.]

There is nothing in the agreement that would authorize the Court to reform the deed because of accident or mistake, the agreement itself showing an intention that the fee should not be reduced to a life estate except upon a contingency which never happened.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 318; Dec. Dig. ⇨82.]

#### [5. *Evidence* ⇨236.]

The declarations of S. as to the nature of her estate amounted to no more than the expressions of an opinion, and were, therefore, inadmissible as evidence against her heir at law.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 879; Dec. Dig. ⇨236.]

[This case is also cited in *Glenn v. Jamison*, 48 S. C. 319, 26 S. E. 677; *Mattison v. Mattison*, 65 S. C. 349, 43 S. E. 874; *Clinkscals v. Clinkscals*, 91 S. C. 61, 74 S. E. 121; *Egan v. Touchberry*, 93 S. C. 572, 77 S. E. 706, without specific application.]

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\*Before Fraser, J., Anderson, October, 1881. The opinion states the case.

Messrs. Featherston & Benet, B. F. Whitner, for appellants.

Mr. J. L. Tribble, contra.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. John L. Davis died intestate in 1863, leaving as his heirs at law five sons, children of a former marriage, and his widow, Sallie Davis. The heirs being all of age, determined to close up the estate without administration, and, for this purpose, on August, 1863, entered into an agreement, which was reduced to writing, whereby agents were appointed to sell the estate and divide the proceeds; but one-sixth, embracing the land about which this controversy arises, does not seem to have been sold by these agents. By this agreement, the widow, upon certain conditions therein stated, agreed to share equally with the children, and to take her share for life, with remainder to the other heirs, in case she should die without issue. The material terms of this agreement are expressed in the following language: "The said Sallie Davis, the widow, agreeing to receive a child's share of said estate, in lieu of all claim of dower in said estate, the property coming to her under said agreement, she hereby agrees she will take good care of and if she should die without bodily heirs, then she hereby agrees and covenants that, at her death, all the remaining property shall revert back to the legal heirs and representatives of the before-named John L. Davis, deceased; provided, the children of the said deceased shall, on their part, faithfully carry out their part of said agreement—they, the before-named Wm., T. W., J. H., T. G., and G. W. Davis, for and in consideration of the said Sallie Davis, the widow, allowing the share coming to her as aforesaid to



revert back to them at her death, do covenant and agree that, should the said Sallie Davis, by any unforeseen accident, become helpless or needy in her lifetime, they bind themselves, their heirs and assigns, to take care of her while she lives."

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"In pursuance of this agreement, the five sons of the intestate, on August 26th, 1863, executed a deed to Sallie Davis for the tract of land, which (or rather the proceeds of its sale) is the subject-matter of controversy. This deed, after referring in its preamble to the above-mentioned agreement, proceeds in the following words: "In consideration of the before recited agreement, and in consideration of the sum of twelve hundred and ten dollars to us paid by Sallie Davis, have bargained, granted, sold, and by these presents do grant, bargain, sell, and release unto the said Sallie Davis, her heirs and assigns (for and during her natural life, should she die without issue) all that plantation, etc., containing one hundred and twenty acres more or less, bounded \* \* \* To have and to hold the said tract of land unto the said Sallie Davis, her heirs and assigns, for and during her natural life as aforesaid. Should she die without bodily issue, the said tract of land to revert to the children of the said John L. Davis, deceased. But should the said Sallie Davis have a child or children, then the said land to rest [sic] in them absolutely forever."

Sallie Davis died intestate in 1880, without issue, leaving as her only heir at law her sister, the petitioner, Polly Yown, and administration of her estate was duly committed to the other petitioner, J. L. Brock. After her death, the sons of J. L. Davis commenced an action for partition of the tract of land conveyed by the above-mentioned deed to Sallie Davis, making all the heirs of J. L. Davis parties, but not making the heir of Sallie Davis a party. Under this proceeding the land has been sold, and the proceeds are now in the hands, or under the control of the Court. At this stage of the case, Polly Yown filed her petition, claiming the proceeds of the sale as heir of Sallie Davis; and J. L. Brock filed his petition, asking that so much of said proceeds as may be necessary for the payment of the debts of Sallie Davis should be paid over to him as her administrator.

The Circuit Judge held that Sallie Davis had an estate in fee simple in said tract of land, but inasmuch as the petitioners did not seek to set aside the sale or disturb the purchaser in his possession, but were content

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to go upon the proceeds \*of the sale, he decreed that so much of said proceeds as would be necessary to pay the debts of Sallie Davis should be paid to her administrator, and that the balance should be paid to Polly Yown as her sole heir at law. From this decree the heirs of John L. Davis appeal, and the real question made is whether Sallie Davis was

entitled to an estate in fee simple in said fund or only to an estate for her life.

There can be no doubt but that at the death of John L. Davis, Sallie Davis, his widow, was entitled, as one of his heirs, to one-third of his estate in fee simple. This she could surrender in whole or in part, both as to the amount of her share and the quality of the estate she had therein. It does not seem to be contested that she has consented to cut down her interest from one-third to one-sixth, and the practical question is whether she has cut down her estate therein from a fee simple to an estate for her life only, with remainder to the other heirs of John L. Davis. The appellants contend that she has done so, and for this purpose rely upon the terms of the above-mentioned deed, construed in connection with the agreement. But even if these two papers be construed together, we are unable to perceive how such a result can be reached. The most that can be said is, that the agreement indicates a willingness on the part of Sallie Davis to reduce her estate to an estate for life, in the event that two conditions shall be fulfilled: 1st, that "she should die without bodily heirs." 2d, that should she "become helpless or needy in her lifetime" that the other heirs would "take care of her while she lives."

The first of these conditions was fulfilled, she having died without leaving any heirs of her body, but the Circuit Judge finds, as matter of fact, and we think his finding is fully supported by the evidence, that the second condition was not performed. It will not do to say that the sons were never called upon to render any assistance to Sallie Davis, and did not know of her helpless and needy condition, and were, therefore, not in fault in not performing the duty required of them by this condition. The proviso upon which she consented by this executory agreement that her estate should be cut down to a life estate was, that they were to take care of her while

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\*she lived, that is, look after her wants and see that she was properly provided for. This, the testimony shows, they wholly failed to do, and thus the condition upon which her estate was to terminate with her life wholly failed.

This, then, being the proper construction of the agreement, what is the effect of the deed construed, either separately or in the light of such agreement? Looking to the terms of the deed alone, we think it plain that it conveyed an estate in fee simple and not an estate for life merely. The words "do grant, bargain, sell, and release unto the said Sallie Davis, her heirs and assigns," are certainly the most appropriate words that could be used to create an estate in fee simple, and the subsequent words used cannot have the effect of cutting that estate down to a life estate. The words immediately following those just quoted, "for and during her natural life should she die without issue," can-

not have any more force and effect than words of similar import used in McAllister's will, by which he gave to N. M. Arnold a certain tract of land "in fee simple for life," and there it was held that the devisee took an estate in fee, and that the superadded words "for life" must be "regarded as repugnant to the estate already conferred, and should be rejected." *McAllister v. Tate*, 11 Rich. 515 [73 Am. Dec. 119].

The words to Sallie Davis, "her heirs and assigns," in the case now under consideration, are practically the same as the words to N. M. Arnold, "in fee simple," and the additional words "for and during her natural life should she die without issue," are in effect the same as the words "for life" in McAllister's case. This case is even stronger than that, for there the question arose under a will, where greater latitude is allowed in seeking for the intention, while here the question is as to the construction of a deed, where one of the rules is that its terms must be taken most strongly against the grantor.

The same remarks will apply to the terms used in the habendum clause, "to have and to hold the said tract of land unto the said Sallie Davis, her heirs and assigns, for and during her natural life as aforesaid"—the superadded words "for and during her natural life" must be rejected as manifestly

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repugnant \*to the estate already secured. And the words "should she die without bodily heirs the said tract of land to revert to the children of the said John L. Davis, deceased," amount to nothing more than a bungling attempt to create a limitation over by way of executory devise, which, of course, cannot be done by deed. We think, therefore, that the Circuit Judge was clearly right in the conclusion which he has reached, and that he is fully supported by the authorities cited by him. *Edwards v. Edwards*, 2 Strob. Eq. 101; *Allen v. Fogler*, 6 Rich. 54, to which may be added the case of *Adams v. Chaplin*, 1 Hill Eq. 265.

It is not unimportant to bear in mind that Sallie Davis was unquestionably once invested with an estate in fee; that she has never, by any conveyance, parted with that estate; and that the most she has done was to agree that such estate should be reduced to a life estate only upon the performance of a certain condition by the appellants, which they have failed to perform, and that the deed which appellants claim has, by estoppel, cut down her fee to a life estate, if construed by the light of its own terms only, must be regarded as creating in her an estate in fee, and not an estate for life merely; and even if construed in connection with the preceding agreement, it cannot, by estoppel, operate to defeat the real intention of the parties, which was that the estate of Sallie Davis

was to terminate with her life only in the event that the conditions named, one of which has failed, should be fully performed.

We are unable to see how "the agreement as acted upon by the deed," can be regarded as a covenant to stand seized to uses, whereby Sallie Davis reserved a life estate to herself with remainder to the other heirs of J. L. Davis, as contended for by one of the counsel for appellants. These papers do not purport to rest, and are not in fact based upon such a consideration as is necessary to support that species of conveyance. And even were they regarded as a covenant to stand seized to uses, the construction contended for by the appellants would defeat what we have seen was the real intention of the parties.

Nor can we see that the appellants have made a case warranting the exercise of the

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power of the Court to reform agreements upon the ground of accident or mistake, for it seems to us that the conclusion reached by the Circuit judge leaves the estate of Sallie Davis exactly where she intended it should be left in the event of the failure of either conditions upon which it was to take a different direction. It is conceded on both sides that, if she had died leaving issue, her estate was to remain what it originally was, a fee simple, and would have descended to such issue as her heirs; and inasmuch as it would not be possible to know with certainty whether she would have issue until her death, it was necessary that the fee should continue in her. And by the terms used in the agreement, Sallie Davis practically said, I agree that my estate, which is now a fee simple, shall, at my death without issue, be reduced to a life estate with remainder to the sons of Davis, provided they will take care of me in the event of my becoming helpless or needy; but, if these conditions are not fulfilled, then my estate is to remain as it is now, a fee simple. Hence, until these conditions were fulfilled, the estate originally in her could not be cut down to any lesser estate. She has never, by any conveyance, parted with any portion of her estate, and has only agreed that it should be reduced to a life estate upon a contingency which has never happened.

The only remaining inquiry is, whether the declarations of Sallie Davis as to the nature of her estate were competent. That was a question of law upon which her declarations, even if otherwise competent, would amount to nothing more than the expression of an opinion, and were, therefore, clearly incompetent.

The judgment of this Court is that the judgment of the Circuit Court be affirmed.



## 17 S. C. 538

## SMITH &amp; CO. v. BRYCE.

(April Term, 1882.)

[1. *Jury* ⇐10.]

In all cases where the right to a trial by jury existed at the adoption of the constitution of 1868, such right is retained, and must "remain inviolate." Art. I., § 11.

[Ed. Note.—Cited in *Frazee v. Beattie*, 26 S. C. 351, 2 S. E. 125.

For other cases, see *Jury*, Cent. Dig. §§ 15, 16, 27½; Dec. Dig. ⇐10.]

[2. *Jury* ⇐14.]

In an ordinary action on an open account  
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or account stated, presenting \*no special features of equitable cognizance, the parties are entitled to a trial by jury, even though the examination of a long account may be involved. Section 295 of the Code must be construed to apply to such cases only as were not triable by jury prior to 1868.

[Ed. Note.—Cited in *Ferguson v. Harrison*, 34 S. C. 170, 174, 13 S. E. 332; *Wilson v. Township of York*, 43 S. C. 303, 21 S. E. 82; *Givens v. North Augusta Electric & Improvement Co.*, 91 S. C. 424, 74 S. E. 1067.

For other cases, see *Jury*, Cent. Dig. § 68; Dec. Dig. ⇐14.]

[3. *Jury* ⇐28.]

In a common law action, an order of reference to take the testimony and state the accounts was objected to by defendant upon the sole ground that no examination of a long account was involved. When the report of the referee was made, and called in the Circuit Court for a hearing, defendant demanded a trial by jury, *Held*, that all the issues not being referred, there was no waiver of the right to a jury trial.

[Ed. Note.—Cited in *State v. Pacific Guano Co.*, 28 S. C. 70, 5 S. E. 167.

For other cases, see *Jury*, Cent. Dig. §§ 176-196; Dec. Dig. ⇐28.]

[4. *Jury* ⇐13.]

Where both legal and equitable issues are involved in a case, each must be tried by its appropriate tribunal.

[Ed. Note.—Cited in *McGee v. Hall*, 23 S. C. 392; *Sale v. Meggett*, 25 S. C. 81; *Price v. Middleton & Ravenel*, 75 S. C. 113, 55 S. E. 156.

For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. ⇐13.]

[5. *Jury* ⇐13.]

In action by a cotton factor against his principal for balance due on an account, the defendant alleged that but for the plaintiff's unauthorized delay in selling the cotton shipped, the account would have been paid. *Held*, that this was not an equitable defense.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. ⇐13.]

[6. *Jury* ⇐13.]

A defendant is not deprived of the right to have a purely legal claim set up by plaintiff tried by a jury by the fact that his answer sets up an equitable defense.]

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 59; Dec. Dig. ⇐13.]

Before Hudson, J., Spartanburg, April, 1881.

Action by B. R. Smith & Co. against John E. Bryce, commenced January, 1880.

Upon the points considered by this Court, the judgment of the Circuit Court was as follows:

This action is by the plaintiffs, who are commission merchants and cotton factors of Boston, Mass., against their principal, John E. Bryce of Spartanburg, seeking to recover a balance alleged to be due them on an account stated between them. At a previous term of this Court, the case being called for hearing, his Honor, Judge Wallace, against the consent of the defendant, it appearing that a long accounting is involved in the action, referred the matter to a referee to take testimony and ascertain the balance due on the account and report the same to this Court. This work has been done by the referee. At the hearing on report of the referee at the present term, the defendant, through his counsel, the juries having been discharged, demanded a trial by jury, and protested against a trial by the Court upon the report of the referee. The plaintiffs insisted upon a trial without a jury. I take it for granted that if the question had been urged before Judge Wallace he would not have, against protest, ordered a reference. But the cause having taken this course under a previous

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order of this Court, \*I did not feel that I should arrest its further progress and remand it to trial by jury.

Besides, the action, though in form in assumpsit, is between parties standing in a fiduciary relation, and does involve a statement of accounts. The jurisdiction of a court of equity may well be invoked to determine such an adjustment of accounts, and this view of the case possibly induced the compulsory reference. We are not disposed to hold sec. 295 of the Code as applicable to actions at law, unconstitutional as violating the right of trial by jury, but look upon it as a provision of law in furtherance of the ends of justice. It is only in actions at law containing features of equitable jurisdiction that compulsory references are allowed, and this is one of that class.

All other matters are stated in the opinion.

Mr. R. W. Shand, for appellant.

Messrs. J. S. R. Thomson, Ralph K. Carson, contra.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. The plaintiffs, who are cotton factors and commission merchants, doing business in the city of Boston, brought this action on an account for money advanced to the defendant at divers times between October 31, 1876, and December 5, 1877, alleging that no part thereof had been paid except as stated in the complaint, to which is annexed a copy of the account as an exhibit. They also allege that on March 1, 1878, an account was stated between the plaintiffs

and the defendant by which a balance of six hundred and ninety-seven dollars and five cents was found to be due by defendant to the plaintiffs, and they demand judgment for such balance with interest from March 1, 1878.

The defense mainly relied upon by the defendant was that, though it was true that the plaintiffs had advanced him large sums of money from time to time, to be used in buying cotton to be shipped to the plaintiffs for sale on commission, yet he had shipped a sufficient amount of cotton to refund these ad-

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\*vances if the same had been sold as directed by the defendant; but that plaintiff, by delaying the sale, in violation of such instructions, had caused a loss which resulted in throwing the balance against the defendant.

The case being at issue was docketed by the plaintiff's attorneys on Calendar No. 1, when an order was moved for by plaintiffs to refer the cause to a referee, on the ground that it was a case requiring the examination of a long account. Defendant, by his counsel, objected to the reference on the ground that it was not a case requiring the examination of a long account. On hearing the complaint, Judge Wallace overruled the objection, and passed the following order: "It appearing that a settlement of a long account is involved in this action, it is ordered that it be referred to Geo. W. Nicholls, Esq., as special referee, to take testimony and state all the accounts of the parties in this action and report the same to this Court."

The referee made his report, finding as matter of fact that the exhibit filed with the complaint is a correct statement of the account between the parties, and that defendant "is not entitled to any discount, set-off, or counterclaim by reason of the plaintiff's not selling the cotton immediately on arrival, or from any want of diligence in failing to secure the best price in selling said cotton," and as matter of law that the defendant is indebted to the plaintiffs in the sum mentioned as the balance due in the complaint, with interest from March 1st, 1878.

The case being still on Calendar No. 1, was not reached until after the juries were discharged for the term, and when it was taken up by consent, the defendant insisted upon his right to a trial by jury, and objected to a hearing without a jury. The Circuit Judge overruled the objection, and required the parties to proceed with the trial, to which ruling the defendant excepted. After argument, the Court rendered judgment in favor of the plaintiffs for the amount found to be due by the referee, and from this judgment defendant appeals upon various grounds. We do not, however, propose to consider any of these grounds but the first, which raises the question whether the defendant was en-

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titled to have the case \*tried by jury, inasmuch as, under our view, the case must go back for a trial by a jury, and it might be premature to consider questions upon the merits which may be presented at another trial, in a different light, and under a different state of facts.

The only question, therefore, is whether the case was such as to entitle the defendant to demand a trial by jury. To determine this question, it is only necessary to inquire whether this was a case of which the Court of Equity could have taken jurisdiction at the time of the adoption of the present Constitution, for it is not pretended that it falls within any of the other classes of cases in which the parties did not then have a right to a trial by jury; because, if it were not such a case, then clearly the defendant had a right to a trial by jury, which right is secured to him by the express terms of the Constitution, Art. I., Sec. 11. "The right of trial by jury shall remain inviolate," that is, wherever that right existed at the time of the adoption of the Constitution, such right should "remain"—continue inviolate.

It is very manifest that the Court of Equity could not have taken jurisdiction of this case, for it was nothing but an ordinary action on an open account, or, as it is claimed in one of the paragraphs of the complaint, an action upon an account stated; and regarded in either light, it is clear that it presented no ground of equitable cognizance. The remedy at law was plain, adequate, and complete, as much so as if it had been an action on an ordinary merchant's account or on a blacksmith's account.

It is quite true that the jurisdiction of the Court of Equity in matters of account was well settled, but we do not understand that it was ever supposed that a Court of Equity could take jurisdiction of every case in which it was sought to recover the amount of an account or a balance due thereon, and certainly not on an account stated, for that presupposes that the parties have already come to an accounting, and ascertained the balance due, and this would supersede the necessity for calling into action the machinery of a Court of Equity, which it was supposed was

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more peculiarly adapted to \*taking and stating accounts between parties. To give that Court jurisdiction there must be some feature in the case peculiarly belonging to equity proceedings.

As is said by Marshall, C. J., in *Fowle v. Lawrason*, 5 Peters, 503: "It cannot be admitted that a Court of Equity may take cognizance of every action for goods, wares, and merchandise sold and delivered, or of money advanced when partial payments have been made, or of every contract, express or implied, consisting of various items on which different sums of money have become due



and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a Court of Chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a Court of Equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required in order to induce a Court of Chancery to exercise jurisdiction."

We are unable to discover in this case anything which imparts to it any feature of equitable cognizance. There is no allegation of any complexity in the account requiring the aid of the machinery of a Court of Equity for its proper adjustment, no allegation of any difficulty in making the necessary proof before the jury, or of any obstacle in the way of a proceeding at law, no demand for a discovery, nothing to indicate that the plaintiffs have not a plain, adequate, and complete remedy at law. Indeed, the plaintiffs do not ask for an accounting, and, on the contrary, the whole frame of their complaint shows that no accounting is necessary or desirable. They simply present a plain legal demand, and demand a judgment which a court of law is quite as competent to render as a Court of Equity would be.

It is true that the language used in Sec. 295 of the Code seems to be broad enough

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to authorize a reference without \*the consent of the parties, in any case where the examination of a long account is necessary, but this language must be construed as applying only to those cases in which a trial by jury is not secured to the parties, in order to avoid a conflict with that provision of the constitution guaranteeing that right. We think, therefore, that the defendant was entitled to have his case tried by a jury, and that the Circuit Court erred in denying him that right.

It is contended, however, by the respondents that the appellant has waived his objection to the order of reference, based upon the ground of his constitutional right to a trial by jury, inasmuch as the only ground that he took in opposition to that order was, that this was not a case requiring the examination of a long account, and not that it was a case in which he had a right to a trial by jury. It will be observed that, by the terms of the order of reference, the issues in the action were not referred to the

referee to be heard and determined by him, but he was simply required "to take testimony and state all the accounts of the parties in this action, and report the same to this Court;" and as Sec. 295 of the Code, in subdivision 1 provides that the referee "may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein," the defendant might well have supposed that the object of the order of reference was not to preclude him from his constitutional right of trial by jury, inasmuch as the order did not authorize the referee to hear and determine the issue, but simply to take the testimony, state the accounts, and report the same to the Court, and that, when the report came in, the question as to the mode of trial could be made. Accordingly, when the report was made to the Court, the question as to the mode of trial was at once raised, and we think it was in time, inasmuch as up to that time there had been no trial of any of the issues in this action.

Again, it is contended that the defense set up by the answer was an equitable one, and thereby the case was converted into an equity case. Even were this so, it would not deprive the defendant of the right to have the legal issues presented by the plaintiff's claim tried by a jury. Under the pecu-

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iar \*system of pleading and practice introduced by the Code, a case may present both legal and equitable issues, and in such an event, it has been held, in *Adickes v. Lowry*, 12 S. C. 108, that the proper practice is, that the issues should be separated, and each tried by its appropriate tribunal. Hence, even if it should be conceded that the answer set up an equitable defense, the defendant would not thereby lose the right to have the purely legal claim set up by the plaintiffs tried by a jury.

We are, not, however, prepared to concede that the answer must necessarily be regarded as setting up an equitable defense. While it is true that a principal might have gone into the Court of Equity for the purpose of demanding an account from his agent or factor, yet it does not follow that this would have excluded a court of law from taking jurisdiction of the question, whether all proper credits had been allowed by the agent or factor on an account upon which he had brought an action in a court of law against his principal. And this is really what the defense set up in this case amounted to.

The judgment of this Court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that Court for a new trial.

## 17 S. C. 545

## BURNETT v. BURNETT.

(April Term, 1882.)

[1. *Deeds* ⇨120; *Trusts* ⇨140, 151.]

A father executed a deed whereby in consideration of the "affectionate love I have for my daughter B., and having special confidence in my brother C. and M. as trustees, I give to my daughter and the lawful heirs of her body the following property, or to the trustees for her and her heirs' use and benefit, ninety-two acres of land \* \* \* reserving the use of the same during my life." *Held*, that the estate of the daughter was a fee-conditional, and at her death it passed per formam doni to the heirs of her body.

[*Ed. Note.*—Cited in *Hendrix v. Seaborn*, 25 S. C. 487, 60 Am. Rep. 520; *Gadsden v. Desportes*, 39 S. C. 144, 17 S. E. 706; *Miller v. Graham*, 47 S. C. 294, 25 S. E. 165; *Owings v. Hunt*, 53 S. C. 197, 31 S. E. 237; *Crawford v. Masters*, 98 S. C. 461, 82 S. E. 794.

For other cases, see *Deeds*, Cent. Dig. § 454; *Dec. Dig.* ⇨120; *Trusts*, Cent. Dig. §§ 184, 195; *Dec. Dig.* ⇨140, 151.]

[2. *Trusts* ⇨131.]

It is regarded as a conveyance to trustees (which is doubtful), the estate both in B. and the heirs of her body would be of like quality, and there being nothing for the trustees to do, the statute would execute the uses.

[*Ed. Note.*—Cited in *Archer v. Ellison*, 28 S. C. 243, 5 S. E. 713.

For other cases, see *Trusts*, Cent. Dig. § 175; *Dec. Dig.* ⇨131.]

[3. *Trusts* ⇨151.]

The heirs of the body take the land per formam doni, but subject to the debts of the first taker.

[*Ed. Note.*—For other cases, see *Trusts*, Cent. Dig. § 195; *Dec. Dig.* ⇨151.]

[4. *Trusts* ⇨616.]

The first taker had the power of alienation during her lifetime, but \*she could not devise this land, and therefore a sale by her executor for the payment of her debts under a power given to him in her will was without authority.

[*Ed. Note.*—For other cases, see *Wills*, Cent. Dig. §§ 1418-1430; *Dec. Dig.* ⇨616.]

[5. *Appeal and Error* ⇨707.]

The pleadings not being set out in the brief, this court cannot consider exceptions alleging error of the Circuit judge in passing upon matters not embraced in the pleadings.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. § 2942; *Dec. Dig.* ⇨707.]

Before Fraser, J., Spartanburg, June, 1881.

Action by J. W. Burnett and Margaret his wife, against Marcus Burnett, Matthew Burnett, William M. Kinney, and Mary his wife, and J. B. Davis, executor, commenced January 25, 1879. To the facts stated in the opinion it will be necessary to add only that William M. Kinney and Matthew Burnett were the purchasers of the land sold by Davis, as executor.

The case was referred to C. P. Wofford, Esq., as special referee, who made an able report, and the cause came on to be heard on exceptions by both sides to this report. The Circuit decree was as follows:

I concur with the referee in his construction of the deed of Mark Cantrell to Mary Burnett and also in the conclusion that the land was liable for Mary Burnett's (afterwards Mary Hammett's) debts after her death. I do not see that any other conclusion is consistent with the principles on which the cases referred to in the report are based. At the same time this Court is bound by the decision in *Jones ads. Postell et al.*, that such an estate cannot be aliened by a devise—creating a liability for debt is an act done in the lifetime, and a devise can only take effect at the death. A devise cannot change its essential character by making it a devise to pay debts, instead of a devise for any other purpose. If the land is liable for the debts, it must be by operation of law, and must be subjected to them in the way provided by law, and not in or through the operation of a devise to executors with a power of sale. There being no valid devise, the power of sale falls with it.

The amendment to rule 55 of the Circuit Court directs that no partition of real estate shall be made without "due provision made for the payment of debts."

The possession of this land held by Mat-

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thew Burnett and \*William and Emiline McKinney, under the deeds of John Bankston Davis, the executor, after notice from the other parties of their objections to the sale is such an exclusive and adverse one as ought to make them liable for rent, and ought not to entitle them for improvements made for their own purposes, and in defiance of the rights of the other children. A man could be improved out of his estate against his will and protest if such a claim were allowed.

It is therefore ordered and adjudged that the deeds executed for these lands by the executor be delivered up by Matthew Burnett and William and Emiline McKinney to the Clerk of this Court to be cancelled by him, and that the notes given to the executor for the purchase money be given up by him, and any money received on account of these purchases be repaid to the purchasers respectively. That the said two tracts of land be sold.

From this decree plaintiffs appealed on the following exceptions, alleging error:

1. In holding that the land in controversy was liable for the payment of the debts of Mary Hammett, deceased.

2. In not holding that under the deed of Mark Cantrell the children of Mary Hammett took a fee simple estate in said lands.

3. In ordering a sale of said land when there was no proof of debts more than could be paid by the other property of Mary Hammett already sold by the executor.

4. In holding that the referee could pass upon other issues than those referred to him and embraced in the pleadings.

5. In making a decree not within the pur-



view of the pleadings, nor relevant to the issues upon which testimony was taken.

6. In holding that even if the children of Mary Hammett are liable for her debts, such liability could be enforced in this action.

7. In holding that the land described in the pleadings is assets in the hands of the children of Mary Burnett for the payment of her debts.

8. In not decreeing that the defendants, or some of them should pay the costs of this action.

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\*9. In not holding that the plaintiffs are entitled to the relief demanded in the complaint.

Defendant, J. B. Davis, appealed on the following exceptions, alleging error:

1. In holding that the terms of the deed from Mark Cantrell to Mary Hammett did not convey a fee simple estate to Mary Hammett.

2. In holding that Mary Hammett had no authority under said deed to direct the sale of the land by her executor for the payment of her debts.

3. In holding that the deeds of J. Bankston Davis, as executor, did not convey good titles to the purchasers.

4. In holding that the land should be resold.

Mr. J. S. R. Thomson, for plaintiffs.

Messrs. Bobo & Carlisle, for defendant Davis.

August 8, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. The principal questions in this case arise upon the construction of a deed which is couched in very informal and inartificial language. Its material terms are as follows: "Know all men by these presents that I, Mark Cantrell, for the bare affectionate love I have to my daughter, Mary Burnett, and having special confidence in my brother Lanceford Cantrell and Joseph W. Martin as Trustees, I give to my daughter and the lawful heirs of her body the following property or to the Trustees for her and her heirs' use and benefit ninety-two acres of land lying \* \* \* reserving the use of the same during my life. And if my wife, Sarah Cantrell, is a longer liver than me, she is to have the use of the Home tract of land, for her support, and choice of the negroes and mares—2 cows and other household and kitchen furniture, as my trustees for my daughter and her lawful heirs think proper, during life or widowhood. And it is my earnest desire that my trustees attend to [here some words are manifestly omitted] agreeable to the intention of this writing or conveyance."

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\*The grantor's wife pre-deceased him, and Mary Burnett, who subsequently intermarried with one Hammett, died in 1877, leaving

no issue of her second marriage, Margaret the wife of the plaintiff J. W. Burnett, and the defendants Marcus Burnett, Matthew Burnett and Mrs. McKinney being her issue by her first marriage. By her will she appointed the defendant Davis executor, directing him to sell sufficient of her personal and real estate to pay her debts. The executor sold all of her property both real and personal, including the lands conveyed by the above mentioned deed, and the object of this action is to set aside the sale of these lands and to have the same partitioned amongst the above named heirs of Mary Hammett, formerly Mary Burnett.

The first question presented is as to the nature of the estate which Mary Hammett took in the lands conveyed by said deeds. Both the referee, to whom the issues in the action were referred, and the Circuit Judge held that she took an estate in fee conditional, and we concur with them in so holding. The deed, as will be seen, is very informal, but the conveying words are to Mary Burnett "and the lawful heirs of her body." The authorities universally hold that these are the apt words, to create an estate in fee conditional, and we are unable to discover anything in the terms of this deed to take this case out of the well-settled general rule. The subsequent words "or to the trustees for her and her heirs' use and benefit" cannot have this effect, for the word "heirs" as there used must be construed as meaning the same class of heirs—heirs of the body—which had previously been designated. The same remark will apply to the words "lawful heirs" as used in the latter part of the deed. These words are not found in the habendum clause, as suggested in one of the arguments, for there is no such clause in the deed and must be regarded as used to indicate the same class of persons referred to in the conveying part of the deed.

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Nor can the fact that trustees are interposed affect the question. For, even if the deed should be regarded as a conveyance to the trustees for the use of Mary and the lawful heirs of her body, about which there

might be a serious question, it would not take the case out of the operation of the rule in Shelley's case. It is true that the case of *Austin v. Payne*, 8 Rich. Eq. 9, does hold that where the estate of the ancestor and that limited to the heirs are not of the same quality, that is, where one is equitable and the other legal, the rule in that celebrated case will not apply. But that case recognizes the doctrine that where both estates are equitable it will apply. If, therefore, the deed should be regarded as creating an equitable estate, originally, in Mary, it created the same kind of an estate in the heirs of her body, and both estates lost that character when there was nothing for the trustees to do, as the statute would then execute the uses. *Bouknight v. Epting*, 11 S. C. 71, and

the cases there cited. The only duty imposed upon the trustees was an exercise of their discretion as to what property the wife of the grantor should be allowed the use of, in the event she survived him; but as she died before the grantor, there was absolutely nothing for the trustees to do, and hence, even if it should be regarded that the deed conveyed the estate to the trustees, the statute would execute the uses and the estates would become legal both in Mary and the heirs of her body.

Regarding then the estate as a fee-conditional, our next inquiry is whether it was liable for the debts of Mary Hammett, the first taker, in the hands of her heirs. In the case of *Izard v. Middleton*, Bail. Eq. 228, cited with approval in *Pearse v. Killian*, McM. Eq. 231, it was held that lands held in fee conditional are bound, after the birth of issue, by the lien of a judgment or decree, against the tenant in fee, in bar of the right of the issue to take per formam doni. It seems to me that the same reasoning which led to this conclusion would necessarily lead to the conclusion that land so held would be assets for the payment of debts even though not reduced to judgment; and such was the opinion of the distinguished Chancellor Harper who delivered the opinion of the Court in *Izard v. Middleton*. At page 235 he says: "But if there had been no decree against Mr. Izard in his lifetime, yet if the heir takes only by succession from the ancestor, and in his right, it would seem to follow that

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whatever would be liable \*to debts in his hands must be assets in the hands of the heir; and such is the purport of the Statute 5 Geo. 2, Chap. 7." It is true that this was only a dictum, inasmuch as in that case the debt had been reduced to judgment and had become a lien on the land during the lifetime of the first taker, yet it is a dictum supported not only by the great name of that eminent jurist, but by the unanswerable reasoning employed by him in that case.

The fundamental difference between an estate in fee conditional, after the condition has been performed, and an estate in fee simple is, 1st. That in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs the estate reverts to the donor; 2d. That the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In a grant of an estate in fee conditional, heirs of the body are not named on account of any benefit intended for them or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent, in case no such disposition is made. In the case of a fee simple estate the law prescribes that the estate shall descend to the heirs generally, in

case the ancestor makes no disposition of the estate, while in the case of an estate in fee conditional the instrument creating the estate confines the descent to a particular class of heirs. Both classes of heirs take by succession from the ancestor, and as in fee simple estates the heirs general take the estate subject to a liability for the debts of the ancestor, we see no reason why, in estates in fee conditional, the heirs of the body to whom the descent is confined should not take the estate in the same way.

Our next inquiry is as to the effect of the disposition made by Mary Hammett, by will, for the sale of the lands held by her in fee conditional. In this State it has been settled that an estate in fee conditional is not the subject of devise. *Jones ads. Postell*, Harp. 92. To allow such a power to a tenant in fee conditional would be to give him the power to disturb the course of descent fixed

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by the instrument creating \*the estate, and hence it cannot consistently with the nature of the estate be allowed. The moment the first taker dies, without having alienated the estate in his lifetime, it descends to and rests in the heirs of his body, and his will, which can only take effect after his death, cannot divest the heirs of the estate. So, at common law, a joint tenant could during his life alien his estate, but he could not devise it for the reason that "no devise can take effect till after the death of the devisor, and all the land presently cometh by the law to his companion who surviveth," and the commentator remarks that Littleton "by the words post mortem and per mortem used in the text, though they jump at one instant, alloweth priority of time in the instant, which he distinguisheth by per and post. And the reason of this priority is that the survivor claimeth by the feofor, and therefore in judgment of law his title is paramount to the title of the devisee, and consequently the devise is void." Co. Litt. 180a. It follows, therefore, that Mary Hammett had no right to devise the lands conveyed by the deed from Mark Cantrell, her power of disposition ceasing with her life, and that the sale thereof made by the executor, under the directions of her will, even though for the payment of debts, was without authority.

The points raised by the plaintiff's third, fourth and fifth grounds of appeal cannot be considered by us, as there is no copy of the pleadings set out in the "Case," and we are not at liberty to assume that the Circuit Judge went beyond the scope of the pleadings in rendering his decree. He was bound by the 55th Rule of the Circuit Court to make due provision for the payment of debts before ordering the partition asked for; and the counsel for the plaintiff is in error in supposing that it did not appear that the personal estate was insufficient for the payment of the debts, for the referee distinctly re-



ported that the debts of Mary Hammett "amounted to very nearly the value of her whole estate."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN absent at the hearing.

### 17 S. C. \*553

\*BATES, REED & COOLEY v. KILLIAN & BROTHERS.

(April Term, 1882.)

#### [1. Attachment *§*232, 233.]

Attachments may be dissolved upon two grounds: 1st, Where some irregularity of a fatal character appears on the face of the proceedings; 2d, Because that the allegations upon which it was issued are untrue.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 795, 796, 797, 798, 803; Dec. Dig. *§*232, 233.]

#### [2. Attachment *§*277.]

Defendant having given a bond under Section 265 of the Code, did not thereby waive his right to have the attachments discharged, under section 264, as irregularly and improvidently granted.

[Ed. Note.—Cited in Kennedy & Son v. Dunbar, 46 S. C. 522, 24 S. E. 383.

For other cases, see Attachment, Cent. Dig. § 825; Dec. Dig. *§*277.]

Before Aldrich, J., Greenville, January, 1882.

This was a motion made by defendants at Pickens to have certain attachments upon their property, under proceedings in Greenville, vacated. The motion was supported by affidavits and was based upon the following grounds: 1st. Because the affidavit on which said attachment was issued was insufficient. 2d. Because the allegations of fraud, or that the defendants had disposed of, secreted or concealed, or were disposing of, secreting and concealing, their property with intent to defraud their creditors, contained in said affidavit, are not true. 3d. Because many other statements made in said affidavit are not true. 4th. Because said affidavit and attachment are in many other respects irregular and void.

This motion was granted, the Circuit judge holding that there was no fraud as charged in the affidavits upon which the attachments issued. From this order the plaintiffs appealed upon the following grounds:

1. Because the defendants had their option either to give the undertaking or to move to discharge the attachment, as in case of other provisional remedies, and having elected to adopt the first course, it is respectfully submitted that they waived their right to the second, and his Honor should have so held.

2. Because the attachment having been discharged upon undertaking could not be again discharged upon motion.

Messrs. Wells & Orr, for appellants.  
Mr. M. F. Ansel, contra.

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\*August 9th, 1882. The opinion of the Court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, appellants, in an action for the recovery of \$1942.53, alleged by plaintiffs to be due them from the defendants, attached certain property of the defendants, consisting of a stock of goods. The defendants applied under § 264 of the code for the surrender of the goods, which upon the execution of the bond required by § 265 of the code was ordered, and the property thereby discharged from the lien of the attachment. Two other attachments were afterwards issued, one of which was by the plaintiff.

Subsequently, the defendants moved to discharge all three of the attachments, upon affidavits served. The appellants resisted the discharge of the first, upon the ground that the defendants having adopted the proceeding provided in the code for the surrender of the property, and having thereby obtained possession, they had waived their right to assail the attachment on any ground, and therefore that their motion as to this attachment should be refused. The Circuit judge overruled this position and discharged all three of the attachments, including the first. The appeal questions the correctness of this ruling as to the first.

Attachments may be dissolved or defeated upon two grounds: 1st. Where some irregularity of a fatal character appears on the face of the proceedings; and 2d. Because of the fact that the allegations upon which it may issue are untrue. The dissolution in either case may be had upon motion—the first being made upon the papers, and the second upon affidavits as to matters dehors the record. These causes go to the root of the attachment, especially in the last class of cases, and when they exist the effect of their interposition is not simply to release the property but to entirely vacate and set aside the attachment proceedings.

Besides this remedy, in cases where the attachment has been irregularly issued, or issued without warrant of law, section 265 of the code supra provides for the release of the property attached, where the attach-

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ment has been legally issued and \*there is no objection as to its regularity or want of observance of proper form, the effect of which provision, when adopted by the defendant, is to convert the action from one in rem to one in personam, with security by the defendant for the payment of the debt. This is done by permitting the defendant to give bond for the payment of the debt in the event that the plaintiff's action succeeds, the purpose of an attachment being to obtain

security for the debt by securing a lien on property. The bond provided for is substituted in the place of this lien, and the property is released.

This proceeding is proper where there is no ground to attack the attachment for either of the causes mentioned first above. Where either of the causes exists, parties would ordinarily be presumed to know it, and no doubt would promptly avail themselves of the opportunity offered to assail the attachment, and in such case there would be no necessity to give the undertaking provided for in the Code. The property attached could be released without this additional liability. There can be no doubt but that the relief provided for in section 265 of the Code was intended primarily to meet the cases where the attachments were regular and valid, and yet where it would be a hardship to the debtor to be deprived of the use of his property during the pendency of the action. This remedy respects the rights and interests of both creditor and debtor, and while it releases the property to the use of the debtor, it gives the creditor a security in the undertaking which it requires equally as reliable as the lien which it displaces.

Now the question arises whether when the debtor avails himself of the latter remedy in the first instance, he can afterwards retrace his steps, and invoke the first; whether after having admitted the legality of the attachment proceeding by applying simply for the release of his property by giving the creditor another security, he can still assail the attachment, because it was irregularly or imprudently issued, and if successful vacate and set aside not only the attachment proceedings, but also the security undertaking which he has previously given.

This question has never been raised before in this State under our attachment laws; nor has there been uniformity of

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\*decision upon it in other States where attachment proceedings are provided for. Mr. Drake in his work on attachments, § 318, says that in Mississippi the court seemed to consider that the execution of the bond released any technical objections to the preliminary proceedings, *Wharton v. Conger*, 9 Smedes & M. 510; while in the Supreme Court of the United States and that of Missouri it was held that thereafter the defendant could not take any exception to the attachment, or to the regularity of the proceedings under it. *Barry v. Foyles*, 1 Peters, 311 [7 L. Ed. 157]; *Payne v. Snell*, 3 Mo. 409. In Louisiana a different rule prevails. 14 La. 82; 1 La. Ann. 372. In Arkansas it was held that the execution of the bond did not preclude the defendant from interposing pleas in abatement, founded on irregularities in the proceeding, *Childress v. Fowler*, 9 Ark. 159. In Kentucky, in *Hazelrigg v.*

*Donaldson*, 2 Metc. 445, the court decided that the execution of a bond under the Code discharged the attachment by operation of law, and rendered the obligors in the bond unconditionally bound to perform the judgment of the court in the action, and that the sufficiency of the grounds for obtaining the attachment could not therefore be inquired into. And in 3 Mich. 18 it was held that the defendant in an attachment, having executed a bond to the sheriff and procured a release of the property under the Revised Statutes, is thereby estopped from applying for a dissolution of the attachment.

The authorities elsewhere, it will be observed, are conflicting, with strong reasons on either side. This being the first case in this state, we must mark out a course for ourselves. When we consider the purpose and intent of the proceeding under section 265 of the Code, we can see no good reason why the adoption of that proceeding should forfeit the right on the part of the defendant to impeach the legality of the attachments afterwards. It is true that that provision is founded on the idea that the attachment was properly issued and has secured a valid lien on the property attached, and the plaintiff is not required to release the lien except upon the condition that he is furnished with another security—and this is furnished by the undertaking which that

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section requires, the \*consideration of this undertaking being the release of the lien already secured.

But suppose the attachment in truth and fact had been irregularly or improvidently issued, so much so as to render it invalid, had a motion been made in the first instance to vacate it, should the fact that the defendant had released the property by his bond to the sheriff cure these defects, and render that legal which under the supposition made is utterly illegal? Such should not be the result, unless for some controlling reason. The proceeding under this section is a prompt proceeding by which the defendant may at once release his property. It may be in many cases of the utmost importance to the defendant that the release should be had at once, where delay would be ruinous. Hence he is allowed to obtain the release from the sheriff, an officer near at hand, and before whom prompt action can be taken, whereas his motion to vacate must be made before a judge, sometimes at an inconvenient distance and with delay. Under such circumstances why should the defendant be expected to avail himself of this prompt relief, at the peril of legalizing the attachment?

The attaching creditor, when he has secured a legal lien, of course ought not to be required to give it up, except upon an equivalent, but at the same time, if the lien is invalid because the attachment is illegal, why should he be entitled to hold the sub-



stituted security, which he has obtained upon a condition which in fact never existed? There can be no reason except that inasmuch as the remedy under section 265 is based upon the presumption that there is no valid objection to the attachment, a defendant resorting to it is supposed to have assented to its correctness. Admitting this to be true, does it follow that a defendant should also be regarded as having thereby waived all right to impeach the attachment afterwards?

There are cases where a failure to take advantage of alleged defects or to assert rights will entail forfeiture, but this is on the principle that some right has attached to the other party in consequence of such failure which it would be inequitable now to divest, or some remedy omitted, or injury would ensue which but for the failure might

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have been provided against. \*In such case the doctrine of estoppel should apply. But the case before the court is not a case of that character. The bond which the plaintiffs hold as security for their debt, stands in the place of the property which that bond released. Had no bond been given, if the attachment was improvidently issued, the lien which it had obtained was an invalid lien and could have been vacated at any time, in some of our sister States, even after judgment. This being so, there can be no good reason why the bond, which occupies the place of the property, should not also be released, when surrounded by the same circumstances which if present would release the property. In New York it was held that the giving up of an undertaking to obtain the return of the property attached will not preclude the defendant from moving to set aside the attachment for irregularity or on the merits. 2 Wait Prac. 184.

Our Code after providing for the surrender of the attached property as found in sections 264 and 265 concludes the latter section as follows: "In all cases the defendant may move to discharge the attachment as in the case of other provisional remedies." This language is broad and comprehensive; it includes expressly all cases. It is found as a part of one of the acts of the Legislature, and embracing, as it does, all cases of attachment, we have no power to limit or contract it to one or two classes of cases only.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

17 S. C. 558

McMORRIS v. WEBB.

(April Term, 1882.)

[1. *Infants* ⚡31.]

In action for dower, the defendant having produced a certificate of renunciation regular in form, the plaintiff may introduce evidence to

show that at the time of such renunciation she was under the age of twenty-one years.

[Ed. Note.—Cited in *Campbell v. Harris Lithia Springs Co.*, 74 S. C. 285, 54 S. E. 378, 114 Am. St. Rep. 1001.

For other cases, see *Infants*, Cent. Dig. §§ 41, 46, 50–63; Dec. Dig. ⚡31.]

[2. *Infants* ⚡26.]

A renunciation of dower made by an infant wife is no bar to her recovery of such dower when the right matures.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 32; Dec. Dig. ⚡26.]

[3. *Infants* ⚡31.]

The silence of the wife for twenty-eight years after the renunciation, while it was spread upon the records and other parties be-

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came pur\*chasers, operated neither as a confirmation nor an estoppel, she being all the while a married woman.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 52; Dec. Dig. ⚡31.]

[4. *Vendor and Purchaser* ⚡239.]

The plea of purchaser for valuable consideration without notice is equitable in its character, and has no proper application to a claim purely legal like that of dower.

[Ed. Note.—Cited in *Sondley v. Caldwell*, 28 S. C. 583, 6 S. E. 818.

For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 583–600; Dec. Dig. ⚡239.]

Before Kershaw, J., Newberry, November, 1880.

The opinion states the case.

Messrs. J. Y. Culbreath, G. S. Mower, for appellant.

Messrs. Suber & Caldwell, contra.

October 2, 1882. The opinion of the Court was delivered by

Mr. Justice McGOWAN. This was an action for dower in a lot in the Town of Newberry. Joseph S. McMorris, the late husband of the plaintiff, being at the time seized and possessed of the lot in question, conveyed the same by deed November 2, 1852, to Edward S. Bailey for the sum of \$1800, its true value, and his wife Angelina on the same day renounced in due form her right of dower in the said lot, on her husband's deed of conveyance. Bailey conveyed the land to Segwick, July 2, 1862, for \$3,500, who conveyed it to William H. Webb, and he conveyed the same to himself as trustee for his wife Cordelia Webb, and his and her children. These conveyances were all regularly recorded. McMorris removed from this State prior to 1868, when the present Constitution was adopted, and died out of the State July 5, 1879.

His widow instituted this action for dower in 1880. The defence was the renunciation made and recorded as long ago as 1852. That was admitted by the plaintiff, but she insisted that at the time she signed the renunciation she was an infant under twenty-one years of age, and not bound by it.

The case was referred to the master, who

admitted, contrary to the protest of the defendant, testimony as to the infancy of plaintiff when she signed the renunciation, and reported in favor of the plaintiff's claim of dower. Upon exceptions the Circuit Judge overruled them, and gave judgment in favor

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of \*the plaintiff for three hundred dollars as dower with interest from July 5, 1879, and decreed the judgment to have a specific lien upon the lot.

The defendant appeals to this Court upon the following exceptions:

1. "Because his Honor erred in deciding that the renunciation of dower in the lot conveyed to Edward S. Baily, November 2, 1852, was not a good and valid renunciation.

2. "Because his Honor erred in holding that if the plaintiff at the time of her renunciation had attained the age required by the law of the State to enable her to renounce, it was voidable, as she was within the age of twenty-one years; whereas it is submitted that he should have decreed that, as plaintiff had attained the lawful age to contract marriage, her said renunciation at the age of twenty years was as good and valid as if she had been at the time of the full age of twenty-one years!

3. "Because if said renunciation was voidable, the long silence of the plaintiff for twenty-eight years is tantamount to its confirmation after she attained the age of majority. And as the defendant is a subsequent purchaser without notice, his defence should be sustained against the claim of plaintiff, who permitted the renunciation, regular in form, to be spread upon the public records for twenty-eight years.

4. "Because the master erred in permitting the plaintiff to introduce evidence to prove that plaintiff was an infant under twenty-one years at the time she signed the renunciation of her right of dower."

As to the last exception, we cannot say that the master erred in receiving proof as to the age of the plaintiff at the time she signed the renunciation. It is true that the certificate being in regular form and before the proper officer, it is presumed that all things were regular in reference to its execution, but we do not see that such presumption necessarily excluded proof dehors the record, such as imposition, fraud, incompetency or infancy. As the certificate of the officer made no reference to the age of the wife, there was probably a presumption that she was "of lawful age," as required by the statute, but that presumption could be over-

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come by evidence. \*Battin v. Bigelow, Peters C. C. 452 [Fed. Cas. No. 1,108]; 2 Scrib. Dower, 284, and note.

Dower is a common law right, and as such favored. It is true that it springs out of the relation of marriage, and at first view it would seem reasonable that the age which au-

thorizes legal marriage should be sufficient also to enable the woman married to dispose of all property and exercise all rights acquired by the marriage. But it must be remembered that by the act of marriage itself, without reference to the age of the parties, the wife falls or at least before 1868 fell, under disabilities which prevented her from exercising any right as to her property, except the power to do so was expressly given to her. The power to renounce the right of dower acquired by the marriage was no exception to the general rule. It was and is entirely a creature of statute, and therefore the first question is whether the renunciation of the right of dower by Mrs. McMorris, a married woman under the age of twenty-one years, was authorized by the law in force at the time it was executed.

We are not aware that this question was ever before made in this State. The court has not been referred to any decided case upon the subject. In some of the States, notably Alabama, Indiana and Maine, express provision has been made to the effect "that all married women, whether under or over the age of twenty-one years, are permitted to release their dower." See 2 Scrib. Dower, 284 and authorities. But no such provision has been made in this State. Our statute upon the subject is as follows: "The wife of any grantor conveying real estate by deed of release, may, if she be of lawful age, release, renounce and bar herself of her dower in all the premises so conveyed," etc.

It is not denied that Mrs. McMorris signed a renunciation in due form, but it is insisted that it does not bar her for the reason that at the time she signed it she was under twenty-one years of age. The act permitted her to renounce only on condition that she was "of lawful age." Did these words of the statute mean "of lawful age" to marry, or to convey rights in land or make any other

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civil contract? In the absence of any \*authority to the contrary, we feel constrained to hold that the words in this statute were used in their ordinary sense, that is to say, as meaning the age at which parties generally are allowed by the law to contract, and that the renunciation of Mrs. McMorris, made by her when under twenty-one years of age, was not a compliance with the law, or in itself a bar to her recovery.

The rule, as we understand, is the same as to other acts of the infant wife, even where there is no express requirement that she should be "of lawful age." It was long a doubtful question in the English courts whether an infant female was bound by a marriage settlement which disposed of her real estate. It was insisted that as a female infant could marry, and into the consideration of marriage her real estate largely entered, the settlement of it, like the marriage, should be binding and indissoluble: but it



has been finally held there that such settlement constitutes no exception to the policy of the common law, which, as a rule, avoids the contracts of infants. See *Milner v. Lord Harewood*, 18 Ves. 259; [*Lester v. Fraser*] 2 Hill, Eq. 529; 2 Kent. Com. 244.

But it is urged that an infant upon attaining majority may confirm any act done during infancy—that one of the forms of confirmation is “acquiescence from which assent may be fairly inferred;” that the plaintiff acquiesced in her renunciation for twenty-eight years from its date, and from this we may fairly infer her assent. This view would be very strong if the plaintiff during all that time had been *sui juris* and entitled to recover her dower, but she was a married woman and had no right to disaffirm the renunciation by claiming dower until 1880, when her husband died. While her husband lived her right had not matured. We cannot say that her silence during his life was voluntary. So long as she was unable to assert her right, no force should be attached to her seeming acquiescence.

It is further said that the plaintiff by her conduct should be estopped from now claiming her dower in this lot; that she placed upon the record the said renunciation in due form without stating her age, which she was required to do, not only by the terms of the statute, but by every consideration of good

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faith \*and honesty, and that this conduct had an effect in inducing the defendant to purchase the lot. “Parties under disability as infants and married women certainly are not estopped unless their conduct has been intentional and fraudulent.” Big. Est. 442.

Mrs. McMorris signed the renunciation of dower on the deed of her husband, but it does not appear that she made any misrepresentations as to her age or in any way procured the sale to Bailey; she was simply silent. Nor does it appear that she had it recorded, which was probably done by the alienee. She was not only an infant at the time it was signed, but under the disabilities of coverture down to 1879. The mere silence of a married woman who knows that the husband is selling her land will not estop her from claiming the land after his death. Herm. Est. 380 and authorities. Where the husband made deed, with warranty of wife's interest therein, and she joined by clause relinquishing right of dower but not by words of grant, held that neither she nor her heirs were estopped from claiming the land even after the lapse of twenty-nine years. *Ibid.* 238, citing 2 Cush. 234.

This is certainly a hard case upon the purchaser, who relying upon the renunciation, perfect in form as it appeared spread upon the records, had no notice of the latent fact that Mrs. McMorris was an infant when she signed it, but we see no good defence against

the claim. The plea of purchaser for valuable consideration without notice is equitable in its character, and has no proper application to a claim purely legal like that for dower. Story Eq. § 630.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 17 S. C. 563

STATE ex rel. CUMMINGS v. KIRBY.

(April Term, 1882.)

[1. *Counties* ⇨ 206.]

A succeeding Board of County Commissioners has no authority to review and revise the action of its predecessor in auditing and allowing a claim against the county.

[Ed. Note.—Cited in *State ex rel. Lockwood v. Adams*, 63 S. C. 191, 41 S. E. 82; *State ex rel. People's Bank of Greenville v. Goodwin*, County Supervisor, 81 S. C. 424, 62 S. E. 1100; *State ex rel. People's Bank of Greenville v. Goodwin*, 59 S. E. 37.

For other cases, see *Counties*, Cent. Dig. § 325; Dec. Dig. ⇨ 206.]

[2. *Mandamus* ⇨ 143.]

The statute of limitations does not apply

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to a proceeding in mandamus, \*but where there is unreasonable delay, the Court, in the exercise of its discretion, will refuse to issue the writ, as in this case, where the application was made ten years after the claim was allowed, and seven years after liability denied, without any explanation for the delay.

[Ed. Note.—Cited in *State ex rel. Myers v. Appleby*, 25 S. C. 105; *State ex rel. Gruber v. Knight*, 31 S. C. 84, 9 S. E. 692; *State ex rel. Abbeville County v. McMillan*, 52 S. C. 73, 29 S. E. 540; *Milster v. Spartanburg*, 68 S. C. 35, 36, 46 S. E. 539.

For other cases, see *Mandamus*, Cent. Dig. § 285; Dec. Dig. ⇨ 143.]

Application for mandamus in behalf of A. W. Cummings against A. H. Kirby and others, County Commissioners of Spartanburg. The opinion states the case.

Messrs. Shand &amp; Bryce, for relator.

Messrs. Bobo &amp; Carlisle, contra.

October 2, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. This was an application to this Court in the exercise of its original jurisdiction, for a mandamus to compel the respondents, as County Commissioners of the County of Spartanburg, to draw their warrant on the County Treasurer in favor of the relator, for the payment of certain claims held by him against the said county, as a part of its past indebtedness.

It is not denied that, in 1872, these claims were audited and allowed by the then Board of County Commissioners of said county and have not yet been paid; nor is it denied that the Board have been authorized from year to year, since 1874, by the Legislature to levy a tax to pay the past indebtedness of the county; nor that such tax has been regular-

ly levied and collected; nor that there are now funds in the hands of the County Treasurer applicable to the past indebtedness. The respondents, in their return, however, allege that in 1875, a succeeding Board of County Commissioners re-examined the claims held by the relator, and that they were then "found to be improper and illegal charges against the county," and proceed to specify in what particulars the said claims are illegal and improper, wherefore they have ever since refused to pay the same.

The first question, therefore, which is presented is whether a succeeding Board of County Commissioners has any authority to review and revise the action of its predecessor.

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sor in audit\*ing and allowing a claim against the county. No such authority is conferred by any statute, nor is such a power necessarily incident to any of the powers conferred upon the Board. We are unable therefore to discover any warrant for the exercise of such a power. It would be in conflict with all the analogies of the law to hold that one Board had an appellate power to review and reverse the action of its predecessor, and would lead to endless complication and confusion. If one Board could review and revise the action of its predecessor, there is no reason why its successor should not have the same power, and the result would be that there could be no such thing as a final determination.

It must be assumed that one set of County Commissioners is quite as likely to be competent to discharge the duties of the office as another, and quite as willing to perform those duties honestly, and there is no reason why one set of County Commissioners should assume any superiority over another. When, therefore, a claim against a county has been audited and allowed by the Board of County Commissioners, acting within the limits of their jurisdiction, their action is final unless appealed from, and stands as a quasi judgment, which can only be set aside by a proper proceeding for that purpose, upon the ground of fraud or mistake. *County of Richland v. Miller*, Clerk of Commissioners, 16 S. C. 236. It seems to us, therefore, that the action of the Board of County Commissioners, in 1875, in undertaking to review and reverse the action of their predecessors was wholly without authority and entirely nugatory. This being so, the relator must be regarded as the holder of claims against the County of Spartanburg, which have been duly audited and allowed by the proper authority, constituting a part of the past indebtedness of said County. Unless, therefore, there is some other obstacle in his way, he would be entitled to a mandamus to compel the Board of County Commissioners

to draw their warrant on the County Treasurer for the payment of the same, provided there are funds in the hands of that officer applicable to such claims.

It is contended, however, that the relator, if he ever had a right to the mandamus pray-

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ed for, has lost it by his laches in \*not prosecuting his claim before, and that it is barred by the Statute of Limitations. There is no special limitation to a proceeding by mandamus, and the Statute of Limitations does not apply to such a proceeding. The rule, however, is, that where there is unreasonable delay the Court will, in the exercise of its discretion, refuse to issue the writ. *Moses Mand.* 190; 1 Redf. Railw. 658 and the cases there cited. See also *King v. Stainforth*, 1 M. & S. 32; *People ex rel. Phelps v. Delaware Common Pleas*, 2 Wend. 259; *People v. Seneca Common Pleas*, 2 Wend. 264, and the authorities collected in a note to 2 Johns Cas. 217. In this case the relator has delayed his application for about ten years since his claims were allowed, and for about seven years since they were refused payment; and in his petition he suggests no reason for such delay. It seems that since 1874 the Legislature has from year to year authorized the levy of a tax to pay the past indebtedness of the county, and it is difficult to conceive of any good reason which would account for this extraordinary delay on the part of the relator in making this application. It is a mistake to suppose, as was argued, that there was a continuing admission of the validity of these claims of the relator, on the part of the County Commissioners, by placing them on the list of the past indebtedness of the county, for that allegation in the petition is distinctly denied in the return, which is not traversed. So too the return alleges that these claims were decided by the Board of County Commissioners to be illegal, as far back as 1875, and since that time payment of the same has been frequently refused. We are unable to discover any sufficient reason, or, indeed, any reason at all, for this extraordinary laches on the part of the relator, and therefore, in the exercise of that discretion to which such an application appeals, we feel bound to refuse the writ prayed for, especially as the return, which is not traversed and which must, therefore, be taken to be true, points out manifest errors in the accounts upon which these claims are founded.

The judgment of this Court is that the application for the writ of mandamus be refused.

Mr. Justice McGOWAN absent at the hearing.



## 17 S. C. \*567

## \*DUNLAP v. GARLINGTON.

(April Term, 1882.)

Testator by his will gave to trustees real and personal property "in trust for the sole and separate use and benefit of my daughter N. and the lawful issue of her body \* \* \* to be and remain in the uninterrupted possession of my daughter N., and should my daughter die leaving no lawful issue of her body, it is my will and desire that the aforesaid property, both real and personal, revert back to my estate." By a second clause, testator gave certain other real and personal property to his wife for life, "and at her death to be sold, and the money arising therefrom be equally divided among all my children, share and share alike, the grandchildren to represent the interest of their deceased parent, and that portion which may be coming to such child, whose interest is secured in trust, I hereby direct my executors to pay over the same to their trustee." The property given to the widow was sold after her death, and N's share was received by her trustee, including two notes on one G. This was prior to 1868. Afterwards N's husband purchased a house and lot from G., and paid for it by a credit on one of these notes, and he then gave this house and lot to his daughter E., and then N. died intestate.

*Held,*

[1. *Descent and Distribution* ⇨12.]

That E. was entitled to the house and lot, and that the balance due on the two notes passed to the husband and children of N., as her distributees, and not to the heirs of her body.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 50; Dec. Dig. ⇨12.]

[2. *Conversion* ⇨15; *Wills* ⇨614.]

The real estate sold under the directions of the will must be regarded as personality.

[Ed. Note.—Cited in *Walker v. Killian*, 62 S. C. 487, 40 S. E. 887.

For other cases, see *Conversion*, Cent. Dig. § 32; Dec. Dig. ⇨15; *Wills*, Cent. Dig. § 1396; Dec. Dig. ⇨614.]

[3. *Husband and Wife* ⇨137.]

This property disposed of by the second clause was not governed by the terms of the first clause, and even if it were, the words used are not sufficient to create a life estate only in N. or even an estate over which her husband could have no control.

[Ed. Note.—Cited in *Mobley v. Cummings*, 35 S. C. 125, 14 S. E. 721.

For other cases, see *Husband and Wife*, Cent. Dig. § 514; Dec. Dig. ⇨137.]

[4. *Wills* ⇨687.]

[Cited in *Du Pont v. Du Bos*, 52 S. C. Append. 606, to the point that under a will devising both realty and personality in trust for the sole and separate use of testator's daughter, but to revert in case of her dying without issue, and devising to testator's wife for life other realty and personality to be sold at her death and the proceeds to be equally divided among testator's children and grandchildren, a grandchild to take its parent's share, and the share of the daughter to be paid to her trustee, her share of the property devised to her mother vests absolutely in the daughter or her children at her mother's death.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1642; Dec. Dig. ⇨687.]

Before Hudson, J., Laurens, February, 1881.

In this case the Honorable T. B. FRASER, Circuit Judge, sat in the place of the CHIEF JUSTICE, who had been of counsel in the cause.

Action by Margaret H. Dunlap, S. E. Dunlap and Hattie Teague against H. W. Garlington, as trustee of Nancy Miller, Eloise W. Shell, Chancy M. Miller and W. D. Black. The opinion states the facts of the case. The Circuit decree, after a statement of those same facts, was as follows:

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therefore, trust property, and is now divisible alone among the heirs of the body of Nancy. 2d. The money in the hands of the Clerk arising from the sale of the property of John Garlington, applicable to the two notes aforesaid, which John Garlington gave to Henry W. Garlington, as trustee, for his part of the purchase of the property devised and bequeathed to the testator's widow, Margaret, and which, by direction of the will, was sold after the widow's death. This money, as well as these two notes, are claimed by the heirs of the body of Nancy Miller. 3d. Whatever of the trust estate that may yet remain in the hands of H. W. Garlington, is likewise so claimed.

All this C. M. Miller denies, and claims that all that came as personality under the will to his wife, Nancy, was hers absolutely, and that he is entitled absolutely to all of the same which, in her lifetime, he reduced into possession, and that which he did not reduce to possession constitutes her intestate estate, of which he is entitled to one third, and the children the balance.

The whole controversy is to be determined by a construction of the two clauses of the will given in the complaint and quoted above. Under the devise and bequest to Nancy Dunlap (Miller), it is clear to my mind that she took a fee conditional in the realty and an absolute estate in the personality. In a deed or will that language which will create a fee conditional in realty will create an absolute estate in personality, for the simple reason that perpetuity will never be tolerated in perishable (personal) property. Nor does the fact that the conveyance is to a trustee alter the case, unless there be some special duty in and about the personal property enjoined upon the trustee in its management and final disposition, which renders it necessary that the estate and title should abide in him. In this case there is nothing of the sort, but, on the contrary, it is expressly provided by the testator that both the real and personal estate shall be uninterruptedly possessed, used, enjoyed by his daughter. I think it clear that she took the personality absolutely and free from the trust and from

the attempted limitation to the heirs of her body. *Henry v. Felder*, 2 McC. Eq. 325; *Addison v. Addison*, 9 Rich. Eq. 58.

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\*Of the property given to Nancy, as I understand from the pleadings and from counsel, there is none in controversy, but the contest is over what fell to her share of the remainder of the gift to her mother, which at her death was, by direction of the will, sold and converted into money. Her share of this was likewise directed to be paid to her trustee. The plaintiffs contend that when paid to the trustee it was to be held by him under the same trusts and limitations as were imposed upon the devise and bequest to Nancy in the previous clause. The testator is silent on this point. He simply directs it paid to her trustee. But grant that the intention was as the plaintiffs contend, and what is the effect? Realty directed to be sold and converted into money becomes personalty, and is to be so treated. Clearly, then, all her share of the proceeds of the remainder of her mother's life estate must be classed as personalty in the hands of the trustee, and as such it vested in Nancy absolutely, as did the personalty given immediately to her.

The two notes in controversy, therefore, became absolutely the property of Nancy Miller. If before the adoption of the Constitution of 1868, C. M. Miller, her husband, had reduced these notes into his possession, they would have been absolutely his; but this I do not think he did. From the evidence, however, I am satisfied that from 1850, when he married Nancy, until her death in 1872, he was allowed by her to manage and use her personal property, and enjoy the income as he pleased; and that when he bought the town lot and took titles to himself, he did not act as trustee nor as agent of his wife, but for himself, and that he paid for the place by the credit on the notes with her full knowledge and consent, using the money as his own. *Reeder & Davis v. Flinn*, 6 S. C. 216 and authorities there cited, furnish sufficient to sustain this view of the law in connection with the facts of this case. The plaintiffs are, therefore, entitled to no share nor interest in this property. The balance of the two notes and what money may be in the hands of the trustee, H. W. Garlington, I hold to be the intestate estate of Nancy Miller, and distributable amongst her children and husband—

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i. e., her heirs at law and distributees according to the statute—and not amongst the heirs of her body only; and it is so ordered, adjudged and decreed; and that the complaint in so far as it seeks to sell or partition the town lot sold by C. M. Miller to Eloise Shell be dismissed.

The plaintiffs brought the case to this Court upon the following exceptions;

1. That his Honor erred, it is respectfully submitted, in deciding that the property involved in this suit should be distributed among the heirs at law of Nancy Miller, and not the heirs of her body.

2. His Honor erred, it is respectfully submitted, in holding that C. M. Miller purchased and held the house and lot as his property by the consent and approbation of Mrs. Miller, when it was in testimony that he was at that time de facto trustee for her and used her trust funds in the purchase, and some of the principal at that; and to allow him to hold the property is a fraud on the rights of the heirs of her body.

3. His Honor erred further, in holding that Nancy Miller took an absolute estate in the personal property willed by her father.

Messrs. Pope & Watts, for appellants.

Messrs. J. W. Ferguson, Holmes & Simpson, contra.

October 4, 1882. The opinion of the Court was delivered by

Mr. Justice FRASER. William Dunlap departed this life in 1839, leaving in force a will which was duly admitted to probate. He left surviving him his widow, a daughter Nancy, and other children. Nancy intermarried with Ewell Black, and of this marriage were born several children, the plaintiffs, and the defendant W. D. Black. After the death of Ewell Black, Nancy intermarried with the defendant Chancy M. Miller, and to them was born one child, the defendant Eloise W. Shell. Nancy died in 1872, all her children above named and her husband, Chancy M. Miller, surviving her.

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\*The will of William Dunlap contains two clauses under which the controversy in this case arises. In one clause he gives to certain trustees real and personal property "in trust for the sole and separate use and benefit of my daughter Nancy and the lawful issue of her body;" and after describing the property adds: "It is my will and desire and all the aforesaid property be and remain in the uninterrupted possession of my daughter Nancy; and should my daughter die leaving no lawful issue of her body, it is my will and desire that the aforesaid property, both real and personal, revert back to my estate."

In another clause he gives certain real and personal property to his wife for life, and at her death as follows: "It is my will and pleasure that all of the property herein bequeathed to my wife be and remain in her possession during her natural life, and at her death to be sold and the money arising therefrom be equally divided among all my children, share and share alike, the grandchildren to represent the interest of their



deceased parent, and that portion which may be coming to such child, whose interest is secured in trust, I hereby direct my Executors to pay over the same to their trustees."

John Garlington alone qualified as executor of the will, and H. W. Garlington alone of the persons named assumed the trust in favor of Nancy. The property, which passed to the widow of William Dunlap under the second of the above clauses, was sold at her death by the executor, and H. W. Garlington, as trustee for Nancy, received her share, and as a part thereof two sealed notes executed to him by John Garlington, one of May 31, 1862, for \$3372.56, and one of March 4, 1863, for \$5147.41, which were secured by a mortgage of real estate. After the death of John Garlington, the executor, his executors sold a part of his estate, and Chancy M. Miller, the defendant, purchased a lot of land known as the "Shockley house and lot," and paid for it by putting a credit on the note for \$5147.41. This transaction was in January, 1870, and the amount of the credit given was \$2020, being \$82.91 in excess of the interest then due thereon. The balance of said two notes was established in a proceeding to set-

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tle the estate of John Garlington. The credit of \$2020 on said note was signed by C. M. Miller, and the title to the Shockley place was made to him. This lot of land he subsequently conveyed to the defendant Eloise W. Shell, his daughter.

This Court concurs with the master and the Circuit Judge in the findings of fact. Chancy M. Miller at no time was trustee or assumed to act as trustee in reference to this property, and his dealings in regard to it must be construed with reference to his marital rights.

The appellants claim that this Shockley place and the balance of the two notes are distributable amongst the issue of Nancy. The Circuit Judge holds that plaintiffs, appellants, are entitled to no interest in the Shockley place, and "that the balance of the two notes is distributable amongst her children and her husband—i. e., her heirs at law and distributees, according to the Statute—and not amongst the heirs of her body." If the property in dispute is controlled by the terms of the first of the above recited clauses of the will, and if it should be held that the same was in trust for Nancy during her life, with valid remainders over, then it is clear that so much of the \$2020 paid for the Shockley place as was interest on the note on which that amount was credited was received by the husband with the knowledge and consent of the wife, and became absolutely his property. *Hill Trust*, 425; *Charles v. Coker*, 2 S. C. 136; *Reeder & Davis v. Flinn*, 6 S. C. 216.

All this property, however, must be re-

garded as personalty, the real estate having been sold under the directions of the will.

The words create an executed trust, and Nancy would have taken in real estate a fee conditional, and "words which convey only a life estate or a conditional fee in land gives an absolute estate in personal property." *Carr v. Porter*, 1 McC. Ch. 60; *Bedon v. Bedon*, 2 Bail. 248; *Daintry v. Daintry*, 6 T. R. 307; *Henry v. Felder*, 2 McC. Ch. 339; *Addison v. Addison*, 9 Rich. Eq. 68.

The second of the above clauses, however, by which this property was conveyed, does

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not expressly refer to the first, and the \*only circumstance which indicates that they are to be construed together, and the terms of the first to control the gifts under the second, is the direction in the second to pay over certain shares to trustees, who are named in the first clause. This of itself would not be sufficient to annex the terms of the gift under the first clause to the gift under the second, where the second is itself silent. It is by no means clear, however, that they would be consistent with each other even if the limitations claimed to have been created by the first are held to be valid. Under the first the limitations would have been to "issue of her body," a term of very much larger import, and including classes of persons not embraced by the word "grandchildren," to whom the property was given under the second clause in the event of Nancy's death before her mother.

The true construction of this second clause is that the gift is to Nancy absolutely, and if she should die before her mother, whose death is the period of distribution, then her children, the grandchildren of testator, are substituted in her place, and they take absolutely. Issue are not necessarily grandchildren.

The words used are not sufficient to create a life estate only in Nancy, or even an estate over which her husband could have no control. There should have been unequivocal evidence of "an intention to exclude the husband from all control. The mere gift to a trustee is not enough." *Perry, Trusts*, §§ 648, 649.

This Court therefore concurs with the Circuit Judge in the conclusion that the complaint be dismissed so far as it seeks a sale or partition of the town lot sold by C. M. Miller to Eloise W. Shell, and in the judgment of the Circuit Court as to the balance of the funds. If an administrator of Nancy Miller, deceased, should be a necessary party, the proper order can be made by the Circuit Court before the distribution of the fund.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

## 17 S. C. \*574

**\*BOWEN v. ATLANTIC AND FRENCH BROAD VALLEY R. R. COMPANY.****MAJOR v. THE SAME.**

(April Term, 1882.)

**[1. *New Trial* ⇨40.]**

Where incompetent testimony is received without objection at the trial, no ground is thereby afforded for a motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 62-66; Dec. Dig. ⇨40.]

**[2. *Eminent Domain* ⇨219.]**

On appeal to the Circuit Court from the assessment of damages for a right of way to a railroad company, an issue was framed and submitted to a jury in the Circuit Court in words "how much compensation is the appellant entitled to for the right of way through his lands." *Held*, that the submission was sufficiently specific to justify the jury, in accordance with the terms of the statute, in estimating not only the value of the land taken, but also such special damage as the construction of the road through his land would cause to the land-owner.

[Ed. Note.—Cited in *Leitzsey v. Columbia Water Power Co.*, 47 S. C. 483, 25 S. E. 744, 24 L. R. A. 215.

For other cases, see *Eminent Domain*, Cent. Dig. §§ 556, 557; Dec. Dig. ⇨219.]

**[3. *Eminent Domain* ⇨255.]**

There would seem to be no error in permitting witnesses to give general estimates of the damages, but no objection to such testimony having been made at the trial, it cannot be raised here.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 666; Dec. Dig. ⇨255.]

**[4. *Eminent Domain* ⇨102.]**

The Circuit Judge committed no error in charging the jury that in estimating the special damage done to the land-owner by the condemnation of a right of way through his lands, they might consider inconvenience of a permanent nature, the rattle of the train, blow of the whistle, smoke of the engine, etc.

[Ed. Note.—Cited in *South Bound R. Co. v. Burton*, 67 S. C. 524, 46 S. E. 340.

For other cases, see *Eminent Domain*, Cent. Dig. § 272; Dec. Dig. ⇨102.]

**[5. *Eminent Domain* ⇨262.]**

This Court cannot consider exceptions alleging excessive damages in a verdict.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 681-686; Dec. Dig. ⇨262.]

**[6. *Appeal and Error* ⇨204.]**

[Objections to evidence cannot be raised for the first time on appeal.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1258; Dec. Dig. ⇨204.]

[This case is also cited in *Rankin v. Sievern & K. R. Co.*, 58 S. C. 538, 36 S. E. 997, without specific application.]

Before Aldrich, J., Pickens, January, 1882.

Reese Bowen against the Atlantic and French Broad Valley Railroad Company and Elizabeth Major against the same. The opinion states the case, but the charge of the judge to the jury in the Circuit Court should be given in full. It was as follows:

"The law of this case, to which you are to apply the facts, is contained in the act regu-

lating the construction of these great highways of travel and trade. The legislature recognizing the vast importance of developing the resources of the State, has conferred upon these railroad corporations great privileges. They are allowed to pass over the freehold of a citizen, raze his homestead to the ground, or dig up the soil which covers the bones of his ancestors, his wife and his

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children, the only compensation being the value of the land covered or subverted, and the actual damage which the proprietor may sustain. While this policy is rendered necessary for the convenience of the community and the development of the common interest of the whole people, we must not lose sight of the fact that it may, in individual cases, operate as a great hardship. Hence the legislature has wisely left it to the jury to say what is the actual damage each proprietor has sustained, by the condemnation of his land for the purposes of the highway. As I said yesterday in the trial of the Bowen case, before the jury, there is a difference of opinion between witnesses and counsel as to what is actual damages. On the one hand it is contended that actual damages is only that which can be measured by dollars and cents, the market value per acre of the land, while on the other hand it is insisted that a continuing inconvenience which puts the proprietor to hourly and daily annoyance is actual damage, which will be measured by the jury according to the circumstances attending each particular case. If the railroad runs through your house, where your ancestors lived and died, your children were born, and which is hallowed by all the associations that cluster around the hearthstone and linger under the roof-tree, is the actual damage only the property destroyed? And shall it be said if the railroad runs in front or rear of your home, disturbing your family night and day, with the scream of the whistle, the smoke of the engine, the rattle of the train, destroying the garden your wife and daughters have spent years in tending and beautifying, that the only damage then is the value of the land? I think not. You may as well say that a picture painted by Rubens, or a statue modelled by our own Powers, has no actual value, because the one is a mere square of canvas, in which is painted in beautiful colors, with artistic skill, a poetic idea; the other a mere block of marble out of which is chiselled an exquisite figure of the ideal man or woman.

And so when bottom land has been brought into cultivation, it is not the cost of the ditch obstructed, or the value of the soil that has been subverted, but the injury done to the whole tract by interrupting the drainage and

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interrupting the free passage over the field. So when a field is divided by an embank-



ment or an excavation, you will not only consider the value of the land over or through which the road is constructed, but the actual loss to the proprietor, in perpetuity, in cultivating his crops, hauling in and out, the loss of time in shortening his rows, and like continuing inconveniences. If such a continuing inconvenience can be estimated in money, that is the actual damage the proprietor has sustained. In making that estimate you must exercise your judgment as reasonable, conscientious, honest men, considering the road as completed. You are not to consider or suppose a trestle instead of an embankment, but render your verdict for a completed road. Your inquiry is not what is the general benefit to the whole State and county, but what is the actual damage to the individual claimant?

So you will perceive that while these great enterprises are to be fostered and encouraged, because they develop the resources of the State and contribute largely to the prosperity, convenience and happiness of the people, yet they do sometimes injure individual interests and destroy the enjoyment of individual property. I know of cases on the Port Royal and Savannah and Charleston Railroads where the drainage of valuable plantations, effected by a large outlay of money, has been entirely destroyed by the construction of these roads. The road should not be stopped for this, but the individual owner should be compensated. To say the market value of the acres used by the road is the actual damage is merest mockery.

And so I charge you that a railroad which puts a proprietor to perpetual inconvenience in the management of his affairs, or continually disturbs the peace of his family, is actual damage, which can be measured by the circumstances attendant on each case, to be determined by the testimony of witnesses familiar with the facts and location. Speculative damages cannot be accorded. You are not to pay a claimant the value of his whole plantation because a railroad runs through it, but you are to allow him the value of the land occupied, and compensation for the actual inconvenience to which he is subjected. The law makes you judges of the facts, as reasonable men, always keeping in mind the

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public interest and the individual \*right. You are not to favor the corporation because it is conferring a great public benefit, nor are you to enrich the proprietor from a mere sentiment, or because the corporation is able to pay, but you are to dispense abstract justice as between man and man."

Mr. R. A. Child, for appellant.

Messrs. Norton, Keith & Hollingsworth, contra.

October 6, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. These two cases involve the same questions, and will be considered together. They were proceedings originally instituted by the appellant here for the purpose of acquiring the right of way over the lands of the respondents, under the provisions of the Act of 1868, incorporated in Chap. LXIII. of the General Statutes, p. 352. The respondents here not being satisfied with the verdict of the jury organized by the Clerk of the Court, under section 76 of that chapter, appealed to the Circuit Court, when the following issue was made up and tried in that Court, to wit: "How much compensation is the appellant, Reese Bowen, entitled to for the right of way through his lands, which have been condemned and taken by the Atlantic and French Broad Valley Railroad Company?"

From the judgment rendered on the verdict found upon that issue, the Railroad company appealed to this Court upon the following grounds: "1. Because his Honor erred in allowing the actors to prove special damage when no such damage was contained in the issue submitted to the jury. 2. Because special damage cannot be proved without a special allegation in the pleadings of such damage, and his Honor erred in allowing such proof, when no allegations of special damage had been anywhere made in the pleadings. 3. Because his Honor erred in allowing witnesses to testify that if it was their land they would not have the railroad to pass over it for \$——. 4. Because his Honor erred in allowing the witnesses to testify that the actors had been damaged \$——

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without requiring them to state \*specially the damage. 5. Because his Honor erred in charging the jury that any inconvenience of a permanent nature, however small, was special damage, and might be considered by them in making up their verdict. 6. Because his Honor erred in charging the jury that the rattle of the train, the blow of the whistle, the smoke of the engine, etc., were special damage, and might be considered by them in making up their verdict. 7. Because that under the issue submitted, the jury could only consider the compensation to be paid the actors for the right of way, that is, the actual value of the land taken up by the railroad, and his Honor erred in charging them that they could bring in a verdict for special damages. 8. Because the damages given by the jury are excessive."

It does not appear that any objection was made to any of the testimony offered at the trial, and therefore such of the grounds of appeal, to wit, the first, second, third and fourth, as are based upon objections to the competency of testimony, cannot be sustained. The rule is well settled that where incompetent testimony is received, without objection, at the trial, it will afford no ground for a motion for a new trial. *State v. Ran-*

kin, 3 S. C. 448 [16 Am. Rep. 737]; Burris v. Whitner, 3 S. C. 512; Powers v. McEachern, 7 S. C. 299. This rule is not only based upon direct authority, but has the support of reason also; for, as is well said, in Burris v. Whitner, *supra*, "It would be unfair to allow a party to postpone his objection as to competency until after the testimony has been given; for, in that case, he would be enabled to retain the evidence if it enured to his advantage, and to exclude it if it made against him. Such speculative advantages are discountenanced by the courts."

The Act of 1878, 16 Stat. 698, does not affect this rule; for that act simply allows exceptions to be taken "to the rulings of the presiding judge," at any time within ten days after the rising of the Court; but where incompetent testimony is received without objection, the Judge makes no ruling, and there is therefore no room for an exception. In Fripp v. Williams, Birnie & Co., 14 S. C. 508, the rule has been recognized and applied since the passage of the Act of 1878; and it has also been recognized in Thompson v.

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Brannon, 14 S. C. 549. It is clear, therefore, that even if the testimony assailed in the first four grounds of appeal were incompetent, appellant has lost the opportunity of availing itself of the benefit of any of these grounds, by failing to object to the testimony when it was offered.

But, as will presently be seen, we do not regard the testimony as incompetent. The appellant contends that, under the issue submitted to the jury, they were restricted in their inquiries to the question as to what was the value of the land actually appropriated and used as a right of way, and that they could not give any damages beyond this, and hence that testimony tending to show any other damage was incompetent. The issue which the jury were called upon to determine was, how much compensation was the land-owner entitled to for the right of way taken by the railroad company, not merely for the land taken. Their inquiry, therefore, was, what would compensate the land-owner for the injury done to him by allowing the railroad company to take and use the right of way in question?

The mere naked value of the strip of land over which the road-bed was constructed would in most if not in all cases afford very inadequate compensation for the injury done; and hence to determine the amount of compensation it would be necessary to consider other elements than that of the naked value of the land. This was, manifestly, the idea of the legislature, for by the express terms of the act under which this proceeding was instituted, provision is made for estimating the amount of compensation not only by reference to the value of the land actually taken, but also by reference to the special damage which the land-owner may sustain by reason of the construction of the road through

his lands. The Act, in effect, defines the term "compensation" to be the value of the land together with such special damage as may be sustained by the land-owner, by reason of the construction of the road through his lands.

In section 77, the jury are required to determine the question of compensation by inspecting the premises and taking testimony "in reference to the construction of the pro-

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posed \*highway, and the quantity of land which shall be required therefor; and irrespective of any benefit which the owner may derive from the proposed highway, and with respect alone to the quantity and value of the land which may be required, and to the special damage which the owner may sustain by reason of the construction of the highway through his lands, they shall ascertain the amount of compensation which shall be made to the owner thereof." The only legitimate construction of this language is that the jury in ascertaining the amount of compensation must disregard any benefit that may accrue to the land-owner from the construction of the road, and base their estimate not only upon the value of the land taken, but upon that and such special damage as the owner may sustain by reason of the construction of the road through his land.

Hence when the issue submitted to them in this case required them to determine "how much compensation" the land-owner was entitled to for the right of way, they should, in accordance with the terms of the act, have looked not only to the value of the land taken, but also to such special damage as may have been done to the land-owner by reason of the construction of the road through his lands, and there was no necessity for the order to specifically direct them to estimate the special damage, inasmuch as the direction to determine the amount of compensation necessarily included an inquiry into the special damage. The testimony as to the special damage was, therefore, in our judgment entirely competent, and absolutely necessary to enable the jury to determine properly the issue submitted to them. The objection that the testimony as to special damage consisted of general estimates, without specifications as to the particular items of damage, not having been made at the trial cannot avail the appellant at this stage of the case. Besides, we do not think it can be said that the testimony upon the subject consisted only of general estimates, for most of the witnesses did go into details; and it was for the appellant, by his cross-examination, to test the correctness of such general estimates as were made. Indeed, we do not see how damages of this character could be ascertained in any other way than by the introduction of such testimony as was adduced in these cases; and this kind of testi-



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\*mony seems to have been received with approval in the cases of the G. & C. Railroad Company v. Partlow, 5 Rich. 428, and White v. Charlotte & So. Ca. Railroad Co., 6 Rich. 47. We do not understand that the Judge charged the jury exactly as is alleged in the fifth and sixth grounds of appeal. As we understand the charge, it was, in effect, that the jury were not to confine their inquiry simply to the value of the land taken, but that they might take into consideration the several matters alluded to in these grounds of appeal, and give, in addition to the value of the land, such special damage as in their judgment would compensate the land-owner for the injury done to him by the taking of the right of way; and in this we see no error.

The eighth ground of appeal cannot be sustained. Whether damages are excessive depends upon a consideration of the facts, and with these we have no power to interfere. This has been distinctly determined, and must be regarded as definitely settled. *Brickman v. South Carolina Railroad Company*, 8 S. C. 173; *Steele v. C. C. & A. R. R. Co.*, 11 S. C. 589.

The judgment of this Court is that the judgment of the Circuit Court in both of the cases above stated be affirmed.

## 17 S. C. 581

## ISELL v. DUNLAP &amp; WARD.

(April Term, 1882.)

[1. *Payment* ⚡8.]

Defendants being sued by plaintiff for his wages as their overseer paid the amount of this indebtedness to the sheriff to be applied to a junior execution, which had lost its active energy. *Held*, that this gave defendants a valid defence to the action, as payment. Code, § 319.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. ⚡26; Dec. Dig. ⚡8.]

[2. *Agriculture* ⚡11.]

An overseer is not an agricultural laborer within the meaning of the act giving laborers a lien on crops, or within the meaning of the Homestead acts.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. ⚡22; Dec. Dig. ⚡11.]

[3. *Payment* ⚡38.]

The money having been paid by defendants to be applied to a certain execution, the plaintiff cannot object to the application to such execution, although it be junior and without active energy.

[Ed. Note.—Cited in *Gray, Sullivan & Gray v. Putnam*, 51 S. C. 102, 28 S. E. 149.

For other cases, see *Payment*, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⚡38.]

[4. *Payment* ⚡8.]

The payment to the sheriff was not a counter-claim, which therefore had to be in existence at the time of action brought, and of which plaintiff was entitled to notice, but was properly pleaded as payment.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 17, 18, 20, 21, 24-27; Dec. Dig. ⚡8.]

Before Wallace, J., Kershaw, February, 1882.

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\*The opinion fully states the case.

Mr. W. M. Shannon, for appellant.  
Messrs. Leitner & Dunlap, contra.

October 6, 1882. The opinion of the Court was delivered by

Mr. Justice McIVER. The action in this case was commenced on January 19, 1882, to recover a balance due plaintiff for his wages as overseer for the defendants during the year 1881.

The defence was payment, and to establish it the defendants offered in evidence a judgment and execution in the case of Cowles v. Isbell, dated February 7, 1876, and the sheriff's receipt on the execution in his office in favor of Cowles, which was in the following words: "Received February 10, 1882, from Dunlap & Ward two hundred and twenty dollars, to be applied to above-named judgment and execution against J. D. Isbell, said Dunlap & Ward being debtors of said J. D. Isbell, and paying said amount on said judgment and execution." The plaintiff then offered in evidence a judgment and execution in favor of Koopman & Summer, dated January 15, 1869, against Isbell, we presume, though it is not so stated in the "Case."

The case was, by consent, heard by the Circuit Judge without a jury, and he, after hearing argument, held: 1. That an overseer could not claim a lien on the crop for his wages, under the terms of the act giving laborers a lien. 2. That his wages were not exempt from levy under an execution. 3. That the sheriff had a right to receive and apply money, as was done in this case, to a junior execution in his office after its active energy had expired. 4. That the sheriff's receipt held by the defendants was not in the nature of a counter-claim, and did not require notice before the same could be offered in evidence; and that it was not necessary that the receipt should have been in existence at the time of the commencement of the action, as in case of a counter-claim. 5. That the claim of the plaintiff was completely paid

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and satisfied by the sheriff's receipt on the execution. The plaintiff appeals upon grounds which question each one of the above-mentioned rulings.

We agree with the Circuit Judge that an overseer cannot be regarded as an agricultural laborer, within the meaning of the act giving to such laborers a lien on the crops made by them, or within the meaning of the Homestead acts exempting the products of such persons from levy and sale. An overseer is one who is employed, not to labor himself, but to overlook and direct the labor of those who are employed to do the manual work of planting, cultivating and gathering a

crop, and it would be a confusion of terms to call such a person a laborer. Whether the relation of master and servant exists between an employer and his overseer is a totally different question, and need not be considered here; and hence we are unable to perceive the relevancy of the case of *Daniel v. Swearengen*, 6 S. C. 297 [24 Am. Rep. 471], relied on by the appellant.

But even if it should be conceded that an overseer has a lien on the crop for his wages, and that his wages are exempt from levy under an execution, we do not see how such a concession could benefit the appellant. The amount due to the plaintiff by the defendants has not been levied on by the sheriff under an execution in his office, but the sheriff has simply, as the agent of the plaintiff, received and receipted for the money due to the plaintiff by the defendants, under the authority of section 319 of the Code. That section reads as follows: "After the issuing of execution against property any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid." Hence it was wholly immaterial whether the execution upon which the money was paid had lost its active energy, or whether it was the junior or senior execution in the office, for the sheriff did not obtain the money by virtue of his power to levy, but he simply received it when offered voluntarily by a person indebted to the judgment debtor, and his receipt is declared by the act to be "a sufficient discharge for the amount so paid."

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\*The act does not require that the money

shall be paid upon the oldest execution in the office; and whether it was the duty of the sheriff to make the application to the oldest execution, as he would be required to do when he levied and sold under a junior execution, or whether the payment made by the person indebted to the judgment debtor is to be regarded as a voluntary payment made by the judgment debtor himself, in which case he could require the sheriff to apply the money to any execution he might select, even though it should be junior to all others, is a question which does not concern the present plaintiff, and is not presented by the record. We therefore concur with the Circuit Judge that the fact that the payment was made on a junior execution which had lost its active energy cannot affect the present inquiry.

The only remaining question is whether the payment to the sheriff should have been regarded as a counter-claim, of which notice should have been given by the pleadings, and which should have been in existence at the time of the commencement of the action, in order to render it available as a defence. We are unable to discover any element of counter-claim in the transaction.

We understand section 319 of the Code to declare, in effect, that the payment to the sheriff, by one indebted to a judgment debtor, on the execution against such judgment debtor, is the same thing as the payment to the judgment debtor himself—that the receipt of the sheriff is in fact the receipt of the judgment debtor. If so, then, clearly, the defence in this case was properly pleaded as payment and not as a counter-claim, and it cannot be subjected to any of the incidents of the latter.

The judgment of this Court is that the judgment of the Circuit Court be affirmed.



## NOTES OF CAUSES

Decided during the Period Comprised in this Volume, and not Reported in full.

17 S. C. \*585

\*No. 1177. MASON v. WINSMITH, November Term, 1881.

[1. *Costs* ⇨71.]

The judgment in *Mason v. Winsmith*, 10 S. C. 314, was conclusive of the case, and entitled defendant to the costs of appeal and also to costs in the Circuit Court, and such right to the Circuit Court costs was not waived by defendant in redocketing the case on calendar 1, nor by taxing up at first only the costs of the appeal and receiving payment of them.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 298; Dec. Dig. ⇨71.]

[2. *Dismissal and Nonsuit* ⇨37.]

The Circuit Judge cannot permit a plaintiff to discontinue his action after issue joined, except upon payment of costs; and in this case the defendant was entitled to his costs without any order of discontinuance.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 72; Dec. Dig. ⇨37.]

Opinion by MCGOWAN, A. J., March 18th, 1882. J. Winsmith, for appellant; J. S. R. Thomson, contra.

No. 1178. BUTTZ v. COUNTY OF CHARLESTON, November Term, 1881.

[1. *Coroners* ⇨4.]

The appointment of deputy coroners and deputy coroners' constables for Charleston County under the Act of 1879 (17 Stat. 50) should be made in writing; or, at least, the evidence of such appointment should be in writing and furnished to these officers.

[Ed. Note.—For other cases, see *Coroners*, Cent. Dig. § 3; Dec. Dig. ⇨4.]

[2. *Assignments* ⇨100.]

The assignee of the accounts of these officers for the salaries fixed by the act, where the assignment was made before audit by the Board of County Commissioners, took the claims subject to all the legal defences that might have been set up against the original holder; as, e. g., that the officers had not been in office for the time charged, or had not properly performed their duties.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 177; Dec. Dig. ⇨100.]

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[3. *Assignments* ⇨15.]

\*The salary stopped when the officer resigned, and his assignee could acquire no right to a salary for a longer term, notwithstanding notice of the resignation was not filed in the proper office until a later date.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 23; Dec. Dig. ⇨15.]

Opinion by SIMPSON, C. J., March 20th, 1882. S. J. Lee, for appellant; J. E. Burke, contra.

No. 1179. LAWRENCE v. WOFFORD, November Term, 1881.

On appeal from an order discharging a rule on the sheriff to show cause, etc., the following points were decided by this court:

[1. *Execution* ⇨326.]

The sheriff's endorsements showing that two executions in his office of different dates were levied the same day upon personal property of the judgment debtor, the proceeds of the sale were applicable pro rata to the two executions.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 969½; Dec. Dig. ⇨326.]

[2. *Execution* ⇨348.]

A levy is *prima facie* evidence of satisfaction, but this presumption may be rebutted; and therefore, where it appears that the property formerly levied upon is the identical property here levied upon and sold, the presumption of satisfaction arising from the former levy is rebutted.

[Ed. Note.—Cited in *National Bank of Newberry v. Kinard*, 28 S. C. 109, 5 S. E. 464.

For other cases, see *Execution*, Cent. Dig. § 1088; Dec. Dig. ⇨348.]

[3. *Execution* ⇨140.]

The presiding judge, who was himself to pass judgment upon the facts, committed no error in declining to receive the testimony of the deputy sheriff, who was produced by relator to prove that he (the deputy) had no recollection of making the levy under the other execution, as stated in the sheriff's endorsement of levy on that execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 340; Dec. Dig. ⇨140.]

Opinion by SIMPSON, C. J., March 20th, 1882. J. Winsmith, for appellant; D. R. Duncan, contra. Appeal dismissed.

## No. 1192. BUTTZ v. CHARLESTON COUNTY, November Term, 1881.

D. H. Buttz, as assignee of two claims against the County of Charleston for salary due to a deputy coroner and his constable from December, 1879, to July 1880, presented these claims to the Board of County Commissioners, in November, 1880. This assignment bore date July 26th, 1880. In December, 1880, one Collins presented an assignment of earlier date than plaintiff's, for these same claims. The Board approved the claims, and declared Collins to be the proper owner and holder thereof. Plaintiff appealed to the Court of Common Pleas, where the case was tried de novo before his Honor, Judge Ker-

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shaw, and a jury. The verdict sustained the action of the Board, except in an immaterial matter not here involved. On plaintiff's appeal, *held*:

[1. *Appeal and Error* ⇨1088; *Counties* ⇨205.]

The case having been tried de novo, exceptions to the action of the Board of County Commissioners are not pertinent to the inquiries presented to this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4287; Dec. Dig. ⇨1088; *Counties*, Cent. Dig. § 333; Dec. Dig. ⇨205.]

[2. *Counties* ⇨205.]

There being two rival claimants of the accounts, it was absolutely essential that the Board and the court should determine to whom the money was due. And if the Board erred in determining this question without giving to the claimants the opportunity of being heard, the appellant here can take no exception to such error by the Board, as he was fully heard at the trial de novo on Circuit.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 328-334; Dec. Dig. ⇨205.]

Judgment affirmed. Opinion by Mr. Justice McIVER, April 11th, 1882. S. J. Lee, for appellant; J. E. Burke, contra.

## No. 1194. OLIVER v. SALE, November Term, 1881.

[1. *Evidence* ⇨183.]

What proof of loss of a written contract is sufficient to permit secondary evidence of its contents is to a large extent a question of fact to be decided by the judge, and his discretion will not be disturbed except in very rare cases. The rule laid down in 1 Greenleaf on Evidence, § 558, approved, and Floyd v. Mintsey, 5 Rich. 372, cited. In this case, the witness testified that he was the custodian of the paper and that it had never gone out of his possession; that he had thoroughly searched his office and could not find it; but afterwards said he would not swear pos-

itively that the paper had never gone out of his office or that he had never given it to any one. His Honor, Judge Kershaw, then permitted proof of its contents.

[Ed. Note.—Cited in *Dingle v. Mitchell*, 20 S. C. 209; *Woody v. Dean*, 24 S. C. 502; *Morrison v. Jackson*, 35 S. C. 314, 14 S. E. 682; *Norris v. Clinkscales*, 47 S. C. 497, 503, 25 S. E. 797.

For other cases, see *Evidence*, Cent. Dig. § 612; Dec. Dig. ⇨183.]

[2. *Appeal and Error* ⇨1033.]

In action on a contract by which the plaintiff was to publish a newspaper in the interest of a party at a municipal election, the defendants being a self-constituted Board of such party, held, on defendants' appeal, that the Circuit Judge did not invade the province of the jury or otherwise err in charging that the defendants were not liable severally but jointly or not at all, if the contract was made with the Committee for the Board; and that if such were the terms of the contract and some of the defendants are not bound because they were in utter ignorance of the matter, had not heard it discussed and did not recognize it afterwards, then the verdict must be in favor of all the defendants

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—such charge being \*favorable to defendants and in accordance with the views suggested by them at the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4056; Dec. Dig. ⇨1033.]

Judgment affirmed. Opinion by Mr. Justice McGOWAN, April 11th 1882. Hayne & Ficken, F. L. McHugh, J. A. Simons, J. N. Nathans, for appellants; W. M. Thomas, contra.

## No. 1195. SULLIVAN v. SULLIVAN MANUFACTURING COMPANY, November Term, 1881.

[1. *Appeal and Error* ⇨1000.]

The findings of a jury upon issues submitted to them in a chancery case, indorsed, approved and confirmed by the Circuit Judge after mature consideration, and supported by some of the testimony in the case, cannot be reversed by this court, especially where the testimony bearing upon the matters at issue was, in part, contained in books of account not before this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3927; Dec. Dig. ⇨1000.]

[2. *Assignments for Benefit of Creditors* ⇨161.]

The correctness of these findings, which negatived charges of fraud in an assignment for the benefit of creditors, are not counterbalanced by presumptions of fraud deducible from the facts that the president of the assigning corporation was a creditor, and in part preferred, and that the books were badly kept, and that the president made no state-



ment of this indebtedness to himself in his tax returns (it being shown that he was largely in debt), and that by good management money could have been made instead of lost.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 451; Dec. Dig. ⚡161.]

Decree of Hudson, J., affirmed. Opinion by Mr. Justice McIVER, April 11th, 1882. Perry & Perry, for defendant, appellant; Earle & Wells, M. F. Ansel, contra.

[For subsequent opinion, see 24 S. C. 341.]

No. 1200. COWAN v. NEEL, November Term, 1881.

This was an action by the holder of two junior judgments to recover from the sheriff of Abbeville County the proceeds of the sale of the judgment debtor's lands, sold under plaintiff's executions, and the assignee of two senior judgments was made a party defendant. A jury trial was waived and the case was tried by Kershaw, J. His findings of fact were that the two senior judgments were obtained by confession in 1855 and 1856, renewed without objection and by consent of the judgment debtor in 1869, destroyed by fire in 1872, and restored under legal proceedings with the debtor's consent in July, 1878, previous to which time they had been assigned to B. P. Neel, as trustee for the judgment

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debtor's wife; that the \*plaintiff's judgments were obtained in May and June, 1878, and the executions were soon afterwards levied on the debtor's lands, which were sold and purchased by B. P. Neel, trustee. The judgment was that the complaint be dismissed, and on plaintiff's appeal to this court, the judgment was affirmed. *Held*:

[1. *Appeal and Error* ⚡1008.]

That this court has no power to review the findings of fact by the Circuit Judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3956; Dec. Dig. ⚡1008.]

[2. *Judgment* ⚡795.]

That without considering the effect of a simple admission, or whether any one other than the judgment debtor could claim the benefit of a presumption of payment from lapse of time, the clear admission of the debt here given made a new starting point of time from which the presumption ran; and the lien continued while the judgment was a subsisting valid obligation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1399; Dec. Dig. ⚡795.]

Opinion by Mr. Justice FRASER (sitting in the place of Mr. Justice McGOWAN), April 14th, 1882. S. C. Cason, for appellant; M. P. DeBruhl, contra.

No. 1206. SLOAN v. WESTFIELD, November Term, 1881.

1. This was an appeal from a decree of Kershaw, J., approving and adopting certain findings of fact by a jury on issues ordered out of chancery. This court approved these concurrent findings, and dismissed the appeal.

[2. *Account Stated* ⚡7.]

Also *held*, that under sections 192 and 199 of the Code, judgment might be rendered on an account stated, although no allegation of an account stated was made in the complaint.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 49; Dec. Dig. ⚡7.]

[3. *Account Stated* ⚡4.]

Defendant having failed to demand an itemized account as provided for in section 181 of the Code, he cannot complain of the verdict or decree upon the ground that the account sued upon was not itemized.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 14, 15; Dec. Dig. ⚡4.]

Opinion by Mr. Justice FRASER (sitting in the place of the CHIEF JUSTICE), April 20th, 1882. J. W. Stokes, T. Q. Donaldson, M. F. Ansel, for appellant; Earle & Wells, contra.

No. 1210. LAMAR v. WALKER, November Term, 1881.

[1. *Judgment* ⚡800.]

One of the obligees of a bond secured by confession of judgment, having purchased from the judgment debtor a tract of land covered by the lien of the judgment, and afterwards reconveyed it to a stranger with gen-

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eral warranty, the lien was, by operation of law, discharged as to the purchasing obligee, but whether it would be discharged as to his co-obligees, doubted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1410-1425; Dec. Dig. ⚡800.]

[2. *Judgment* ⚡800.]

But all the other lands of the judgment debtor having been subsequently divided out among all the obligees, and notes interchangeably given and received to equalize shares, and these lands then sold by the sheriff to perfect titles, and bid in by the parties to whom previously allotted respectively, the obligees could not enforce their judgment for the deficiency against the tract sold as above to one of the obligees, as the judgment creditors thereby lost their equity of requiring their co-obligee, who had released the lien upon the tract for which he received full value, to permit them to be made equal, out of the other lands, before he received any more; and therefore they could not then proceed against the stranger-purchaser who held his vendor's warranty, as by their own consent

this vendor (their co-obligee) had received that which should have gone to them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1410; Dec. Dig. [§800](#).]

Circuit decree of Wallace, J., in its result, affirmed. Opinion by Mr. Justice McIVER, May 3d, 1882. Jas. Aldrich, G. W. Croft, J. P. Carroll, for appellants; Henderson Bros., contra.

No. 1212. DAVIS v. FOWLER, November Term, 1881.

[*Appeal and Error* [§994](#), 1008.]

This was a case in chancery involving the genuineness of the signature to a note, and if genuine, whether the signature was obtained by fraud, deceit or undue influence. The Circuit Judge, Wallace, held that it was a valid and binding obligation, and on appeal his decree was affirmed. The Court uses this language: "This Court is very unwilling to disturb the finding of the Circuit Judge where the question is as to how much reliance can be placed upon the integrity or intelligence of a witness who can be present in the Circuit Court and not in this."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904, 3955; Dec. Dig. [§994](#), 1008.]

Opinion by Mr. Justice FRASER (sitting in the stead of the CHIEF JUSTICE), May 12th, 1882. Bobo & Carlisle, Evans, Bomar & Simpson, for appellants; J. S. R. Thomson, J. W. Ferguson, contra.

No. 1217. MARS v. VIRGINIA HOME INSURANCE COMPANY, April Term, 1882.

[*Appeal and Error* [§819](#).]

Motion by defendant to suspend the hearing of the appeal in this case (see ante, p. 514), to enable it to make a motion in the Circuit Court for a new trial upon the ground

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of \*newly discovered evidence. Motion refused, this court holding that such motion was addressed to its discretion and would not be granted, as it appeared that such evidence would not induce the Circuit Judge to grant a new trial, it being parol cumulative, and only the opinion of one witness as to the amount of goods on hand at the time of the fire; moreover, the affidavit showed that the evidence was discovered after the trial, but it did not appear to have been before appeal taken, nor did the affidavit show that it was unknown to the officers of the defendant company at the trial, or could not have been discovered by them by the use of due diligence. This court says that a very strong case must be made to warrant the court in granting a

new trial on newly discovered evidence, when such evidence is cumulative and resting in parol.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3200; Dec. Dig. [§819](#).]

Opinion PER CURIAM, May 24th, 1882.

No. 1218. WALLINGFORD & RUSSELL v. BENSON, April Term, 1882.

[*Appeal and Error* [§781](#).]

Order dismissing an appeal with costs from an order refusing a motion to vacate an order of arrest, the bond given by the appellant under the order of arrest having been voluntarily cancelled by respondent during the pendency of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 63; Dec. Dig. [§781](#).]

Order by the CHIEF JUSTICE, May 25th, 1882.

No. 1220. COTHRAN v. KNOX, April Term, 1882.

[1. *Reference* [§97](#).]

Referee made his report, which was generally approved by the Circuit Judge, but it was "recommitted to the referee" for reformation in certain specified particulars. On appeal to this court, no modification was directed of this part of the decree, but certain further corrections in the items of the account were ordered (13 S. C. 496). After remittitur filed, the original referee made the changes directed without notice to counsel. Held, that in this there was no error.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 127; Dec. Dig. [§97](#).]

[2. *Reference* [§97](#).]

The referee's second report was filed more than sixty days after the filing of the Circuit decree and opinion of the Supreme Court, but within sixty days of the filing of the remittitur. Held, that it was in time.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 128; Dec. Dig. [§97](#).]

[3. *Reference* [§80](#).]

To entitle a party to object that the referee has not filed his report within sixty days, such party must give notice before report filed that he elects to end the reference.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 56; Dec. Dig. [§80](#).]

Decree of Aldrich, J., affirmed. Opinion

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by Mr. Justice HUDSON (sitting \*in the stead of Mr. Justice McGOWAN), May 27th, 1882. W. S. Monteith, for appellant; W. H. Parker, L. W. Perrin, contra.



No. 1228. ROBERTSON v. SHARPTON,  
April Term, 1882.

[1. *Estoppel* ⇐38.]

Where one sells land with warranty to which at the time he has no title and afterwards acquires a title, he is estopped by the first deed from saying that he had no title at the time of the sale. Reeder ads. Craig, 3 McC. 411.

[Ed. Note.—Cited in Richardson v. Atlantic Coast Lumber Corp., 93 S. C. 258, 75 S. E. 371.

For other cases, see *Estoppel*, Cent. Dig. § 99; Dec. Dig. ⇐38.]

[2. *Ejectment* ⇐111.]

Plaintiff brought action to recover a tract of land described by metes and bounds and alleged to have been purchased by defendant from one J——. The defendant asserted title to the land described by the same metes and bounds as in the complaint. An issue was submitted by consent to the jury as to the ownership of the land included in those same metes and bounds. As matter of fact, this land was not the land purchased from J——. The verdict was for plaintiff for “the land in dispute.” Held, that the verdict was sufficiently certain and definite, and that the judgment was valid, notwithstanding the false description in the complaint of a purchase from J——.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 332; Dec. Dig. ⇐111.]

[3. *Trial* ⇐350.]

An issue in the words, “Is plaintiff entitled to the possession of the following described land,” does not refer questions of law to the jury, but only an issue of fact to be determined by the jury under instructions from the court upon the law of the case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 832; Dec. Dig. ⇐350.]

[4. *Equity* ⇐379.]

When all equitable features have been eliminated from a case, reducing it simply to an action for the recovery of real property, it is properly triable by jury, and there is no necessity for framing the issues to be submitted. It is not conceded, however, that mere want of formality in framing or submitting an issue to be submitted in a case in chancery, would invalidate the judgment.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 801; Dec. Dig. ⇐379.]

Appeal from judgment by Cothran, J., dismissed. Opinion by Mr. Justice McIVER, July 7th, 1882. Norris & Folk, for appellant; B. W. Bettis, contra.

No. 1236. JONES v. CATHCART COMPANY, April Term, 1882.

Under bill for the settlement of an estate, a tract of land was bid off for the Clerk of Court, who was conducting the sale. He took possession, but never complied with the

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terms of \*sale, and it seems that no report of this sale was ever made to the court, but if made was never confirmed, and no deed was ever executed. Such clerk afterwards sold this land, and by successive conveyances it passed to the defendant here, who, at the time of his purchase, had notice of the defect in the title. Under order subsequently passed in the original action, this tract was resold, and purchased by the plaintiff here, who then brought this action for the recovery of this tract of land. The trial was had before Pressley, J., and a jury. The verdict was, “We find for the plaintiff titles to the land in dispute and twelve bales lint cotton, weighing four hundred pounds each, or four hundred and eighty dollars damages.” Defendant appealed. Held:

[1. *Judicial Sales* ⇐58.]

That the presiding judge did not err in charging the jury that the clerk's title failed if he in any way failed to pay in full for his purchase.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 114; Dec. Dig. ⇐58.]

[2. *Ejectment* ⇐13.]

A legal title will always prevail over an equitable one unless the equity is so complete as to entitle the equitable claimant to a conveyance paramount to the opposing legal title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 56-58; Dec. Dig. ⇐13.]

[3. *Trial* ⇐194.]

A charge to the jury, that the balance claimed by the clerk from the estate was too small to pay off his bid on the land, taken in connection with the entire charge, was not a charge upon the facts in violation of Art. IV. § 26 of the Constitution.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ⇐194.]

[4. *Trial* ⇐329.]

The verdict, though not in exact form, was substantially a finding of the land in dispute for the plaintiff and \$480 damages, and was sufficiently responsive to the issues involved.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 775; Dec. Dig. ⇐329.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, July 15th, 1882. W. S. Monteith, L. F. Youmans, for appellant; J. H. Rion, contra.

No. 1242. ROSS v. LINDER. LINDER v. ROSS, April Term, 1882.

[*Arbitration and Award* ⇐57.]

A tract of land was partitioned between two tenants in common by commissioners selected by themselves for that purpose. A difference afterwards arose between them as

to the exact location of the dividing line, which difference was submitted by them to arbitrators, who, without attempting to locate this dividing line, awarded a new partition with a dividing line of their own location. The action first above entitled was then instituted to set aside the award, and

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the second action \*was brought for damages for a breach of the arbitration bond. The referee sustained the award, but his report was overruled by the Circuit Judge (Fraser) upon the ground that the award exceeded the terms of the submission, and he adjudged that the award be set aside, and dismissed the action for damages. On appeal to this court the Circuit decree was affirmed.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 281; Dec. Dig. ☞ 57.]

Opinion by Mr. Chief Justice SIMPSON (Mr. Justice McGOWAN absent at the hearing), July 27th, 1882. J. S. R. Thomson, for appellant; Bobo & Carlisle, contra.

No. 1247. JACOBS v. BUSH, April Term, 1882.

This was an action for the partition of a tract of land in the possession of defendant Bush, who had purchased the same at a prior sale under partition proceedings in the Court of Probate. Bush believed that he had purchased a good title, but at the trial conceded the invalidity of his title, and set up in this proceeding, by consent, a claim for betterments. The referee fixed the enhanced value by reason of the improvements at \$275, and found that all rents and profits were exclusively due to the improvements, and therefore defendant should not account for rents. This report was confirmed by the Circuit Judge (Hudson), who directed a sale of the land, and out of the proceeds that the costs and expenses of sale and the costs of plaintiffs' attorneys be paid, then \$275 to defendant (out of which defendant's costs be paid), the remainder distributed to the tenants in common. From this decree plaintiffs appealed, but the decree was confirmed in all respects, except that the enhanced value by reason of the improvements was reduced to \$187.50, this court holding:

[1. *Partition* ☞ 85.]

That this was a proper case for the application of the betterment act. Gen. Stat. ch. cxxi. §§ 1-7.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 238; Dec. Dig. ☞ 85.]

[2. *Appeal and Error* ☞ 1022.]

That there was no evidence to fix the enhanced value of the land at a sum greater than \$187.50. In this connection the court uses the following language: "Under the decided cases in this State upon this sub-

ject, the finding of the referee thus concurred in by the presiding judge must stand, unless there is an entire absence of testimony to sustain it or the manifest weight is opposed to it. True, this court could arbitrarily overrule this finding or the findings below of any court, and this being a court of last resort,

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the parties would have no \*alternative but to submit. This court, however, recognizes the fact that it is not a law unto itself; on the contrary, that well-established principles should govern here as elsewhere. In fact, because this court is a court of last resort affords an additional reason why we should be the more careful not to disregard settled principles, even by inadvertence. These remarks are made because we feel constrained to overrule the Circuit Judge as to the value of the betterments allowed, and to show that we have not done so without due regard to previous decisions and precedents."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ☞ 1022.]

[3. *Partition* ☞ 86.]

That the rents and profits being entirely due to the improvements, were properly disallowed; the principles announced in *Scaife v. Thomson*, 15 S. C. 337, being also applicable to a case like this, and it being expressly provided for in the betterment law, supra.

[Ed. Note.—Cited in *Lumb v. Pinckney*, 21 S. C. 475.

For other cases, see Partition, Cent. Dig. § 247½; Dec. Dig. ☞ 86.]

[4. *Costs* ☞ 13.]

The costs were within the discretion of the Circuit Court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ☞ 13.]

Opinion by Mr. Chief Justice SIMPSON, July 31st, 1882. J. S. R. Thomson, Evans, Bomar & Simpson, for appellants; Bobo & Carlisle, contra.

No. 1257. CARRERE v. WHALEY, April Term, 1882.

Action by the administrator of a deceased partner against the survivor for account and relief. The referee reported an account stated on a certain day showing balance due by the defendant, charged certain other items of later date, and rejected a counterclaim of defendant as entirely unsupported by the evidence, and recommended judgment against the defendant for \$314.61. This report was approved and confirmed by the Circuit Judge, and the case was brought to this court on appeal. *Held*:

[1. *Account Stated* ☞ 11.]

That an account stated is prima facie correct, but may be opened and re-examined by a court of equity, if shown to be erroneous



by reason of accident, fraud or undue advantage taken.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 63; Dec. Dig. ⚡11.]

[2. *Account Stated* ⚡1.]

Doubtful whether the memoranda produced here amounted to an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1-8; Dec. Dig. ⚡1.]

[3. *Partnership* ⚡300.]

That there was error in charging the partnership (a law firm) with the entire fee collected in a case commenced during the lifetime of the deceased, but prosecuted and terminated afterwards.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 696; Dec. Dig. ⚡300.]

[4. *Appeal and Error* ⚡1022.]

Certain findings of fact overruled as being

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without evidence to sustain them or manifestly opposed to the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. ⚡1022.]

Opinion by the CHIEF JUSTICE, August 8th, 1882. J. F. Izlar, for appellant; Glover & Glover, contra.

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No. 1258. WALLACE v. CAMPBELL,  
April Term, 1882.

[*Executors and Administrators* ⚡225.]

This was an action to marshal the estate of John Campbell, deceased, for sale of land in aid of assets, etc., instituted in the Court of Probate for York County, October 1st, 1879, by the administrator of Campbell.

Creditors were called in, and the following claims were presented:

1. Sealed note signed by the intestate as surety, dated January 18th, 1855, due at twelve months, with four credits endorsed, the latest bearing date January 8, 1859. The note was given for purchases made by the widow of an intestate at the estate sale. The widow died in 1862, and John Campbell, the surety, died in 1872.

2. Administration bond of A. and B. in the estate of C., signed by Campbell as surety, bearing date December 26th, 1854. In 1866, B. then insolvent, made a return which stated that the administrators were in default to the amount of \$1171.56, and this sum with interest was claimed here. A. died insolvent during the war.

3. Administration bond of C. in the estate of his son D., signed by Campbell as surety in 1837. C. made his first and last return in 1838. C. died in 1854 intestate, possessed of a considerable estate. In 1866, B., surviving administrator of C., made a return stating a balance due by C. to the estate of D., and how the same should be paid. This claim was presented by some of the distributees of D., they being also distributees of C.

The Probate Judge held that these claims were stale, barred by laches and lapse of time. His decree was confirmed by the Circuit Judge (Cothran), and, on appeal, by this court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 618, 640; Dec. Dig. ⚡225.]

Opinion by Mr. Justice MCGOWAN, August 8th, 1882. C. E. Spencer, for appellant; Wilson & Wilson, contra.

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⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



















# REPORTS OF CASES

HEARD AND DETERMINED BY

# THE SUPREME COURT OF SOUTH CAROLINA

## VOLUME XVIII

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1882

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.

FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS

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# JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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## JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

## CIRCUIT JUDGES.

FIRST CIRCUIT,	HON. BENJAMIN C. PRESSLEY.
SECOND	" " ALFRED P. ALDRICH.
THIRD	" " THOMAS B. FRASER.
FOURTH	" " JOSHUA H. HUDSON.
FIFTH	" " JOSEPH B. KERSHAW.
SIXTH	" " ISAAC D. WITHERSPOON.
SEVENTH	" " WILLIAM H. WALLACE.
EIGHTH	" " JAMES S. COTHRAN.

## ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

HON. CHAS. RICHARDSON MILES.<sup>1</sup>

## SOLICITORS.

1st Circuit—W. ST. J. JERVEY.

5th Circuit—R. G. BONHAM.

2d Circuit—F. H. GANTT.

6th Circuit—T. C. GASTON.

3d Circuit—J. J. DARGAN.

7th Circuit—D. R. DUNCAN.

4th Circuit—G. W. DARGAN.

8th Circuit—J. L. ORR.

## CLERK OF THE SUPREME COURT.

A. M. BOOZER.

<sup>1</sup> Elected at general election in November, 1882.



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# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED  
IN THIS VOLUME.

Hon. WILLIAM D. SIMPSON, Chief Justice.  
Hon. HENRY McIVER, Associate Justice.  
Hon. SAMUEL MCGOWAN, " "

### 18 S. C. \*1

#### \*TOMPKINS v. TOMPKINS.

(April Term, 1882.)

#### [1. *Executors and Administrators* ⇨125.]

Cotton belonging to an estate was put into the hands of factors by one executor, and afterwards shipped and sold by direction of the other executor, and the proceeds were drawn partly by one and partly by the other. *Held*, that each was chargeable only with the amount by him received.

[Ed. Note.—Cited in *Hyatt v. McBurney*, 18 S. C. 215.

For other cases, see *Executors and Administrators*, Cent. Dig. § 522; Dec. Dig. ⇨125.]

#### [2. *Wills* ⇨731.]

A testator advanced \$5,500 to make the one-third cash payment on a tract of land purchased by his sons. In his will, supposing himself to own a one-third interest in this land, he declared in the ninth clause that "upon the payment of \$5,500 to my estate, or the accounting therefor in the division of the residuum by my sons, F. and R., I will, devise and bequeath unto them and their heirs forever, all my interest, being the one-third part of a tract of land," &c. In the eleventh clause, the testator canceled all debts due by his sons,

except \* \* \* and also a \*debt of \$5,500 against my sons, F. and R., mentioned in the ninth clause of my will." *Held*, that the original debt was canceled by the will, and the debt excepted in the eleventh clause did not arise, F. and R. having declined to take the land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1795; Dec. Dig. ⇨731.]

#### [3. *Reference* ⇨65.]

Objection to testimony as incompetent, under section 415 of the code, comes too late where first raised in exceptions to the referee's report.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 97, 98; Dec. Dig. ⇨65.]

#### [4. *Partnership* ⇨255.]

A partnership between testator and his son having been dissolved by the death of the former, his estate is chargeable with its proportion of all losses properly traceable to the effort to fulfill contracts binding at the time

of dissolution and to expenses incurred in the legitimate effort to wind up the partnership matters, but not for losses resulting from new business.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 558; Dec. Dig. ⇨255.]

#### [5. *Payment* ⇨14.]

A merchant's account, contracted during the war, not being shown to have been made with reference to Confederate money as a basis of value, should not be scaled.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 91-98; Dec. Dig. ⇨14.]

#### [6. *Executors and Administrators* ⇨88.]

Interest might properly be allowed by a court of equity on an open account due by testator to his executor, where interest is charged on the executor's accounts with the estate and upon the accounts between the several parties.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 393, 393½, Dec. Dig. ⇨88.]

#### [7. *Appeal and Error* ⇨1022.]

Finding of fact by referee and Circuit judge affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

#### [8. *Executors and Administrators* ⇨118.]

In the absence of evidence showing that Confederate money and bonds could have been made available for purposes of the estate, executors are not chargeable with such assets which were left by testator and came into their hands only a few months before the termination of the war.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 472; Dec. Dig. ⇨118.]

#### [9. *Executors and Administrators* ⇨88.]

And the debts by specialty being large and the assets apparently insufficient for the payment, a simple contract claim of one executor was not extinguished by Confederate money in testator's hands at his death in May 1864, and received by the other executor in September following.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 393, 393½, Dec. Dig. ⇨88.]



[10. *Executors and Administrators* ⇨203.]

A. and B. were equally liable as sureties for the payment of a note, and A. paid it, using in part (less than half), money of B. A. died, and, by his will, bequeathed this note to C. upon conditions which C. refused to perform. *Held*, that B. had no right to recover from A.'s estate the amount of B.'s money so used by A.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 731; Dec. Dig. ⇨203.]

[11. *Executors and Administrators* ⇨89.]

In the absence of evidence showing that notes, &c., of an estate administered just after the war, could, by proper diligence, have been collected, the executors are not liable for such of these notes as were produced at the trial uncollected, the executors testifying that they had tried to collect them and failed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 394; Dec. Dig. ⇨89.]

[12. *Executors and Administrators* ⇨278.]

Executors are entitled to credit for the payment of an informal judgment rendered against themselves as executors, the debt itself being undisputed.

[Ed. Note.—Cited in *Parks v. McDaniel*, 75 S. C. 10, 54 S. E. 801, 117 Am. St. Rep. 878.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1099-1101; Dec. Dig. ⇨278.]

[13. *Executors and Administrators* ⇨104.]

In stating an executor's accounts, the payments made in each current year should be deducted before striking a balance to bear interest for the year in which said payments were made.

[Ed. Note.—Cited in *Nicholson v. Whitlock*, 57 S. C. 42, 35 S. E. 412.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 423-432; Dec. Dig. ⇨104.]

[14. *Executors and Administrators* ⇨303.]

A legatee receiving cotton which he sold for gold in 1865, as a part of his interest in the estate, is properly chargeable with the value of the gold in currency at that time, all the other transactions of the estate having been had in currency.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1229-1242, 1245; Dec. Dig. ⇨303.]

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[15. *Executors and Administrators* ⇨104.]

\*Executors held liable for interest after a decree requiring them to account, they not having shown that the funds were kept on hand unemployed to meet the results of the accounting.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 423-432; Dec. Dig. ⇨104.]

[16. *Executors and Administrators* ⇨500.]

When an executor is required to account before the Court of Equity, it is no longer necessary for him to account before the ordinary, and, therefore, his failure to do so does not deprive him of his right to commissions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2136; Dec. Dig. ⇨500.]

[17. *Executors and Administrators* ⇨500.]

For a failure to make returns since the adoption of the General Statutes of 1872, an executor did not forfeit his commissions, there being no law imposing such forfeiture.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2131-2139; Dec. Dig. ⇨500.]

[18. *Executors and Administrators* ⇨495.]

An executor is entitled to commissions on funds that practically passed through his hands.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2089-2106, 2108; Dec. Dig. ⇨495.]

[19. *Appeal and Error* ⇨1022.]

A finding of fact by referee, overruled by Circuit judge, approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

20. An omission by referee and Circuit judge as to a matter of fact, corrected.

[21. *Appeal and Error* ⇨266.]

[On appeal from the confirmation of a referee's report on final settlement of an executor's accounts, the objection that interest was allowed on an open account against the estate is unavailable, where no exception was taken in the lower court.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1555; Dec. Dig. ⇨266.]

[22. *Witnesses* ⇨180.]

[Where objection is taken to the competency of a witness to testify in an action, and said objection is made too late, it is unnecessary to consider whether it could have been sustained if taken at the proper time.]

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 727; Dec. Dig. ⇨180.]

Before Aldrich, J., Edgefield, March, 1881.

Action by J. G. Tompkins, Lucy G. Tompkins and R. A. Tompkins, a minor, against S. S. Tompkins and J. W. Tompkins, as executors of the last will of James Tompkins, deceased, James L. Tompkins and F. A. Tompkins, commenced April 23d, 1877, for settlement of the estate of James Tompkins and for an accounting by the executors. J. G. Tompkins, a son of H. W. Tompkins, was assignee of Lucy G. Tompkins, who was assignee of H. W. Tompkins, and Lucy G. Tompkins, widow, and R. A. Tompkins, an infant, were distributees of R. Augustus Tompkins, deceased, a son of testator.

James Tompkins died in May, 1864, leaving a will, the ninth and eleventh clauses of which were as follows:

9th. Upon the payment of the sum of \$5,500 to my estate, or the accounting therefor, in the division of the residuum by my sons, Franklin A. and R. Augustus Tompkins, I will, devise and bequeath unto them and their heirs forever, all my interest, being the one-third part of a tract of land in the State of Texas, county of Brazoria, and whereon my son Henry W. Tompkins now resides, and the remaining two-thirds of which are owned respectfully by my sons Henry W. of the one part, and Franklin A. and R. Augustus Tompkins of the other part.

11th. By the above bequests, I have attempted to equalize the advancements heretofore made to my children, and if any of the above negroes, given to any of my sons or

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grandsons, \*should die before they are received, except those given my son James L., my desire is, and I do direct, that my exec-

utors substitute one of equal value for any son's negro or negroes so dying, from my negroes not herein specially disposed of. I have also included in the estimate of advancements all notes and debts due me by any of my children, which I hereby declare canceled; excepting, however, the \$6,000 and the debt against Tompkins & Macmurphy, in the fourth clause of this, my will, which are to be paid by my son, James L. Tompkins, as therein directed, and also a debt of \$5,500 against my sons, Franklin A. and R. Augustus Tompkins, mentioned in the ninth clause of my will.

S. S. and J. W. Tompkins were appointed executors. They were then in the Confederate army, but returned to their homes in September, 1864, and qualified. The inventory and appraisement were filed in February, 1865. Testator's heirs were his widow, Huldah; his sons, Stephen S., James L., Henry W., John W., Franklin A. and R. Augustus Tompkins, and a grandson, S. J. Tompkins. Henry W. Tompkins died in 1867, intestate, leaving a widow, Lucy G., and an infant son, R. A. Tompkins. Mrs. Huldah Tompkins died in 1868, intestate, and S. J. Tompkins died intestate in 1871, and his share in the estate of his grandfather and grandmother passed by assignment of his distributees to the plaintiff, R. A. Tompkins. The estate was very considerably in debt, and, but for several very favorable compromises made by the executors, would have been insolvent. As it turned out, however, the debts were nearly all paid, and much valuable land was saved to the estate.

The facts bearing upon the points decided are generally stated in the opinion. To such statement should be added that there was no objection taken at the reference to the testimony of J. W. Tompkins as to his transactions with his deceased father; and that the sale of the White House place was a transfer to a creditor made under a power in the will in compromise of a large claim at twenty-five per cent. agreed to in consideration of certain services rendered by one of the executors. The case was referred to John R. Abney, Esq., to take the testimony and state the accounts. He reported, *inter alia*, as follows:

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\*On February 27th, 1864, the testator took up a note held by the bank of Hamburg against Tompkins & Macmurphy, principal, and James Tompkins and J. W. Tompkins, sureties, by paying thereon the sum of \$18,406.02. It is in testimony that the testator used \$5,355 of the money of J. W. Tompkins in taking up said note. In the fourth clause of the testator's will he bequeathed said note to J. L. Tompkins, upon the condition that he pay for the claim testator has in it, in cotton, at seventy-five cents per pound. The said J. L. Tompkins does not think he ought to pay said claim in full, and urges

that the testator was indebted to him by reason of his being a part owner of the Texas land with F. A. and R. A. Tompkins; and H. W. Tompkins who owed J. L. Tompkins a large sum of money for advances, and, also, by reason of J. L. Tompkins having a separate account of \$56.70 against the testator. As to the first discount, I do not think it should be allowed, since there is no evidence of the testator's being interested in the farming operations on said place; but as to the second, I think it proper to allow it, unless the said J. L. takes said claim strictly under the will. I think the said J. L. can either take under the said clause or refuse to do so. And, under the circumstances, I think it proper to require him to account for and pay the \$18,406.02 according to the value of said amount in good currency, as regulated by our statute. By applying the statute the amount would be reduced down to currency of the present day, and the account would stand as follows: \* \* \*

Under the ninth clause of testator's will, a bequest or devise is made to F. A. and R. A. Tompkins, which is conditional. In such cases the right of election exists, and, in my opinion, fairness and equity would be done by permitting them to decline to assume the indebtedness therein imposed on them, and to leave the matter as it stood previous to the will. Then, if that be done, the next question is, to whom did the place belong? From the testimony it appears that no title-deed had ever been drawn. H. W. Tompkins admits that he was to be one of the purchasers, but says that he had no showing. In equity, I don't think that makes any difference. The others do not appear to have designed excluding him from the benefit of

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\*the trade, and I apprehend that his name would have been in the deed of conveyance had the credit portion of the purchase-money been paid. If, then, he was a part owner, what portion did he own? I think it clear that it was one-third; and, furthermore, I think it equally clear that the claim which James Tompkins had over the land was an equitable mortgage in its nature. Each of the three sons were to own one-third when the land was paid for, and the credit portion was to be paid out of the proceeds of the farms on the place, in which farms the brothers were equally interested. I, therefore, think that each of them should pay one-third of the \$5,500 advanced by the testator for the payment of the cash portion of the purchase-money, and their accounts for that would stand as follows: \* \* \*

It will be seen above that I have computed interest from January 1st, 1860. From F. A. Tompkins' testimony it appears that the \$5,500 was loaned about that time, or before.

Tanning Business—In July, 1863, the tes-



tator and his son, J. W. Tompkins, entered in a partnership for the purpose of carrying on a tannery. This firm was dissolved in January, 1864, and the stock, &c., sold for \$10,710 net. This amount was used for the purpose of taking up the Hamburg bank note against J. L. Tompkins, hereinbefore mentioned; and as J. W. Tompkins was entitled to one-half of the \$10,710, the said J. L. Tompkins is due him \$701.50, as may be seen by referring back to the account of J. L. Tompkins with the testator's estate for the amount paid in taking up said note.

In January, 1864, a new firm was organized for the purpose of tanning. It was composed of James Tompkins, J. W. Tompkins, and one Price, and styled Price & Tompkins. The business continued to be carried on after the testator's death, and was discontinued in the latter part of 1866. But before its ending, Price went out of the firm and transferred his interest to the estate of the testator and J. W. Tompkins, upon a settlement had with him. After Price had gone out of the firm there were liabilities against the firm, which J. W. Tompkins claims to have paid out of his own money. This being

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\*the case, the estate is indebted to him for one-half of the amount so paid. The said firm also owed J. W. Tompkins \$72, and James Tompkins \$152. The accounts would be as follows: \* \* \*

The firm obtained a patent from the United States government for tanning, which belongs to the testator's estate. I recommend that the patent and two notes, which also belong to the firm, be sold, and the proceeds applied in a settlement between them.

**Mercantile Business**—In January, 1858, James Tompkins and J. W. Tompkins formed a mercantile partnership, which lasted for two years. At its termination, the firm owed James Tompkins \$207.07, and, therefore, J. W. Tompkins owed the testator one-half of said sum. The accounts stand as follows: \* \* \*

The assets consisted of goods, notes and accounts, on which only \$20 was collected. I recommend that the said notes and accounts be sold, and the proceeds thereof applied to the settlement of the above account. The testator's interest in the goods was bought by J. W. Tompkins, and about the same time J. W. Tompkins, being in the shoe business with one Jennings, also purchased Jennings' interest, and consolidated the two branches of business. The account of testator has been offered in evidence. At the end of each current year, from 1861 to 1864, both inclusive, I have scaled the account down according to the schedule regulating the value of Confederate money. The accounts stand as follows: \* \* \*

**Overseeing Account**—J. W. Tompkins claims that the testator was due him \$600 for services rendered in overseeing the tes-

tator's plantation during the late war. I don't think, however, that it has been shown to be due even upon an implied contract. The circumstances existing at the time the services were rendered, or evidenced by the letter of James Tompkins to the comptroller general, appear to have given the government a voice in the premises, and the implied contract thereby proved, tends to show that

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such services were given on \*the part of the government as in the nature of a gratuity.† I, therefore, do not think that the claim should be allowed.

It is impossible now to make a complete statement of the accounts, as the land is not yet sold, and the choses in action on hand uncollected are also to be disposed of; but the foregoing accounts are in full compliance with the order under which I was appointed, and are sufficient to render a full settlement easily effected so soon as all the assets of the estate are sold and the proceeds collected. The plaintiffs contend that J. W. Tompkins, executor, is liable for certain, if not all, of the deficit in the account of S. S. Tompkins, executor, but it does not appear tenable ground in view of the testimony and the law. See *Gates v. Whetstone*, 8 S. C. 244 [28 Am. Rep. 284].

In making a full settlement of the estate of the testator, the share of H. W. Tompkins will be charged with all liabilities, just as if it had not been assigned. The assignee took the said share subject to such charges as were proper against H. W. Tompkins. See Code, § 135. I recommend that the land be sold on salesday in November. \* \* \*

I further recommend that the creditors of the testator's estate, who have not been paid, be called in to prove their claims, or be required to file the same.

To this report the plaintiffs filed the following exceptions:

1. Because the referee erred in holding the estate of testator liable to J. W. Tompkins in the sum of half the amount of the liabilities of the firm of Price & Tompkins, to wit, the sum of \$1,268.42.

2. Because the referee erred in holding that the estate of testator is indebted to J. W. Tompkins in the sum of \$1,127.61 on account of the tannery.

3. Because, in respect to the tannery, the report is, in other respects, erroneous.

4. Because the referee erred in allowing J. W. Tompkins an interest in the Tompkins & Macmurphy note, paid by testator.

5. Because the referee erred in holding J.

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L. Tompkins in\*debted to the estate of testator only in the sum of \$1,717.42 on account of the Tompkins & Macmurphy note, and because, in other respects, in reference to the

† This was an exemption from service in the Army to act as overseer for his father.—REPORTER.

said note of Tompkins & Macmurdy, the report is clearly erroneous.

6. Because the referee erred in holding H. W. Tompkins indebted to the estate of testator in the sum of \$4,271.60, or in any other sum, on account of the sum of \$5,500 advanced by testator for the purchase of a tract of land in Texas.

7. Because the referee erred in holding the estate of testator indebted to J. W. Tompkins in the sum of \$3,939.23, on account of the mercantile business.

8. Because the referee erred in allowing J. W. Tompkins commissions on the proceeds of the sale of the White House place in 1873, to wit, on the sum of \$3,716.18, when the said sum did not pass through his hands.

9. Because the referee erred in allowing J. W. Tompkins credit for the sum of \$2,700, claimed to have been paid by him on account of the judgment of Jennings, Smith & Co., in the year 1876, the said judgment not being authorized by law, and being, if authorized by law, irregular, null and void, and because, if paid, was not paid out of individual funds.

10. Because the referee erred in allowing S. S. Tompkins credit for the sum of \$7,662.93, claimed to have been paid out in 1869, whereas, in that sum is included the payment of the identical Jennings, Smith & Co. judgment, embraced in the exception next above.

11. Because the referee erred in not holding J. W. Tompkins equally and jointly liable with S. S. Tompkins for the amount of the proceeds of the sale of one lot of cotton in Liverpool, to wit, the sum of \$11,923.

12. Because the referee erred in allowing the executors any commissions after the year 1866, no annual returns having been made after that time.

13. Because the referee erred in not holding the executors responsible for the notes and accounts on hand at the death of testator, no evidence being introduced showing them to have been worthless or doubtful, and no effort having been made to collect all of them.

#### \*10

\*14. Because the referee erred in holding the executors liable for the sum in Confederate treasury notes on hand at the death of testator, to wit, the sum of \$15,535, of which only the sum of \$1,700 was charged to S. S. Tompkins.

15. Because the referee erred in not holding the executors liable, to some extent at least, for the sum of \$9,550.90 in Confederate bonds, on hand at the death of testator, in 1864.

16. Because, if the estate of testator was indebted to J. W. Tompkins on account of the mercantile business in the sum of \$3,939.23, or in any other sum, the referee erred in not canceling it by the Confederate money on hand at the time of testator's death.

17. Because the referee erred in allowing

J. W. Tompkins to testify to the transactions between him and his testator as to the mercantile account, and because the said account was barred by the statute of limitations.

18. Because the referee erred in allowing defendants to amend without giving plaintiffs an opportunity to reply.

19. Because, in regard to the mercantile business, the referee erred in not giving the amount in Confederate money that was reduced, nor the rate of the reduction, to gold.

20. Because the referee erred in allowing J. W. Tompkins credit in gold for the sum of \$95.90 on account of taxes paid for P. L. Tucker, in 1865, when the amount was paid in Confederate money, and should have been reduced to gold, according to law.

21. Because the referee erred in not adjusting the rights of the parties amongst themselves, in obedience to the order of reference.

22. Because the report of the referee is, in other respects, contrary to the evidence and the law.

Exceptions of J. W. Tompkins—

1. Because the referee erred in not deducting the payments made in each current year before striking a balance.

2. Because the referee erred in not charging to the estate the amount found due this defendant for money furnished by said J. W. Tompkins to pay the Tompkins & Macmurdy

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note, \*testator having appropriated the note and disposed of it by his will.

3. Because the referee erred in not allowing this defendant compensation for services rendered as overseer.

4. Because the referee erred in reducing this defendant's accounts against the testator, as if the charges were made in Confederate currency, when the items charged in said accounts were charged at gold prices.

5. Because the referee erred in not allowing this defendant his part of the account of H. W. Tompkins due Jas. Tompkins & Son, and in not charging testator's share of said account against the said H. W. Tompkins.

6. Because the report of the referee is contrary to law and evidence in other respects.

Exceptions of S. S. Tompkins—

1. Because the referee erred in not deducting the payments made by the defendant for each current year before striking a balance to bear interest for the years in which said payments were made.

2. Because the referee erred in charging this defendant and F. A. Tompkins with the nominal value of the currency received by them for cotton instead of the value of such currency in constitutional money at the time received; and, further, because he demonetized gold in his statement of the account of R. A. Tompkins for cotton sold by him, though it was but the logical consequence of his mode of charging this defendant and F. A. Tompkins.



3. Because the referee erred in charging this defendant with interest, after the order of Chancellor Lesesne for him to account, on the money, received by him during and after the year in which said order was made. See *Clark v. Tompkins*, 1 S. C. 119.

The Circuit decree was as follows:

This case was heard on exceptions to the report of Mr. John R. Abney, referee. The report is very long—seventy-seven pages—containing evidence, accounts and conclu-

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sions of law and \*fact. When a case is referred in which matters of fact are to be ascertained and accounts balanced, the findings of the referee, like the verdict of a jury, are conclusive on the court, unless the findings of fact are contrary to the evidence, or the statements of the account show error on their face. The exceptions to the report number thirty-one in all; hence, the labor of investigation has been much more difficult than that of decision.

Mr. James Tompkins, an eminent and wealthy citizen of Edgefield, departed this life in May, 1864, leaving of force his last will, by which he appointed his two sons, the defendants, his executors. He, with his sons, had been engaged in mercantile pursuits, a tannery, the purchase of land and various moneyed transactions. Hence, as will be seen by the report, the referee had much labor in sifting the testimony and adjusting the accounts. The main subject of controversy, however, was the sale of one hundred and thirteen bales of cotton in Liverpool. From that sale J. W. Tompkins received \$1,775, and S. S. Tompkins \$10,148.47. It is contended the executors are jointly liable for this amount. The referee was directed to take testimony, state the accounts between the executors and the estate, and between the parties; to ascertain the amounts due by the executors, and each of them, to the parties respectively; to report at what time and upon what terms the real estate should be sold, and any special matter. The referee has laboriously performed that duty.

The deceased was reputed to be a man of wealth, and doubtless, but for the misfortunes of the war, his estate would have been amply sufficient to meet all its liabilities, but, like many other estates, it proved to be insolvent. His son and executor, S. S. Tompkins, whom I have known from his early manhood, a gentleman of irreproachable character and of the highest integrity, seems to have had the chief management of the estate, and I have no doubt has acted throughout with an eye single to the best interest of all concerned. He is evidently very sensitive on the subject of his management, but I do not think has cause of uneasiness, for his frank explanation and the earnestness he has displayed throughout must disarm the most censorious and convince the most suspicious that his every ef-

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fort \*has been to preserve his father's memory, advance the fortunes of his children and make the best settlement in his power for the creditors. I think it is but simple justice to give this expression of opinion here, because, from the feeling displayed by Mr. Tompkins at the hearing, he is greatly moved, as I am sure no one will suspect him of improper motive or conduct.

I repeat, the main discussion was on one exception, which applies to the sale of one hundred and thirteen bales of cotton in Liverpool. This question is, I think, settled by the case of *Gates v. Whetstone*, 8 S. C. 244 [28 Am. Rep. 284]. In that case all the preceding authorities on the liabilities of co-executors are very well grouped, and the rule is announced that "in this State the courts have not held an executor liable for the acts of his co-executor to which he has not contributed in some direct and active way, so as by his interference to afford not only countenance, but coöperation." The facts on which the referee has based his findings are briefly these: This cotton was stored on one of the plantations of the testator. Incendiary fires were so frequent that Mr. S. S. Tompkins became solicitous for its safety, and suggested to his brother, J. W. Tompkins, co-executor, the propriety of removing it to Augusta. In this Mr. J. W. Tompkins acquiesced; had the cotton hauled to the river, and it was shipped to Augusta.

After the war, the factors who had the cotton in charge, shipped it to Liverpool and sold it. An account was opened by the factors with the executors, who were credited with the amount of the sales. Mr. S. S. Tompkins drew \$10,148.47, and Mr. J. W. Tompkins \$1,775. Mr. S. S. Tompkins says: "The cotton was sold by my individual order, and not by concurrence of my co-executor." Mr. J. W. Tompkins says: "When I drew the \$1,775, I was under the impression that I had individual funds in the hands of the factors; at that time I did not know the cotton had been sold; did not learn it until 1868 or 1869; the shipping of the cotton was the act of my co-executor; when I drew the \$1,775, I supposed it would be charged to my individual account, and not to me as co-executor." There is a good deal of testimony on this head, but these are the salient points of the evidence of the executors, the

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actors in \*this transaction; they both appear to speak with frankness and candor, I think. Mr. S. S. Tompkins says: "I do not recollect if I consulted my brother about the shipment of the cotton, but I have no doubt he would have acquiesced if I had."

I have looked over the evidence carefully, and my conclusion is, that it establishes the following facts: 1. That J. W. Tompkins agreed with S. S. that the cotton was not safe on the plantation; that it should be sent

to Augusta, and he superintended the removal and shipment. 2. That he did not know of the shipment to Liverpool and sale. 3. That he did not know the proceeds of the sale were credited to him and his co-executor. 4. That when he drew the \$1,775 he supposed he had funds of his own, in the hands of the factors, to pay it. 5. That he was not consulted by his co-executor when he drew the balance, nor did he know what disposition he made of the money. 6. That he lived in Cokesbury; that his father had entire confidence in his brother, his co-executor; that he was the older and a lawyer and that he desired to leave the whole management of the estate in his hands, being unwilling to qualify as executor.

Now, I cannot see how J. W. Tompkins has "contributed in some direct and active way, so as by his interference to afford not only countenance, but coöperation." He did not know when the cotton was shipped to Liverpool and sold. He did not know that the proceeds of the sale were in the hands of the factors, and credited to him and his brother, as executors. When he drew for the \$1,775, he expected the drafts to be paid out of his individual funds. He did not know that his co-executor drew the balance, or what he did with it. How, then, can it be said that he contributed actively and directly to the act of his co-executor? I see no reason to disturb the finding of the referee on this fact, and the exception is overruled.

As to the first exception, this is also a question of fact. It was stated in the argument that no exception was taken as to the competency of J. W. Tompkins as a witness, nor does it appear by the report that such exceptions were made at the reference. If this be so, the fact was fully established by the proof, and there is no error in the find-

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ing. The exception is overruled. \*Query: Without deciding the objection as to the competency of the witness, is it not too late to make the exceptions after the coming in of the report? It is like objecting to the verdict of a jury on evidence that was permitted to go to them without challenge at the trial.

Second exception. The referee has found that a contract was to be performed at the death of the testator; the death dissolved the copartnership as to all future contracts, but I see no error in the finding of the referee as to the contracts existing at the time of the death. This exception is overruled. And so are the third, fourth and fifth exceptions. If the referee was satisfied from the evidence that this payment was made with partnership funds, I see no error in the finding, and these exceptions are overruled. The sixth and seventh exceptions embrace questions of fact and matters of account; the referee had the witnesses and books before him; he had a much better opportunity

to judge what was the truth and right of the case than I have, and I will not disturb his findings. The exceptions are overruled.

The eighth exception must be sustained. If the money did not pass through the hands of the executor, J. W. Tompkins, he incurred no liability, and I do not see on what principle the referee allows commissions. It was the result of a compromise of a debt in which no money passed; simply an exchange of papers. The ninth exception must be overruled. It was no part of the inquiry referred to the referee, to try the validity of the judgment. It was found that the executors paid it in good faith; they regarded it as a valid claim, and it was certainly binding on the estate until it was set aside. The tenth exception must be sustained; it seems to be evident that the referee has committed an error here.

The twelfth exception is overruled. When I was commissioner in equity, the practice was general where an estate was taken into the Court of Equity on a bill for account, the returns to the court of ordinary ceased, because, while the accounting was going on before the commissioner, there was no necessity to undergo the expenses of another before the ordinary. Commissions were always allowed. The nineteenth exception must be sustained in part. I can very well

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see how, in view of the universal calamity that had befallen the country, and the state of public opinion in Edgefield, the executors may have concluded there was no use to incur the expense and trouble of trying to collect these old debts; they reason, if the juries interpose no obstacle, the stay law will prevent, and probably the referee shared this opinion. But there should have been an inquiry; some, if not all, may have been collected. Nor do I think it right to charge the whole to the executors. Let there be a further inquiry.

The fourteenth, fifteenth and sixteenth exceptions must be sustained; the value of Confederate money and securities that came into the hands of the executors was a proper charge against them, and should have been allowed. As to the seventeenth exception, I am in doubt if the code applies; the books were the evidence, not the witness, J. W. Tompkins. These books were as much evidence against one partner as the other. All were equally bound by them; the entries of one were the entries of the other; each had the right to correct errors or mistakes, and if one partner allows a charge made against him in his lifetime without complaint or objection, it seems hard and unjust, the moment the breath leaves the body, the books—his books—shall not prove that account. It was as much his act as the act of his partner, and it is the account, the silent witness, that speaks, not the surviving partner. The exception is overruled.



The eighteenth, nineteenth and twentieth exceptions I cannot determine; the report does not furnish me sufficient evidence to form a satisfactory judgment. The nineteenth and twentieth are denied; these must go back for further inquiry. I am sorry that severe indisposition prevented me from writing out my opinion when the argument was fresh in my memory; it was due to the earnestness, zeal and ability with which it was pressed, but my state of health, during the court and the succeeding court in Columbia, prevented. It is ordered that the report go back to the referee, or some other, as Mr. Abney is out of the county, if the counsel desire, to be reformed on the principles herein announced.

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\*From this decree plaintiffs and the two defendants first named appealed upon the following exceptions:

## Plaintiffs' exceptions—

1. Because his Honor, the presiding judge, erred in deciding that the estate of James Tompkins, deceased, is insolvent.

2. Because his Honor, the presiding judge, erred in deciding the matter of fact that J. W. Tompkins simply superintended the removal and shipment of one hundred and thirteen bales of cotton, whereas, it appears from the evidence of J. W. Tompkins himself, that the said J. W. Tompkins actually took possession of the said cotton, had it entirely within his own control, and removed and shipped it upon his own responsibility.

3. Because his Honor, the presiding judge, erred in deciding as matter of fact that J. W. Tompkins did not know of the shipment of said cotton to Liverpool and the sale thereof.

4. Because his Honor, the presiding judge, erred in deciding that J. W. Tompkins, did not know that the proceeds were credited to him and his co-executor.

5. Because the court erred in deciding that when J. W. Tompkins drew the \$1,775 he supposed he had funds of his own in the hands of the factors to pay it.

6. Because his Honor erred in deciding that J. W. Tompkins "was not consulted by his brother when he drew the balance, nor did he know what disposition he made of the money."

7. Because his Honor erred in deciding that J. W. Tompkins "lived in Cokesbury; that his father had entire confidence in his brother, his co-executor; that he was the older and a lawyer, and that he desired to leave the whole management of the estate in his hands, being unwilling to qualify as executor."

8. Because his Honor erred in not holding J. W. Tompkins equally and jointly liable with S. S. Tompkins for the amount of proceeds of the sale of said lot of cotton sold in Liverpool, to wit, the sum of \$11,623.

9. Because his Honor erred in deciding the

estate of testator is liable to J. W. Tompkins in the sum of one-half the amount of the liabilities of the firm of Price & Tomp-

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kins, to wit, the \*sum of \$1,268.42, and also in deciding that this was a question of fact.

10. Because his Honor erred in deciding that the estate of testator is indebted to J. W. Tompkins in the sum of \$1,127.61 on account of tannery business.

11. Because his Honor erred in overruling the third, fourth, fifth, sixth, seventh and ninth exceptions taken by plaintiffs to the referee's report.

12. Because his Honor erred in deciding that the twelfth and seventeenth exceptions to the referee's report, submitted by plaintiffs, must be overruled.

## Executors' exceptions—

1. Because his Honor erred in holding the executors accountable for any sum for the notes and accounts not collected, the same, or receipts of attorneys therefor, having been produced at the reference and proven uncollectable by the executors, and in the absence of any proof showing that the said notes and accounts, or any of them, were collectable or solvent.

2. Because his Honor erred in holding said executors liable for anything on account of Confederate treasury notes and bonds on hand at death of testator, the proof showing that the testator had invested his ward's funds in them, and executors regarded them as belonging to another trust. See *Clark v. Tompkins*, 1 S. C. 119.

3. Because his Honor erred in not ruling upon and sustaining the joint exception of said executors to the referee's report, the following being said exception, viz.: Because the referee erred in not deducting the payments made in each current year, before striking a balance to bear interest for the year in which said payments were made.

## J. W. Tompkins' exceptions—

1. Because his Honor erred in not considering and sustaining the defendants' exceptions to the report of the referee herein.

2. Because his Honor erred in sustaining the plaintiffs' eighth exception to the report of the referee, the proof being that the defendant effected the compromise through his

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individual influence, and borrowed a large sum of money individually to make the compromise.

3. Because the Circuit judge erred in sustaining the plaintiffs' sixteenth and nineteenth exceptions to the said report of the referee, and in recommending the twentieth exception to said referee.

## Exceptions of S. S. Tompkins—

1. Because his Honor erred in sustaining plaintiffs' exception No. 10, objecting to the credit given to S. S. Tompkins in 1869, of \$7,662.93, there being no evidence to impeach any of the vouchers or the validity of any

of the debts paid, except the admission of the defendant, S. S. Tompkins, that the sum of \$1,500 of that sum was paid by his co-executor, and properly credited to him by the referee.

2. Because his Honor erred in not considering and sustaining this defendant's second exception to the referee's report, to wit: "Because the referee erred in charging this defendant and F. A. Tompkins with the nominal value of the currency received by them for cotton instead of the value of such currency in constitutional money at the time received; and, further, because he demonetized gold in his statement of the accounts of R. A. Tompkins for cotton sold by him, though it was but the logical consequence of his mode of charging this defendant and R. A. Tompkins."

3. Because his Honor erred in not considering and sustaining the defendant's third exception to the referee's report, to wit: Because the referee erred in charging this defendant with interest after the order of Chancellor Lesesne for him to account on money received by him during and after the year in which said order was made. See *Clark v. Tompkins*, 1 S. C. 119.

Messrs. B. W. Bettis, F. H. Wardlaw, for plaintiffs.

Messrs. S. S. Tompkins, W. T. Gary, Ernest Gary, for defendants.

July 12th, 1882. The opinion of the court was delivered by

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\*McIVER, A. J. James Tompkins departed this life on May 9th, 1864, having first duly made and executed his last will and testament, whereby he appointed his two sons, the defendants, S. S. and J. W. Tompkins, executors. Owing, however, to the fact that these executors were both absent in the Confederate service, they did not qualify until September 25th, 1864, and the appraisement of the estate was not made until February 14th, 1865, a very short time before the termination of the recent war.

This action was commenced on April 25th, 1877, for the purpose of obtaining from the executors an accounting, and effecting a final settlement of the estate of the testator. The referee, to whom it was referred to take and state the accounts of the executors, as well as between the several parties, made his report, to which all parties filed exceptions, and the case came before the Circuit judge to be heard on said report and exceptions, and from his decree all parties have appealed. Without stating in detail the various grounds of appeal, we propose to consider the several questions which we understand are raised by the various grounds of appeal.

The first, and one of the most material questions in the case is, whether the executor, J. W. Tompkins, should be made liable to account for anything more of the proceeds

of the sales of certain cotton belonging to the estate which had been sent to Liverpool, than the amount which actually went into his hands. It seems that the testator left, at the time of his death, on his plantation, a considerable lot of cotton, something over one hundred bales, and the executors, fearing that it would be lost or destroyed if allowed to remain there, on account of the disturbed and unsettled condition of things in this State at the close of the war, determined that it should be shipped to Augusta, Georgia, and the executor, J. W. Tompkins, superintended the removal and shipment.

Some time afterwards, it was shipped to Liverpool by the directions of the other executor, S. S. Tompkins, and sold, and the proceeds of the sale were placed to the credit of the estate on the books of Warren & Co., fac-

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tors and commission merchants of Augusta. Of these proceeds, J. W. Tompkins drew, at different times, and in different amounts, sums amounting in the whole to \$1,775, with which he has been charged; and the balance of the proceeds, amounting to something over \$10,000, was drawn by the other executor, S. S. Tompkins; and the question is, whether J. W. Tompkins shall be charged, in his account as executor, with the whole amount, or only with the amount actually drawn by him.

It is well settled that one executor is not liable for funds which went into the hands of his co-executor, unless it is made to appear that he has paid them over to his co-executor, or has joined in the misapplication of them, or has joined in a receipt, or done some other act which enabled his co-executor to receive the funds. *Atcheson v. Robertson*, 3 Rich. Eq. 137 [55 Am. Dec. 634]; *Gates v. Whetstone*, 8 S. C. 246 [28 Am. Rep. 284], where the authorities upon this subject are collected. We see no evidence in this case of any act done by J. W. Tompkins which enabled his co-executor to receive the proceeds of the sales of the cotton. Either of the executors had the authority to order the cotton shipped and sold, and when the proceeds of the sale were placed to the credit of the estate, either of the executors had the right to draw on such proceeds, and one could not prevent the other from so doing. We are, therefore, unable to perceive any ground upon which J. W. Tompkins can be made to account for that portion of the proceeds of the sales of the cotton which was drawn by the other executor.

The next question is, whether any of the parties can be made liable to the estate for the sum of \$5,500 advanced by the testator to make the cash payment on the Texas lands. In the view which we take of this matter, it is not important to determine which of the sons of testator were interested in the purchase of these lands, or in what proportions they were interested. The testator evidently supposed, when he made his will,



that, whatever may have been the original scheme, or who were the parties to it, the eventual arrangement was that he was to have a one-third interest, his son, H. W. Tompkins, a third, and that the remaining third belonged jointly to his sons, Franklin A. and R. Augustus Tompkins. It turned

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out, however, that \*no title had ever been obtained for these lands, nothing having been paid on the purchase-money, except the amount advanced by the testator to make the cash payment, and that the land was surrendered to the vendor, Smith.

Whether this would have given the testator a claim on those of his sons for whom he advanced the money, need not be considered, for any such claim was released by the express terms of the eleventh clause of the will, in which the testator, after stating that, by the preceding bequests, he had attempted to equalize the advancements previously made to his children, uses this language: "I have also included in the estimate of advancements all notes and debts due me by any of my children, which I hereby declare canceled, excepting, however, the \$6,000 and the debt against Tompkins & Macmurphy in the fourth clause of this, my will, which are to be paid by my son, James L. Tompkins, as therein directed; and, also, a debt of \$5,500 against my sons, Franklin A. and R. Augustus Tompkins, mentioned in the ninth clause of my will." If, therefore, any indebtedness existed on the part of any of the sons, to the testator, growing out of the advance made by him to meet the cash payment on the Texas lands, such indebtedness is expressly canceled by the terms of the eleventh clause of the will.

It is argued, however, that the indebtedness of \$5,500, on the part of the two sons, Franklin A. and R. Augustus, is expressly excepted, and that they, therefore, remain liable to the estate for the same. We do not so understand it. The debt against them, which is excepted, is the debt which the testator supposed he was creating against them by the terms of the ninth clause of his will, and not the indebtedness growing out of the original transaction. Hence, we do not see how any charge can be made against any of the sons for any indebtedness which any of them may have incurred to the testator by reason of his having advanced the money for the cash payment on the Texas lands, because all such indebtedness is canceled by the express terms of the eleventh clause of the will. Nor do we see how any charge can be made against Franklin A. and R. Augustus Tompkins by reason of the debt mentioned in the ninth clause of the will, because no such debt could arise unless these two sons accept-

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ed \*the devise given by the ninth clause, which, of course, they have not done, and 10

will not do, as the thing devised turns out not to be the property of the testator.

The next point made is that J. W. Tompkins, under section 415 of the code, was not competent to testify as to any transactions with the testator. This objection came too late, and, therefore, it is unnecessary to consider whether it could have been sustained, even if taken at the proper time.

Our next inquiry is, whether the claim of J. W. Tompkins against the estate for one-half of the losses resulting from the tanning business can be sustained. The facts presented in the record are not sufficient to enable us to determine this question. The original partnership between the testator and his son, J. W. Tompkins, for the purpose of carrying on the tanning business, seems to have been formed in 1863, and was dissolved in January, 1864, when a new partnership was formed, composed of the testator, his son J. W. Tompkins, and one Price.

This partnership was, of course, dissolved on May 9th, 1864, by the death of the testator, but the business was continued after that time by the survivors, the allegation being that the partnership was then under large contracts with third parties which it was bound to perform. Price subsequently transferred his interest in the partnership to the estate of the testator and the other partner, J. W. Tompkins, and retired from the concern. The business of the partnership, when finally wound up, resulted in a loss of something over \$1,200, for one-half of which the surviving partner, J. W. Tompkins, claims that the estate is liable to him, he having paid the liabilities of the firm.

The partnership was dissolved on May 9th, 1864, by the death of the testator, and the rule is, that after that time the surviving partner could continue the business only so far as was necessary to settle existing demands and complete transactions begun, but unfinished, at the time of the dissolution, but no further. As is said in *Gow Part. 231*: "From the nature of a partnership, engagements may be contracted which cannot be fulfilled during its existence, exposed, as it is, to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding en-

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gagements, \*of taking and settling all the accounts, and converting all the property, means and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although, for all other purposes, the partnership is actually determined.

In this case it does not appear how the losses were incurred, whether in fulfilling contracts existing at the time of the dissolution, and in a legitimate effort, to wind up

the affairs of the partnership, or whether they were the result of new business undertaken after the dissolution. There must, therefore, be an inquiry as to this point, and so much of the losses as are properly traceable to the effort to fulfill contracts existing at the time of the dissolution, and which the partnership was bound to perform, or to expenses incurred in a legitimate effort to wind up the affairs of the partnership, will constitute a legitimate partnership debt, and the estate will be chargeable with its proper proportion thereof. But so far as such losses resulted from any new business undertaken after the dissolution, they are not chargeable to the estate of the testator.

There seems to have been one item charged twice by the referee against the estate of the testator, viz.: The amount (\$72) claimed to have been paid by J. W. Tompkins for one month's board of six hands, inasmuch as it appears in the general tan-yard account, and is also made a separate charge against the estate. This, also, will be inquired into and rectified if it has, in fact, been twice charged.

The next point is as to the mercantile account claimed by J. W. Tompkins as a charge against the estate. The correctness of this charge depended largely upon a question of fact, and we see no reason for interfering with the conclusion of the referee, concurred in by the Circuit judge, except as to the matter of scaling this account. It does not necessarily follow, that a contract should be scaled because it was made during the war. The question is, whether the contract was made with reference to Confederate States' notes as a basis of value, and, until that is made to appear, there is no ground for applying the scale fixed by the act. We

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see no evidence in this case that this \*account was contracted with reference to Confederate States' notes as a basis of value, and, on the contrary, the inference would be, from the prices charged for many of the articles, that it was not.

It is urged, however, that interest on this account should not have been allowed. There is no exception raising this distinct point, and it is not, therefore, properly before us. We may say, though, that while it is true that open accounts do not bear interest, yet sometimes equity allows interest upon demands, as to which interest is not recoverable at law, upon the principle that it would be inequitable to withhold it. *Pettus v. Clawson*, 4 Rich. Eq. 103. We can, then, very well understand why the referee and the Circuit judge should have thought that it was but just and equitable to allow it in this instance, inasmuch as interest had been charged upon the accounts of the executors with the estate, as well as upon the accounts between the several parties.

As to the claim for overseers' wages, we see no reason for interfering with the finding of

fact by the referee concurred in by the Circuit judge.

The next question is, whether the executors should have been charged with the Confederate bonds and Confederate treasury notes on hand at the death of the testator. It will be observed that these assets were not money in the legal sense of the term, and should, therefore, be treated as any other personal property. It must also be remembered that, owing to the condition of things existing at the time of the testator's death, the currency of the war, and the absence of the executors in the Confederate service, together with the disturbed and unsettled condition of things generally, these assets did not come into the hands of the executors until a very short time before the end of the war, when they lost what little value they may have previously had. It seems to us, therefore, that if these assets became valueless in the hands of the executors without any fault upon their part, and without some evidence that they were used, or could have been used, for the benefit of the estate, the executors should not be charged with them.

As has been said, they did not come into

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the hands of the \*executors until a very short time before the war terminated, and there is no evidence that, within that short time, they could have been used in payment of debts of the estate, or otherwise made available. Indeed, in the condition in which the country then was, it is not at all likely that they could have been so used; and even if they had possessed the legal attributes of money, it would, perhaps, have been hazardous for the executors to have appropriated such money to the payment of any particular debt, when the estate seemed inevitably doomed to insolvency, before they had taken time to look around and ascertain the rank and amount of the heavy debts due by the estate.

It is urged, however, that, at least, the claims now presented by the executor, J. W. Tompkins, should have been extinguished by the Confederate treasury notes on hand. But these assets went into the hands of the other executor, and he certainly would not have been justified in applying them to simple contract claims of his co-executor, when he knew that there were very heavy outstanding specialty claims against the estate, with every prospect that the assets of the estate would prove insufficient for the payment of its debts. We see no ground, therefore, for charging the executors, or either of them, with the Confederate bonds or notes left by the testator, especially when the executor who was principally active in the management of the estate, and who, according to the testimony, was possessed to the fullest extent of the testator's confidence, testifies that he understood that these assets were investments made by his father, of



the funds of his wards, and did not really belong to the estate.

Our next inquiry is, whether the estate should be held liable to J. W. Tompkins for the amount furnished by him to the testator to take up the note of Tompkins & Macmurphy to the bank of Hamburg. It seems that the testator and J. W. Tompkins were the sureties of Tompkins & Macmurphy on a note to the bank of Hamburg, and that, a short time before his death, the testator took up this note, using for that purpose some money belonging to J. W. Tompkins, not amounting, however, to one-half of the sum paid on the note. How this could give J. W. Tompkins any claim against the estate of the testator, we are at a loss to conceive. He and the tes-

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tator were \*both liable to the holder of the note for the full amount of it, and, as between themselves, each was liable for one-half, and unless J. W. Tompkins furnished more than one-half of the amount used in taking up the note, he could have no claim against the estate of the testator.

It is contended, however, that inasmuch as the testator, by his will, undertook to dispose of the note, the transaction must be regarded as a loan by J. W. Tompkins to the testator of the amount advanced by him, and, therefore, that the estate is liable to refund to J. W. Tompkins the amount borrowed from him. It is true that the testator does undertake, by his will, to give to his son, J. L. Tompkins, one of the firm of Tompkins & Macmurphy, the note in question, but the bequest is upon the condition "that he account or pay to my estate for the sum paid by me and interest, in fair cotton, at seventy-five cents per pound." This gave to J. L. Tompkins the right of election, and, as he has not and, we are given to understand, will not accept the bequest upon that condition, it necessarily fails, and the matter stands as if no such bequest had been made, and leaves the transaction as it originally stood, by which the testator was entitled to a claim against Tompkins & Macmurphy for the amount paid by him as their surety, and J. W. Tompkins was entitled to a similar claim against Tompkins & Macmurphy for the amount advanced by him for the purpose of taking up the note.

The next question to be considered is, whether the executors should be held liable for the uncollected notes and accounts due the testator at the time of his death. These assets were produced or accounted for by receipts of attorneys with whom they had been lodged for collection, and the evidence on the part of the executors is, that they tried to collect them, but were unable to do so. There is no evidence that any one of them could, by proper diligence, have been collected; and, in the absence of such evidence, and under all the circumstances surrounding this case, the condition of the country, and

the disasters resulting from the war, we do not see any sufficient ground to warrant the conclusion that these uncollected assets should be charged against the executors. As was held in *Pettus v. Clawson*, 4 Rich. Eq.

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\*92, before an administrator should be charged with notes marked by the appraisers on the inventory as good, there should be some proof of their collection or of negligence in collecting; and the same doctrine would apply to executors. To have required proof that the debtors had been sued to insolvency, or to have taken up each one and offered evidence as to his insolvency, would have involved an expense to the estate, which, in our judgment, would not have been justified.

The next question is as to the credits allowed for the payment of the judgment in favor of Jennings, Smith & Co. We see no error in the conclusion reached by the Circuit judge in reference to this matter. Even though there may have been technical informalities in the judgment, yet there is no evidence that the debt on which the judgment was recovered was not a valid claim against the estate, which has been extinguished by the executors, and they, therefore, should have credit for the amount paid by them. There does, however, seem to have been a mistake in crediting \$1,500 of this amount to the executor, S. S. Tompkins, which he admits to be an error; and the Circuit judge has fallen into an error in sustaining plaintiffs' tenth exception to the referee's report in toto, while it should have been sustained only as to the \$1,500 erroneously credited to S. S. Tompkins, there being no evidence assailing any of the other credits allowed.

The next question is as to the mode of stating the accounts of the executors, it being alleged, in their behalf, that the referee erred in not deducting the payments made in each year before striking a balance to bear interest. The position taken by the executors is correct, and is fully sustained by the case of *Pettus v. Clawson*, 4 Rich. Eq. 92.

Our next inquiry is, whether there was any error in ascertaining the amounts chargeable to R. A. Tompkins and F. A. Tompkins on account of cotton received by them from the estate in 1865. R. A. Tompkins received two bales of cotton on July 24th, 1865, and sold them for \$215.16, in gold; and F. A. Tompkins received two bales on November 24th, 1865, which he sold for \$443.90, in currency. In adjusting the accounts of the several parties, the referee converted the

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amount, for which \*R. A. Tompkins sold his two bales, into currency, by adding thereto the premium on gold, thus ascertaining the amounts chargeable to these parties by the same standard of value. In this we see no error. The other transactions between the parties, and the dealings of the executors

with the estate, since the termination of the war, were, doubtless, made in currency, and not in gold: and, hence, it seems to us fair and equitable that the amounts with which R. A. Tompkins and F. A. Tompkins were chargeable for this cotton should be ascertained by the same standard of value.

Next, it is contended by the executors that they should not be charged with interest after the order of Chancellor Lesesne was made, in the case of *Clark v. Tompkins*, 1 S. C. 119, requiring them to account. If it had been made to appear that the executors had collected in the assets of the estate, and retained the same in their hands unemployed to meet any balance that might be ascertained on the accounting ordered, there would have been good ground to claim an exemption from liability for interest; but as this has not been made to appear, we do not see any ground upon which the position taken by the executors can be sustained.

The next question is, whether the executors were entitled to commissions after 1866, when they ceased to make annual returns to the ordinary. There is no doubt but that, by the terms of the act of 1789 (5 Stat. 112), an executor forfeited his right to commissions by a failure to make the returns required by that act (*Lay v. Lay*, 10 S. C. 208); but we have always understood the rule to be, that, when an executor or administrator is required to account before the Court of Equity, it was no longer necessary for him to make returns to the ordinary, inasmuch as a court of superior jurisdiction had assumed the duty of taking the account.

In this case it appears that these executors were required to account before the Court of Equity by an order passed in the case of *Clark v. Tompkins*, 1 S. C. 119, which case seems to have been heard in June, 1867, and although it does not distinctly appear when the bill was filed, it must, necessarily, have been in the latter part of 1866 or early in the

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year 1867. This, we think, rendered it unnecessary for the executors to make annual returns to the ordinary after that time, and their failure to do so should not deprive them of their right to commissions. In addition to this, the act of 1789 was repealed on February 10th, 1872, by the adoption of the General Statutes, and the provision inserted therein, in lieu of the act of 1789, contains no clause by which an executor or administrator loses his right to commissions by a failure to make annual returns; and, therefore, in any event, the executors would be entitled to commissions since 1872. *Davidson v. Moore*, 14 S. C. 266.

In regard to the commissions allowed by the referee on the proceeds of the sale of the White House place, the Circuit judge seems to have fallen into an error of fact in saying that no money passed through the hands

of the executor, for, as we understand the testimony, the proceeds of the sale did, practically, pass through the hands of the executor. We think, therefore, that the Circuit judge erred in sustaining the exception relating to this matter.

The only remaining error alleged is the omission to charge the assignees of H. W. Tompkins with the amount of an account due by him to James Tompkins & Son. This matter seems to have been overlooked, both by the referee and the Circuit judge. From the testimony before us, this seems to be a proper charge against the assignees, and the accounts should be rectified accordingly.

The judgment of this court is that the judgment of the Circuit Court be modified so as to conform to the principles herein announced, and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect the views herein presented.

18 S. C. \*31

\*HOLMES &amp; DURHAM v. NATIONAL BANK OF WILMINGTON.

(April Term, 1882.)

[1. *Banks and Banking* ⇨ 234, 275.]

Action for breach of contract may be brought in the courts of this State against a national bank established in another State.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1061; Dec. Dig. ⇨ 234, 275.]

[2. *Banks and Banking* ⇨ 278.]

There is nothing in the acts of Congress, relating to these banks, that prevents an attachment from issuing in such action before judgment.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1068; Dec. Dig. ⇨ 278.]

[This case is also cited in *Central R. & Banking Co. v. Georgia Const. & Investment Co.*, 32 S. C. 344, 11 S. E. 192, without specific application.]

Before Mackey, J., Charleston, April, 1881.

This was an action by Holmes & Durham against the First National Bank of Wilmington, in the State of North Carolina, commenced in October, 1879. The opinion states the case. The order of the Circuit judge was as follows:

National banking associations are the creatures of Congress, and are fiscal agents of the government. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383 [20 L. Ed. 840]. They have such powers only as Congress thought proper to give to them, and are subject to such liabilities only as the national government has chosen to impose upon them. *Osborn v. Bank*, 9 Wheat. 738 [6 L. Ed. 204]; *Commercial Bank of Cleveland v. Simmons*, 10 Alb. L. J. 155 [Fed. Cas. No. 3,062]. The evident intent of the acts creating them is to free them as much as possible from any embarrassment in the fulfilment of their func-



tions. They have full power to contract as bodies corporate, and any contract may be enforced against them as well in the Circuit and District Courts of the United States as in the State, county and municipal courts, provided the action, suit or proceeding is brought in the place in which they are located.

The motive of this restriction is evident. If a national bank can be compelled to answer suit in a locality other than its place of business, absence of its officers, removal and detention of its books may be enforced, and its business operations, and, consequently, its utility, as one of the financial agents of the government, may be greatly hampered, if not entirely suspended. This construction of the act of Congress is sustained by courts

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\*in this country of the highest rank and of unquestionable authority. *Crocker v. Marine National Bank*, 101 Mass. 240; *Chesapeake Bank v. First National Bank*, 40 Md. 269; *Cadle v. Tracy*, 11 Blatchf. 101 [Fed. Cas. No. 2,279]. The first ground of demurrer is sustained.

The second ground of demurrer is in the terms of the act of Congress, and it is also sustained. Revised Statutes, § 5242 [U. S. Comp. St. 1913, § 9834].

This case came up to be heard on demurrer to the complaint. After argument of counsel thereon and consideration thereof, it is ordered, adjudged and decreed that the demurrer be sustained, and the complaint be dismissed.

From this order the plaintiffs appealed upon exceptions raising the precise points decided by this court.

Mr. T. M. Mordecai, for appellant.

Messrs. Simonton & Barker, contra.

August 1st, 1882. The opinion of the court was delivered by

SIMPSON, C. J. The defendant, a national banking association in Wilmington, N. C., created under an act of Congress, has been made a party in this action by attachment of its funds in the hands of a national bank located in Charleston. The action proper is an action for an alleged breach of warranty in the sale of certain chattels and personality by the defendant to the plaintiffs, and the attachment is an incident thereto.

The defendant demurred to the action upon two grounds: 1. That the court was without jurisdiction over the defendant, for, that, under the act of Congress, it is liable only to suits and actions and proceedings brought against it in the State, county or city in which it is located, to wit, in the State of North Carolina, county of Brunswick and city of Wilmington, and nowhere else. 2. That it cannot be proceeded against by attachment, because, under the acts of Congress no attachment can issue against such corporations before final judgment in any

suit, action or proceeding in any State, county or municipal court. Both of these grounds

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were sustained by the Circuit \*judge, who dismissed the complaint. The appeal involves the consideration of these grounds of demurrer.

It is conceded that if the defendant was an ordinary foreign corporation, that the objections made to the action could not be sustained. It is, however, contended that the defendant is a corporation created by act of Congress, and being, in some degree, a financial agent of the United States, that its powers, duties and liabilities are dependent upon the acts which gave it existence, and, under these acts, it cannot be sued except in the State where it is located. In view of this position, the first inquiry to be made is, what provisions have been made on this subject by Congress in the acts creating such associations.

The first act on the subject of national banks is the act of June 3d, 1864, styled "an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." 13 Stat. at L. 99. In section 8 of this act, it was enacted that any association formed under this act shall, from the date of its organization, be a body corporate, having power to adopt a corporate seal, to make contracts, sue and be sued, complain and defend, in any court of law and equity, as freely as natural persons.

Section 52 of this act provides "that all transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposit to its credit; all assignments of mortgages, sureties, or real estate, or of judgments, or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." Section 57 provides "that suits, actions and proceedings against associations under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municip-

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pal court \*in the county or city in which said association is located, having jurisdiction in similar cases."

On March 3d, 1873, this act was amended, and especially section 57 above, by adding thereto the following proviso: "And provided further, that no attachment, injunction or execution shall be issued against such as-

sociation or its property before final judgment in any such suit, action or proceeding in any State, county or municipal court." 17 Stat. at L. 603 [U. S. Comp. St. 1913, § 6537].

On June 27th, 1866, Congress passed an act to provide for the revision and consolidation of the statute laws of the United States, 14 Stat. at L. 74. The commission appointed under this act, having reported, an act was passed December 1st, 1873, in conformity thereto, known as the Revised Statutes of the United States. In this general act, section 57 of the act of 1869, as amended by section 3 of the act of 1873 was left out as a whole, and section 3 was added to section 52, and made section 5242 of the Revised Statutes. Section 5596 of the Revised Statutes [U. S. Comp. St. 1913, § 10593] repealed all parts of acts not contained in said revision, and made the sections of the revision applicable thereto, to stand in the place of such repealed provisions. In 1875, an act was passed (18 Stat. at L. 320) correcting errors in the Revised Statutes, by which act section 57 of the act of 1864, left out in the previous consolidation, was restored and made a part of section 5198 [U. S. Comp. St. 1913, § 9759] which is now as follows: "That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district within which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Thus it will be seen that when this action began, section 5198 above, and the proviso to section 57 of the act of 1864 inhibiting attachment before judgment, were of force, the substance of which, for a proper understanding of the question involved, will now be repeated. Section 5198 provides that these associations may be sued in any circuit, district or territorial court of the United States held within the district where the association is established, or in any State,

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county or municipal court in the \*county or city where it may be located, having jurisdiction in similar cases. And section 5242, which is the section rendering transfers of notes \* \* \* in contemplation of insolvency \* \* \* void by proviso attached thereto, inhibits attachments against these associations before judgment.

Now, the question is, whether, with these two provisions of force, this suit can be maintained in a State court not in the State where the bank is located. This will depend upon the construction which must be given to these two provisions. And, first, was it the intent of section 5198 to confer exclusive jurisdiction upon the courts therein named? and, secondly, does the proviso to section

5242 apply to all suits, or only to such suits as might arise in consequence of the attempted transfers of notes \* \* \* made in contemplation of insolvency, which are inhibited in that section, and to which section this proviso is attached?

The eighth section of the act declares that every banking association formed and organized in pursuance thereof, shall be a body corporate, possessed with the usual powers of corporations, to wit, to make contracts, to sue and be sued in any court of law and equity, as a natural person. If the act had stopped at this section, the question presented here could hardly have arisen, as, doubtless, the jurisdiction of the State courts would have been universally conceded when the action was properly brought in accordance with State laws. Did the subsequent section of the original act, section 57, now section 5198 of the Revised Statutes, conflict with section 8? It certainly did not in express terms. It is true that jurisdiction is conferred on the courts therein named, but not in language which expressly makes that jurisdiction exclusive. The language employed is, that suits, actions and proceedings against such associations may be had in said courts. The word "may" is a permissive word, not mandatory and not necessarily exclusive.

There being no express negation, then, of jurisdiction to the State courts generally, the next question is, has jurisdiction been taken away by implication? It has been held in some courts that the jurisdiction of a State court cannot be taken away by implication. *Teall v. Felton*, 1 N. Y. 537; *S. C.*, 2 Hill N. Y. 164; 26 Wend. 192. The

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subject-matter involved in this action \*is an ordinary common law matter—breach of contract. The Circuit Court certainly had jurisdiction of this. The defendant is an artificial being, invested with the rights and privileges, and subject to the liabilities of a natural person, and, ordinarily, should stand before the courts as to jurisdiction over its person as other individuals occupying the same position. Our laws have made provision for making such beings parties to actions under certain conditions where their rights are involved, or their obligations are to be enforced, and in the absence of all express exclusion of jurisdiction by the acts of Congress creating them, the implication should be very strong to divest the State courts of their usual functions in such cases. It should be a necessary implication.

The argument is, that the enumeration of certain courts in the act was wholly useless, unless a restriction was intended; that these courts would have had jurisdiction without this special grant in common with other courts, and, therefore, the only purpose of conferring it expressly must have been to confer it exclusively. This argument has



much force, but it is not conclusive. The implication arising from it does not appear to be of that strong controlling character sufficient to paralyze the arm of the State courts, and to render these associations free from State control, enabling them to delay and defraud creditors, and, as was said by Church, C. J., "involving an amount of expense and injustice which we cannot attribute to the intention of the law-making power."

The decisions in other States are not uniform on this question. The two most prominent cases in which the question has been discussed, are the cases of Crocker et al. v. Marine National Bank of the City of New York, 101 Mass. 240 [3 Am. Rep. 336], and the case of Cooke v. State National Bank of Boston, 52 N. Y. 97 [11 Am. Rep. 667]. These cases reached directly opposite conclusions; Gray, J., in Massachusetts, holding that, by force of the act of Congress, such associations could be sued only in the county or city where the association was established, and Church, C. J., in New York, that an intent to take away jurisdiction from the State courts should not be deduced from the doubtful and ambiguous language employed in the act of Congress. The question has

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never \*been made squarely in the Supreme Court of the United States. The nearest approach to it was in the case of Casey v. Adams, 12 Otto 66 [26 L. Ed. 52], but the decision there is not strictly in point, and the respondent's counsel admits frankly that the decisions in the other States are in conflict.

In the absence of any case in our own courts, of direct decisions in the Supreme Court of the United States, and in the conflict between the cases in the courts of the States, the respondent, falling back upon general principles, takes the position that these associations are financial agents of the government, established by act of Congress for that purpose; that, as such, they are exempt from all control of the State authorities, except so far as may be permitted by Congress. He refers to Van Allen v. The Assessors, 3 Wall. 589 [18 L. Ed. 229], in which Chase, C. J., the author of the system, discussed fully the character of these banks and the purpose of their creation.

No doubt they were intended as financial agents of the government, and, being created by act of Congress, they should be entirely free from the legislation of the States; that is, the States could not add to or diminish their powers and duties by adverse legislation or cripple them in any way in the exercise of their legitimate functions; but it does not follow that they are to be regarded as wholly exempt in every respect from responsibility to State laws. This would be giving them a much higher position than any other citizen of the United States. This is not necessary to their usefulness or value as financial

agents of the government, and they are not entitled to that position. They have power to contract in the several States, to sue in the State courts, and there can be no reason why they should be exempt from State process when they breach their contracts. There should be reciprocity. In our opinion, the demurrer upon the first ground should have been overruled.

The proviso to section 5242 prohibiting attachment proceedings against these associations before judgment rendered, we think, applies to the suits arising out of the matters referred to in that section. The purpose of this proviso being to prevent discrimination between creditors in cases of insolvency or bankruptcy, and this not being a

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case arising under that section, there \*was no foundation for the demurrer on that ground. Robinson v. National Bank, 81 N. Y. 392 [37 Am. Rep. 508]. The question of the power of Congress to strip the State courts of jurisdiction in such cases, involving, as in this case, simply a common law cause of action, is not necessarily involved, and, therefore, we have not considered it.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded for a new trial.

## 18 S. C. 38

Ex parte BENSON & CO. GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY. STATE, Ex relatione ATTORNEY-GENERAL, v. SAME.

(April Term, 1882.)

[Reported and annotated in 44 Am. Rep. 564.]

## [1. Carriers ⇨192½.]

The common-law rule seems to be that common carriers shall transport goods at reasonable rates, but this rule does not require the same rate of compensation to be charged alike to all.

[Ed. Note.—*Avinger v. South Carolina Ry. Co.*, 29 S. C. 275, 276, 7 S. E. 493, 13 Am. St. Rep. 716; *Fulmer v. Southern R. Co.*, 67 S. C. 263, 45 S. E. 196.

For other cases, see Carriers, Cent. Dig. § 867; Dec. Dig. ⇨192½.]

## [2. Carriers ⇨192½.]

Independent of charter and statute restrictions, corporations stand upon the same footing as other persons invested with powers of contracting, and their contracts depend upon the same principles that govern contracts between natural persons.

[Ed. Note.—Cited in *Ober v. Blalock*, 40 S. C. 36, 18 S. E. 264.

For other cases, see Carriers, Cent. Dig. § 867; Dec. Dig. ⇨192½.]

## [3. Carriers ⇨192½.]

A contract of a railroad company to pay a rebate upon all cotton shipped over their road by certain cotton buyers is not inequitable or against public policy; and, after the shipment made, is binding on the company and its creditors.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 867; Dec. Dig. ⇨192½.]

[4. *Railroads* ⇨209.]

And the contract having been made by the superintendent while the road was in the hands of a receiver, the claim for rebate under such contract should be paid out of the receiver's fund.

[Ed. Note.—Cited in *Ex parte Carolina National Bank*, 18 S. C. 295; *State v. Port Royal & A. R. Co.*, 45 S. C. 469, 23 S. E. 380.

For other cases, see *Railroads*, Cent. Dig. § 692; Dec. Dig. ⇨209.]

5. In re Fifty-four First Mortgage Bonds, 15 S. C. 304, qualified by McGowan, A. J.

Before Fraser, J., Richland, December, 1881.

Petition by E. B. Benson & Co. in re *Gibbes v. Greenville and Columbia Railroad Company*, and the State, ex relatione the Attorney-General, v. same. The petition was based upon a contract made by letter, and which is fully stated in the opinion.

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\*The Circuit decree, after a statement of the facts repeated in the opinion, was as follows:

Under orders, in such cases, receivers are sometimes allowed to do certain specific acts; but, in this case, there is no limit, except, as I construe the order, that which is furnished by a wise discretion, subject to the order of this court. No unlimited power was ever claimed, and none was conferred by the order. I take it that every contract was made subject to the supervision of the court, and that no wrong is done even at this late day, if the approval of the court is withheld from a contract which has in it no substantial merit. The authority in *High Rec. 392*, and *Jones Railr. Sec.*, § 498, rest on the same case, and I find no other for allowing a payment of rebates in a receiver's account. It is an unfair discrimination amongst shippers, and I do not think proper, especially when made by an appointee of the court. I cannot concur in the opinion expressed by the witness that such contracts are necessary. The interest of a great common carrier, like a railroad company, is best subserved by fair and equal rates of freight, which are open to all. The question is a new one in this State, and I am not willing, in this case, under a loose construction of Judge Melton's order, to give the approval of the court to a contract which I think is against public policy, and could not have been of any real benefit to the property under the control of the court, and has no equity. The exceptions are, therefore, sustained, and it is, therefore, ordered and adjudged, that the petition be dismissed with costs.

The exceptions of petitioners raise the questions of the validity of the contract and the right to payment out of the receiver's fund.

Messrs. J. S. Muller, J. T. Sloan, for appellants.

Mr. James Conner, contra; cited 90 U. S. 252; 52 N. H. 448; 62 Pa. 230; 7 Vr. 407.

August 8th, 1882. The opinion of the court was delivered by

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\*Mr. Chief Justice SIMPSON. The appellants, Benson & Co., filed a petition in the court below in re the above stated causes, praying payment of a certain claim for \$608 as rebate freight on six hundred and sixty-eight bales of cotton shipped over the Greenville and Columbia railroad by the petitioners, from Anderson Court House, during the cotton season of 1877-78. This claim was founded upon an alleged contract between the petitioners and the president and directors of said railroad company acting as receivers under the order of June 18th, 1872, known as Judge Melton's order, and the petition prayed payment out of the "receivers' fund." The contract relied on by the petitioners is not denied, nor is it denied that the petitioners have fully performed their part thereof.

The contract is fully set out in the petition. In substance, it is as follows: The petitioners were engaged in buying cotton. They purchased largely in Hartwell, Georgia, and, with the view to induce them to ship their cotton, bought at that place, over the Greenville railroad instead of down the Savannah river, Thomas Dodamead, the then superintendent of the said road, proposed that if they would ship all cotton purchased during the season of 1877-78, in Hartwell, by way of Anderson, S. C., over said road to Charleston or Augusta, they, the said president and directors, would transport said cotton at the regular rates, the freight to be paid at the regular rates by the consignees, with the understanding, however, that the petitioners should have refunded to them, at the close of the season, the sum of one dollar per bale so shipped to either point above mentioned.

This proposition was accepted by the petitioners, and a contract made accordingly, and, as has been stated, was acted upon by petitioners to the extent of shipping the six hundred and sixty-eight bales mentioned above over the road during the cotton season specified. At the end of the season, the agent at Anderson, C. H., made out a statement of the number of bales shipped under the contract with Mr. Dodamead, the superintendent, with vouchers for the amount due, who approved the same in regular form for payment and forwarded it to the treasurer's office to be placed to the credit of Benson &

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Co. The claim, \*however, was not paid, because, as Mr. Dodamead says: "The funds on hand were not sufficient, every available dollar being used to pay interest on debt of road instead of being applied to current expenses."

Mr. Dodamead further testified in this connection, that such a debt as this one, to wit, rebate on interchange of freights, should



have a preference to all other debts, as they are essential to the successful competition of railroads over freights. He said that they were competing with the Savannah river transportation, and the benefit of this particular transaction to the business of the road was, that it brought cotton to the road which would not have otherwise come; besides that, the persons who hauled their cotton, also bought their supplies there, and the road got the benefit, not only of the freight in the cotton down, but also on the return supplies.

In the latter part of the year 1878, the railroad property passed out of the hands of the president and directors, heretofore receivers, into the possession of a second receiver appointed under an order of Judge Pressley, made to that end, and, the claim of the petitioners still remaining unpaid and refused, this petition was filed on November 2d, 1881. At the December Term of the court for Richland county, the master to whom the petition had been referred to take testimony touching the claim, and to report thereon to the court, submitted his report, embracing the facts herein above stated, with a recommendation that the claim be allowed, and paid out of the fund known as the "receiver's fund."

At the hearing below, Judge Fraser, upon exceptions to the master's report, dismissed the petition with costs, holding, substantially, that the contract was without equity, was against public policy, could not have been for the real benefit of the company, was an unfair discrimination between shippers, and was not proper, especially when made by an appointee of the court. From this decree of Judge Fraser, the petitioners have appealed, and the appeal, though founded upon several exceptions, really brings up but a single question, to wit: Are the petitioners entitled to payment out of the receiver's fund in priority to mortgage bondholders?

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\*It is admitted that this contract was made prior to the act of 1878 (16 Stat. 784), regulating the matter of freights and charges on railroads and preventing rebates. It will be also conceded that there is nothing in the charter of this company which forbade such a contract. In the absence of statutory regulations then controlling the action of the company, it being a common carrier, we must look to the common law for the principles which are to govern in such a case.

What does the common law say as to questions like this? The leading principle of the common law, as applicable to common carriers, is that they are bound to carry for all, and for a reasonable remuneration from each. In *Johnson v. Pensacola and Perdido Railroad Co.*, 16 Fla. 623, Mr. Justice Westcott, in discussing a similar question to the one involved here, has collected many authorities bearing upon this point, and the conclusion which he reaches is: "That as against a common or public carrier, every person has the same right; that in all cases where his com-

mon duty controls, he cannot refuse A, and accommodate B.; that all the entire public have the right to the same carriage for a reasonable price at a reasonable charge for the service performed, and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, that for services performed, he shall charge no more than a reasonable sum to him."

This conclusion is sustained by numerous authorities, both English and American. *Peek v. North Staffordshire Railroad Company*, 10 H. L. 511; *Bastard v. Bastard*, 2 Show. 82; *Harris v. Packard*, 3 Taunt. 264; *Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story 35 [Fed. Cas. No. 2,730]; [*Chicago B. & Q. R. Co. v. Iowa*] 4 Otto 155 [24 L. Ed. 94]; 1 Chitty Cont. 684. In *Fitchburg Railroad Company v. Gage*, 12 Gray 393, the Supreme Court of Massachusetts held that a "railroad corporation is not obliged, as a common carrier, to transport goods and merchandise for all persons at the same rate," the common law rule being that equal justice shall be done to all parties. "But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each par-

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ticular case of service a reasonable \*compensation and no more." If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint.

In the eighth edition of *Story Bailm.*, § 508, it is stated that "at common law, a common carrier of goods is not under obligation to treat all customers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a common carrier from carrying for favored individuals at an unreasonably low rate, or even for gratis."

As extracted from these authorities, and many others which might be cited, the extent of the common law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not per se invalidate the contract as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others.

Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the

validity of their contracts depends upon the same principles which govern in contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and, therefore, not enforceable. To be void on such grounds, it must run counter to some known principle of equity or contravene some well-established doctrine of public policy forbidding it.

We do not know that this contract was obnoxious to any of these objections; nor, in the face of the testimony of the experienced superintendent who gave it, can we say that it was unnecessary. The cotton which he brought to the head of his road at Anderson, C. H., was grown in the State of Georgia, at a distance from Anderson. The Savannah

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River, running between Anderson and Hartwell, was its natural outlet to market, and, no doubt, afforded cheaper transportation. With these obstacles in the way, it required some inducement to be held out so as to bring this cotton to the Greenville road. And so long as the charges against others were not unreasonable, and in no way increased by the rebate offered to it, what ground is there for the courts to interfere? It is the province of the court to enforce contracts, not to destroy them.

But the main question in the case is, should this claim be paid out of the "receiver's fund." In the present unsettled state of the law as to what expenses may be properly chargeable to income in the hands of a receiver operating a railroad or other enterprise taken possession of by the court at the instance of mortgage creditors it is difficult to lay down any inflexible rule by which every claim may be tested and determined. In the early history of such cases, these charges were at first confined to such expenses as were necessary to the preservation of the property. But the doctrine has been progressive, gradually enlarging until now many items of expense which, at first, would have been excluded, would be allowed, and justly so. If creditors, through the aid of the courts, will oust corporations of their property, take possession and operate the enterprise preparatory to an ultimate sale, through their agents, and for their own benefit, all the necessary and incidental expenses should certainly be paid, and the doubt in my mind is, not whether they should be chargeable to the earnings alone, but whether the corpus also should not be liable.

But to recur: What character of expenses will be allowed? It is said in Jones Railr. Sec., § 498, "That all outlays of a receiver of a railroad, made in good faith, in the ordinary course of the management and operation of it, or so made with the view to advance and promote the business of the road and make it profitable and successful, are fairly within the limit of discretion necessarily allowed him. Thus," he continues,

"payments made by him as rebatement of freights to shippers in order to secure custom and increase the business of the road, being in the nature of drawbacks, such as are usual

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with transportation companies, are properly within his discretion," referring to *Cowdrey v. Railroad Company*, 1 Woods 331 [Fed. Cas. No. 3,293].

In High Rec., we find the following (section 392): "The duties of the receiver of a railway entrusted with the management and operation of the road, being very different from, and far more responsible than those of a passive receiver, appointed merely to collect and hold money, a somewhat wider discretion is allowed him in the matter of expenditures necessary to operate the road. And it may be said in general, that all outlays made by him, in good faith, in the ordinary course of the business of the road, with the view to advance and promote its interests, and to render it profitable and successful, may be allowed in passing his accounts; such outlays may include, not only keeping the road and its buildings and rolling stock in repair, but also procuring such additional accommodations and stock as the necessities of the business may demand, always referring to the court or master for advice when any considerable outlay is required. Thus, the charge for rebate on freights for horses and wagons, for the delivery of freight, for drayages and wharfage, for office room, for advertising the accommodations of the road, and for interest paid a bank for loans of money, have been allowed."

It is true these authorities are not, in themselves, binding upon this court, but they come from distinguished text writers, and are worthy of consideration, especially as the principles announced are founded in good sense, and rest upon high equity. At all events, as was said by Mr. Justice Bradley, in the case of *Cowdrey v. The Railroad Company*, supra, "Whatever objection to these rebatements might be made by the State, or by the planters and others who did not obtain like favorable terms, it does not lie in the mouths of the creditors, who reap positive benefits from the arrangements, to complain of it." And especially in this remark pertinent in this case, when it is remembered that the receivers here were appointed at the instance of the creditors under an order which invested them with almost unlimited power and authority, the exercise of which, in its widest range, they stood by and permitted, without objection or protest, for a period of five or six years.

In the case of *Ex parte Brown & Wife*, 15

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S. C. 532, this \*court held that the order of June 18th, 1872, not only constituted the president and directors receivers in the general sense, but conferred upon them "sweeping powers to conduct and carry on the business



of the company." In the Fifty-four Bond Case, 15 S. C. 304, pronounced before Ex parte Brown, the same construction was given to this order. The authority of High and Jones may not be controlling, but the two cases referred to above are from this court, and we cannot disregard them. The principles held in those cases, and under which the claims set up therein were allowed, vindicate fully the claim of the petitioners here, both in point of authority and in the substantial justice which underlies it. We think the Circuit judge was in error in dismissing the petition.

It is the judgment of this court that the Circuit decree be reversed and that the case be remanded, so that the amount found due by the master may be decreed to the petitioners to be paid out of the "receiver's fund."

Mr. Justice MCGOWAN. I concur in the result; but as the reference to the Fifty-four Bond Case, may be construed as approving all that is there said, I think it proper, in order to prevent confusion hereafter, to say that I do not agree with some things said in that opinion, especially the statement that "large discretion is allowed him (the receiver) in the financial manipulation of the assets." In my view, a receiver is not the agent of the company so as to bind it by his contracts, but simply the officer of the court. His new administration is separate and distinct from that of the company, and, without the express orders of the court, he has no right to touch the general finances of the company, but is limited to the income which arises from operating the road while under his control.

Judgment reversed.

## 18 S. C. \*47

\*PEARSON v. CARLTON.

SAME v. FOWLER.

(April Term, 1882.)

An intestate died in March, 1862. In July, a bill was filed for partition of his lands, and, by order passed in September, the widow was allotted one-third of the land, and the remainder was ordered to be sold; and the sale was made in October. An infant heir, A., was not a party to the proceedings; an heir, B., who had been made a party, died in August intestate and unmarried; and a child, C., was born to the first intestate after the sale. The purchase-money was paid and became worthless before distribution. *Held*—

### [1. *Partition* ⇨95.]

That A. was not bound by any of these proceedings, and was, therefore, here entitled to have partition of the lands purchased so as to obtain his share thereof as a distributee of the intestate, and also as a distributee of B.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 314; Dec. Dig. ⇨95.]

### [2. *Dower* ⇨112.]

That the allotment to the widow was not binding upon A. as a distributee of the intestate and of B.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 235, 317, 318; Dec. Dig. ⇨112.]

### [3. *Tenancy in Common* ⇨28.]

That the purchaser must account to A. for his share of the rents and profits.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 77; Dec. Dig. ⇨28.]

### [4. *Descent and Distribution* ⇨27.]

That C. was entitled to the same rights as A.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 78; Dec. Dig. ⇨27.]

### [5. *Partition* ⇨114.]

That there was no error in requiring the widow to pay her own costs in this action.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 440-449; Dec. Dig. ⇨114.]

### [6. *Descent and Distribution* ⇨27.]

A child born alive after the death of an intestate father is one of the children left by such father, and, as such, is capable of inheriting under our statute of distributions.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 78; Dec. Dig. ⇨27.]

### [7. *Partition* ⇨109.]

That such child is not bound by an allotment or sale in partition made before its birth, nor is it remitted to the proceeds of a sale so made.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 375-397; Dec. Dig. ⇨109.]

[This case is also cited in *Ex parte Worley*, 49 S. C. 60, 26 S. E. 949, as an instance of disregard of rule prescribed in section 2322, Rev. St.]

Before Hudson, J., Spartanburg, April, 1881.

These were two actions commenced by James T. Pearson on March 7th, 1878; one against Elizabeth Carlton, Anna Waddill and others, distributees of James Carlton, deceased, and the other against J. M. Fowler, Sanford Brockman and others, the same defendants as in the other case, except Elizabeth Carlton. The opinion states the facts of the case.

The Circuit decree, after a statement of facts, was as follows:

In regard to the unborn infant, Anna Waddill, we feel much perplexed. She was no party to that bill, nor could she be made

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\*such; and yet she was then heir to her father, and entitled, upon birth, to a share of the estate. It is passing strange that, in this hasty partition, the condition of the widow was not noticed, and that a living heir, James T. Pearson, was overlooked. There would be no difficulty nor hardship in the matter if the land had been allotted to the other heirs, and was still in their hands. They could be decreed to contribute to this posthumous child out of their shares until she be made equal. Even if the fund were on hand undistributed she could get her share after a re-adjustment. But the fund,

though still in court, or in the hands of the commissioner, and undivided, is utterly worthless. She had no voice in the suit by which this was brought about, and should not suffer from this calamity which the other heirs are called on to bear.

We feel constrained to hold that she is still entitled to her share of her father's land, although it has, in part, passed into the hands of a bona fide purchaser. The same rule, of course, must apply to the plaintiff, James T. Pearson, who was then in esse, but not a party. But how far can these two children disturb their mother's share of land, allotted to her as and for her thirds? The widow's share is fixed, and is not varied or affected by the number of children; be the same few or many, she takes under the statute her one-third in value of the land. That one-third has been duly allotted to her, and she has been for nearly twenty years in the quiet possession thereof. We do not think that this child and grandchild can be allowed to disturb her possession, unless they can show that the allotment to her was excessive. If this can be successfully done, then out of the excess they should be allowed to take their shares respectively; and of the sum of money which she was ordered to pay for equality of partition, and which she has not paid, they must have their shares.

Of the lands purchased by J. M. Fowler, the said Anna Waddill and James T. Pearson are entitled to demand partition, and likewise an accounting for rents and profits. He is entitled to all said lands, and to the use and occupation, rents and profits thereof, except such portion of land and rents or rental as shall be ascertained to belong to these

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claimants. Whether he will have any rents and profits or rental to account for will depend upon whether he has derived rents and profits from more than his share of the land, or whether he has actually used more than his share thereof. The correct rule by which he will be held to account is laid down in the case of *Jones v. Massey*, 14 S. C. 292.

Fowler (and Brockman who has bought of him) will be held to account only for the rents, issues and profits, use and rental of whatever portion of the land, over and above Fowler's share, which has actually yielded rents and profits or rental income. Against the claims of James T. Pearson and Anna Waddill to a part of this land, and the rents, issues and profits thereof, the defendants, Fowler and Brockman, are entitled to a fair and reasonable offset for the enhancement of the value of the land by reason of betterments made and erected under the honest belief that their titles were good against all the heirs-at-law of James Carlton, deceased. These offsets can be adjusted either by a separate action under the statute, or may be adjusted in this action in the partition of the land, and accounting for rents and prof-

its. It is therefore ordered, adjudged and decreed:—

1. That Mary R. Godfrey and William Godfrey, her husband; Sarah Pearson and her husband, Green L. Pearson; and Francis Wood and Thomas Wood, her husband, are entitled to no relief in this action, the said wives being bound by the original partition in 1862.

2. That a writ in partition do issue, directed to five commissioners, selected according to the practice of this court, commanding them, or a majority of them, to make partition of the lands of James Carlton, described in the pleadings as being in the possession of J. M. Fowler, (and under him, in part possessed by Sanford Brockman,) so as to allot to James T. Pearson, the plaintiff herein, and Anna Waddill, one of the defendants herein, their respective shares thereof as heirs-at-law of James Carlton, deceased, and of his son, John Carlton, deceased, and the balance to J. M. Fowler, and Sanford Brockman, who claims a part under said Fowler.

3. That the same commissioners do view

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the tract allotted to the widow, Elizabeth Carlton, and ascertain whether the same be more than her one-third in value of the lands of James Carlton, of which he died seized, and \$23.90 in excess, as was reported by the commissioners in partition in 1862. That they, in making this estimate, have reference to the value of said lands in 1862, at the date of the division, and make due return of their action in the premises to the next term of this court.

4. That Elizabeth Carlton do pay the said \$23.90 and interest into this court, and, that when paid in, the said J. T. Pearson and Anna Waddill do receive their respective shares of the same.

5. That it be referred to C. P. Wofford, Esq., to take an account of the rents, issues and profits, or rentals of the lands in the possession of J. M. Fowler and Sanford Brockman, according to the principles of this decree; and also of the betterments and improvements made and erected thereon by the said Fowler and Brockman, and that he do adjust and balance the accounts and offsets, and make report of his actings in the premises, with leave to report special matter.

It is further ordered that the parties herein do pay their own costs, respectively.

Exceptions were filed to this decree and appeal taken to this court.

Messrs. Bobo & Carlisle, for appellants.

Messrs. J. S. R. Thomson, R. K. Carson, contra.

August 8th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. James Carlton died intestate in March, 1862, and in July, 1862, a bill was filed in the Court of Equity by certain of his heirs, alleging that the per-



sonal estate in the hands of the administrator was sufficient for the payment of his debts, and praying for partition of his real estate. The administrator answered, saying that he had assets sufficient for the payment of the debts, and consenting to the partition. To this bill the plaintiff, who was then an infant of tender years, and the only child of a deceased daughter of the intestate,

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was not made a \*party. John Carlton, a son of the intestate, who was a party to the bill, died intestate in August, 1862, leaving, as his heirs-at-law, the other parties to the bill and the plaintiff, James T. Pearson, as well as the defendant, Anna Waddill, who also claims to be one of his heirs.

No notice was taken of the death of John Carlton in the proceedings then pending for partition, and on September 6th, 1862, an order for a writ of partition to issue was made. In pursuance of this order the writ was issued, to which the commissioners made a return, allotting a tract of land to the defendant, Elizabeth Carlton, the widow of the intestate, as her one-third of the real estate, which, exceeding in value her share by the sum of \$23.90, she was directed to pay that amount (to the other heirs, we presume, though it is not stated to whom,) for the purpose of equalizing the partition. The remainder of the land was recommended to be sold, and, accordingly, on the same day, to wit, September 6th, 1862, an order for the sale was made, and in pursuance of this order the balance of the land was sold on October 6th, 1862. At this sale the defendant, Fowler, became the purchaser, complied with the terms of sale, took titles, went into possession, and, subsequently, conveyed a portion of the land to his co-defendant, Brockman. Three days after this sale the widow of the intestate gave birth to a child, the defendant, Anna Waddill, who claims, as a posthumous child of the intestate, to be one of his heirs, and, as such, entitled to a share of his estate.

These actions were brought by the plaintiff; one for the purpose of obtaining his portion of the tract of land allotted to the widow, and the other for his portion of the land bought by the defendant, Fowler, at the sale for partition, and for rents and profits. The defendant, Anna Waddill, in her answer, sets up a claim for her share in the said lands as one of the heirs of the intestate. The Circuit judge held that, so far as the land allotted to the widow was concerned, she could not be disturbed in the possession of it, unless, upon an inquiry which he directed, it should be ascertained that it exceeded in value her share of the estate, in which event, the plaintiff and the defendant, Anna Waddill, would be entitled to their

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shares of such excess, as well as to \*their shares of the amount which the widow was

directed to pay for the purpose of equalizing the partition. He also held that these parties were entitled to their shares of the land bought by defendant, Fowler, at the sale for partition, and now claimed by him and his co-defendant, Brockman; and that these defendants should account for the rents and profits of so much of the land over and above their share as actually yielded rents and profits, subject to a deduction for improvements made by them. It was also adjudged that the plaintiff and the defendant, Anna Waddill, were also entitled to their shares of the share of John Carlton, who died pending the proceeding for partition. Finally, it was decreed that the parties herein pay their own costs respectively.

From this judgment the defendants, Fowler, Brockman and Mrs. Carlton, appeal on the following grounds: Because the Circuit judge erred—1. In refusing to dismiss the complaint in the case first above stated. 2. In requiring the defendant, Elizabeth Carlton, to pay her own costs. 3. In requiring a re-assessment of the land assigned to said defendant, Elizabeth Carlton, as her distributive share of the real estate of her deceased husband. 4. In holding that the plaintiff and Anna Waddill were entitled to any share in the premises so assigned. 5. In holding that the defendants, J. M. Fowler and Sanford Brockman, should account for the rents and profits of the land purchased by the said Fowler at the partition sale of the real estate of James Carlton, deceased. 6. In holding that the defendant, Anna Waddill, is entitled to any share in the land purchased by the said Fowler as aforesaid. 7. In holding that the defendants, J. M. Fowler, Sanford Brockman and Elizabeth Carlton, were bound to account to the plaintiff and Anna Waddill for the interest of the latter in the share of John Carlton, deceased, in said premises. 8. In holding that the premises described in the complaint were subject to partition.

We propose, first, to consider the claims of the plaintiff. We do not see how it can be questioned that he has a right to have partition of the lands in question. He was confessedly one of the heirs of the intestate, James Carlton, and he was not made a party to the proceedings for partition—was an infant at

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the time \*and has only recently attained the age of twenty-one years. He was, therefore, not bound by those proceedings, and his rights stand as if no such proceedings had ever been instituted; for if there is anything settled, it is that judgments bind only the parties to the proceedings in which they are obtained and their privies. Indeed, it does not seem to be seriously denied that he has a right to demand partition of the land purchased by the defendant, Fowler, and to have his share thereof set apart to him.

It is contended, however, that inasmuch as the share of the widow would have been one-

third anyhow, no matter what may have been the number of the children, and inasmuch as only one-third of the real estate was allotted to her, that the plaintiff has no cause of complaint against her, as that amount would have been allotted to her even if the plaintiff had been a party to the proceedings for partition. But it must be remembered that persons interested in the subject-matter of litigation are required to be made parties for the purpose of enabling them to be heard at every step taken therein, and as this plaintiff has not yet had an opportunity of being heard as to the propriety of the partition which has been made, he still has that right. It may be that, through collusion, mistake or negligence of the other parties, the land allotted to the widow exceeded her share, or that the partition was open to objection upon some other ground, and the plaintiff undoubtedly has a right to have the whole matter inquired into; and most unquestionably he has a right to demand from the widow his portion of the amount which she was directed to pay for the purpose of equalizing the partition. This being so, it follows, necessarily, that there was no error in requiring the defendant, Elizabeth Carlton, to pay her own costs; on the contrary, the provision of the Circuit decree, in that respect, is perhaps, more favorable to her than she would have had a right to demand.

The next inquiry is, whether there was any error in requiring the defendants, Fowler and Brockman, to account for rents and profits. Although there seems to be some conflict of decision elsewhere as to the liability of one tenant in common to account to his cotenants for rents and profits of the premises

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held in \*common, yet, in this State, the rule is too well settled to admit of controversy, that, when one tenant in common occupies and uses more than his share of the common property, he is liable to account to his cotenant for the rents and profits of so much of the common property as he has occupied and used in excess of his share. *Scaife v. Thomson*, 15 S. C. 338, and the authorities therein cited. The plaintiff, never having been divested of the title to his share in the land bought by Fowler at the sale for partition, was, unquestionably, tenant in common, and, as such, entitled to an account for rents and profits as directed by the Circuit judge.

Next, as to the plaintiff's claim for his portion of the share of his deceased uncle, John Carlton, in the intestate's estate. John Carlton was originally one of the parties to the proceeding for partition, and had he lived until the decree for partition and sale thereunder was made, his interest would undoubtedly have passed to the purchaser at such sale. But, pending that proceeding, and before any decree for partition, he died intestate, leaving the plaintiff, who was not a party to such proceeding, as one of his heirs-at-law, and no notice whatever was taken of

his death in the further conduct of that case. Of course, when John Carlton died intestate, his interest in the real estate of his deceased father at once descended to and became vested in his heirs-at-law, of whom the plaintiff was one, and any subsequent sale of the estate, under a proceeding to which the plaintiff was not a party, could no more divest the interest of the plaintiff in the share of his deceased uncle than it could divest his interest in the estate of his grandfather. It is clear, therefore, that the plaintiff was entitled to claim, not only his share as one of the heirs of his deceased grandfather, but also his share as one of the heirs of his deceased uncle, John Carlton; and there was no error in the judgment below in this respect.

Finally we are to consider what is the only real question in the case, the claim of the defendant, Anna Waddill, the posthumous child of the intestate. Under a rule which was rigidly observed by some of the former chancellors of this State, this question could never have arisen; for, according to that rule, a bill for partition of the real estate of an in-

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testate would not \*have been entertained until after the lapse of twelve months from the death of such intestate. If this wholesome rule had been observed when the application was made for the partition of this estate, the parties would, probably, have been saved the expense of this litigation. But although this was a rule governing the practice of some, at least, of the former chancellors, on circuit, yet it was not based upon any statutory provision like that forbidding the distribution of the personal estate of an intestate "till after one year be fully expired after the intestate's death," (2 Stat. 524; Gen. Stat. 455,) nor did it have the sanction of any decision of a court of last resort, so far as we know. We cannot, therefore, undertake to say that the failure to observe this salutary rule invalidated the partition now under consideration.

The question, therefore, of the right of a posthumous child to inherit from his deceased father, is, so far as we are informed, for the first time distinctly presented for decision in this State. The rule, elsewhere, seems to be well settled, that a posthumous child inherits from his deceased father just as if he had been born in the lifetime of such father, and had survived him. In 4 Kent Com. 412, it is said: "Posthumous children inherit, in all cases, in like manner as if they were born in the lifetime of the intestate and had survived him. This is the universal rule in this country. It is equally the acknowledged principle in the English law; and for all the beneficial purposes of heirship, a child in ventre sa mere is considered as absolutely born." So in 3 Washb. Real Prop., bk. 3, ch. I., § 2, p. 16, it is said: "Posthumous children inherit in the same manner as if they had been born in the lifetime of their father,



and were surviving heirs: and this doctrine is universally adopted in the United States. And this relates back to the conception of the child, if it is born alive."

In *Wallis v. Hodson*, 2 Atk. 115, the intestate died in December, 1724, "and, at his death, left issue, Towers Wallis, his only child, an infant, who died within a week after his death, and the defendant, Elizabeth, his widow, enceinte with the plaintiff, who was born on May 22d following;" and the question was whether the posthumous child

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could take any portion of the \*deceased son's estate. Held, that she could; Lord Hardwick saying: "The principal reason I go upon in the question is, that the plaintiff was in ventre sa mere at the time of her brother's death, and, consequently, a person in *rerum natura*, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime." In *Lancashire v. Lancashire*, 5 T. R. 49, John Lancashire, being unmarried, made his will, and, subsequently, married and died, leaving his wife pregnant, who, subsequently, gave birth to a child, and the question was whether this operated as a revocation of the will. The general proposition that marriage and the birth of issue would operate as a revocation being conceded, the only question considered was, "whether a posthumous child is considered in the same situation as one born during the parent's life," and the conclusion reached was that there was no distinction. See, also, *Thellusson v. Woodford*, 4 Ves. 322.

An argument in support of a contrary view has been suggested, drawn from the word "leave" in our statute of distributions, and it has been contended that as our statute provides only for those whom the intestate leaves at his death, an unborn child of the intestate cannot be said to be one of those left by him at his death, and, consequently, cannot inherit under the statute. If, however, as we have seen, there is no distinction, in law, between a posthumous child and one born during the father's lifetime, so far as the right to inherit is concerned, this argument loses its force. But, in addition to this, it has been repeatedly decided that a devise to the children of one "living at his death" embraces a posthumous child. *Clarke v. Blake*, 2 Ves. Jr. 673, and the cases therein cited; *Jenkins v. Freyer*, 4 Paige 52; *Stedfast v. Nicoll*, 3 Johns. (N. Y.) Cas. 18.

So in *Burdet v. Hopegood*, 1 P. Wm. 486, the testator devised the premises, "in case he should leave no son at the time of his death," to the defendant, Hopegood, and died, leaving his wife pregnant, who afterwards gave birth to a son, the plaintiff, and it was held that the plaintiff was entitled to the devised premises, the contingency upon which the estate was to go over to the defendant not having happened; the testator did leave

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a son, \*although he was not born at the time of his father's death. See, also, *Bedon v. Bedon*, 2 Bailey 231, where the same view seems to have been taken as a matter of course, the question not being discussed by the court. It seems to us, therefore, that a posthumous child, who is afterwards born alive, must be regarded as one of the children left by his deceased father, and, as such, capable of inheriting under our statute.

It may be contended, however, that though a posthumous child is an heir of his deceased father, and, as such, entitled to a portion of his estate, yet, that, as his rights do not attach until his birth, he must take his portion of the estate in the condition in which it is found at his birth; and where, as in this case, the real estate of his deceased father has, before his birth, been converted into money or bonds by a sale thereof, his claim must be confined to his share of such money or bonds, and that he cannot claim a share of the land in the hands of a purchaser.

We have found one case, which, at first view, seems to support this proposition. *Knotts v. Stearns*, 91 U. S. 638 [23 L. Ed. 252]. In that case, the action was brought to set aside the sale and conveyance of certain real estate in the city of Richmond, Virginia, of which one Edwin Knotts died seized. The order of sale was obtained under a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was a party. The case made by the pleadings and evidence was, that the property sold consisted of a house and lot, which, with a few articles of household and kitchen furniture, constituted the entire estate of the intestate; that the house was much out of repair, so much so that it could not be rented, and the parties had no means to repair it, nor had they any other property from which they could derive a support; and that it was manifestly for the interest of all parties concerned that the property should be converted into funds yielding an income. The property was sold on April 5th, 1863, the money paid and invested in Confederate bonds by order of the court, and titles were made to the purchaser. In the month of May, following the sale, the widow gave birth to a posthumous child, and the sale was attacked because this unborn child was not a party to the proceedings, nor were its interests spe-

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cifically considered in the proceedings, \*in that case. The court held that "the posthumous child did not possess, until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interests of the children then in being or the enjoyment of the dower right of the widow required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in

its then condition. That property had then ceased to be realty; it had become, by the sale, converted into personalty." The court also relied upon the further ground that, under the laws of Virginia, "Parties in being, possessing an estate of inheritance, are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties," and refers to the case of *Faulkner v. Davis*, 18 Gratt. 651 [98 Am. Dec. 698]; and this case, upon examination, will be found to be not in conflict with the views herein presented. No other authority is cited, and the conclusion reached by the court, upon this branch of the case, is not supported by any reasoning further than that above quoted.

This case, it will be observed, was not a case in which the order of sale was attacked, was in question, but, on the contrary, was a case in which the order of sale which was attacked, was made by the court for the purpose of changing an unfruitful investment of the property of persons who were not sui juris, into something that would yield an income necessary for the support of such persons. The sale, therefore, might, perhaps, have been sustained upon the principles established by the case of *Bofil v. Fisher*, 3 Rich. Eq. 1 [55 Am. Dec. 627], in which the Court of Equity asserted its power to bar, by its decree for sale, the interest of unborn contingent remaindermen, who, of course, could not be made parties. But such a power would only be exercised when a proper case was made for its exercise—when, as in the case of *Knotts v. Stearns*, and in *Bofil v. Fisher*, it has been ascertained, by an inquiry made for that purpose, that a sale was necessary to provide for the interests of those who could be, and were, brought before the court. A proceeding for partition is a very different matter, and presents totally different questions for the consideration of the court; and

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if, as we have seen, the doctrine \*is well settled that a posthumous child inherits in the same manner as if he had been born in the lifetime of his father and had survived him, we do not see how his interest could be divested by a proceeding for partition to which he was not a party, notwithstanding the inference that may be drawn from some of the remarks made in the case of *Knotts v. Stearns*, supra.

We think, therefore, that the defendant, Anna Waddill, was entitled to claim the same rights as the plaintiff has been shown to be entitled to, and that there was no error on the part of the Circuit judge in so adjudging.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN, absent at the hearing.

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WILSON v. BABB.

(April Term, 1882.)

[1. *Bastards* ⚭3.]

A child born in lawful wedlock is presumed to be legitimate until the contrary be shown, even where born so soon after marriage that it could not have been lawfully begotten; but in such case, the evidence of illegitimacy is not required to be so strong as in other cases. This rule should be applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families.

[Ed. Note.—Cited in *Kennington v. Catoe*, 68 S. C. 472, 47 S. E. 719.

For other cases, see *Bastards*, Cent. Dig. §§ 4, 5; Dec. Dig. ⚭3.]

[2. *Bastards* ⚭5.]

Any competent testimony bearing upon this question is admissible, and, if it satisfies the mind, is sufficient.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 7, 8; Dec. Dig. ⚭5.]

[3. *Bastards* ⚭3.]

Impotency of the husband, impossibility of access, or cohabitation of the wife with another man, are not the only facts competent to establish the illegitimacy of a child born in wedlock.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 5; Dec. Dig. ⚭3.]

[4. *Bastards* ⚭6.]

A finding by the Circuit judge of the fact of the illegitimacy of a child born four and one-half months after marriage, sustained.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 9, 10; Dec. Dig. ⚭6.]

Before Fraser, J., Laurens, July, 1881.

Action for partition of a tract of land of which J. Newton Bolling died seized. Elizabeth Wilson and others, children of James and Lucinda Johnson, were plaintiffs, and

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the defendants \*were, at first, Tandy M. Babb, administrator de bonis non of J. N. Bolling, and Amanda Bolling, widow; and after her death, Tandy Babb, as heir-at-law of the widow of J. N. Bolling, and the widow and children of Melmoth Babb. Tandy and Melmoth Babb were brothers, and only heirs-at-law of Mrs. Bolling. Mrs. Bolling survived her husband, and her brother, Melmoth survived her. The brief gives no dates.

The testimony was as follows:

Martin Arnold—Am connected with the family; know Elizabeth Wilson, Sarah Monroe; they were acknowledged to be children of James Johnson and Lucinda Johnson; she was also the mother of Henry Johnson; Henry Johnson was a brother to petitioners; Henry Johnson and J. N. Bolling called each other brother.

X.—Reside in Greenville county; Lucinda Johnson was the mother of Elizabeth Wilson and Sarah Johnson; never heard her claim to be the mother of J. N. Bolling; knew the parties for forty years; well acquainted with petitioners; Mrs. L. Johnson raised them.

William Ellison—I know Elizabeth Wilson and Sarah Monroe; they were said to be children of Lucinda Johnson; am connected with



the family by marriage; knew J. N. Bolling; he was said to be a son of Lucinda Johnson.

X.—Reside in Laurens county; it was said by neighbors and connections that J. N. Bolling was a son of Lucinda Johnson; Mrs. Perrit said, during her life, that J. N. Bolling was a son of Lucinda Johnson; Mrs. Perrit and Mrs. Johnson were sisters.

Martin Arnold, recalled—Know that Mrs. Perrit and Mrs. Johnson were sisters; J. N. Bolling was raised by old Mrs. Bolling.

X.—Heard Mrs. Perrit and Mrs. Johnson say they were sisters; old Mrs. Bolling was the mother of Mrs. Johnson and Perrit.

Wesley Latimer—Know J. N. Bolling;

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heard him say that \*Lucinda Bolling was his mother; Lucinda Bolling was the wife of James Johnson; heard Mrs. Isabella Latimer, my former mistress, say that J. N. Bolling was taken from his mother when very small; Mrs. Latimer and Mrs. Bolling were closely connected after her marriage with Johnson; Mrs. Johnson had other children—Sarah, who married Monroe; Elizabeth, who married Wilson, and others.

X.—It was in Greenville county I saw Mr. Bolling, some twenty-two or twenty-three years ago, when he told witness that Mrs. Bolling was his mother; can't recall any other conversation that then took place between them; frequently saw before-mentioned at Mrs. Johnson's; they called her ma; Mrs. Latimer said to witness, the child was carried away when very small, but did not say where from.

Josiah Sullivan—I know J. N. Bolling; Lucinda Bolling was his mother, who afterwards married James Johnson; did not know the Johnson boys; when they were play-boys together, heard J. N. Bolling say Lucinda Bolling was his mother; he (Bolling) then lived at the old Bolling place.

X.—Knew J. N. Bolling well; were play-boys together; witness is over seventy years old; saw Mr. Bolling frequently after we grew up; did not know the Johnson boys; it was when they were boys heard J. N. Bolling say Mrs. Bolling was his mother.

Phyllis Bolling—I knew J. N. Bolling well; Lucinda Bolling was his mother; was born after her marriage with James Johnson; I knew both J. N. Bolling and his mother well.

X.—Witness belonged formerly to mother of Mrs. Bolling; carried a letter from Esquire Dunklin to James Johnson, saying he would take the child and its mother too; I carried the child to my home at Mrs. Abby Bolling's, but the mother stayed; I have heard J. N. Bolling say Mrs. Lucinda Johnson was his mother; he was then a good-sized boy; have heard Mrs. Johnson say J. N. Bolling was her son; Mr. Johnson is dead; witness was not at Mr. Johnson's for several days after the birth of the child.

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\*XX.—Witness went for the child; got it

at Mr. Johnson's house, and from the bed with Mrs. Johnson; Mrs. Johnson said it was her child, but that Mr. Johnson would not allow her to "suckle" it; witness raised the child at Mrs. Abby Bolling's; lived with him after he was grown; saw him after death; and knew him to be the same J. N. Bolling.

Mrs. Ann H. Sullivan—Knew Newton Bolling and his mother; Bolling was born, I think, in 1808 or 1809; his mother was then married to James Johnson; I knew Elizabeth, daughter of James and Lucinda Johnson; she married John Wilson; and Sallie, another daughter, married Francis Monroe; did not know the other children; am not related to Newton Bolling; knew his grandmother; lived near her and visited her; Lucinda was at my house several times.

X.—Lucinda was never married, except to James Johnson; about time of Newton's birth, I saw Phyllis carrying the child to his grandmother's, Mrs. Abigail Bolling; and also heard Mrs. Kinman, the midwife, speak of the circumstances of his birth about 1808 or 1809.

Nathaniel Gaines—Knew J. N. Bolling; report said he was son of Lucinda Bolling, born after her marriage with James Johnson.

X.—My recollection is, that James Johnson and Lucinda Bolling were married in the latter part of the summer or early fall of 1809; about four and a half months after, the child, J. N. Bolling, was born; recollect the date from the fact that my (witness) father died November 6th of that year; recollect the birth from the fact, as reported then, that Mrs. Kinman, the midwife, on that occasion, attempted to pacify Mr. Johnson by telling him that four and a half months for himself and four and a half months for his wife, made the full nine months; was familiar with the Bolling family from a short time before said marriage; do not recollect to have heard said family, or Johnson, or his wife, speak of the child; was frequently at James Johnson's in 1809 and 1810; was there a few weeks after the birth of said child; did not, at any time, see the child or

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hear \*the family speak of him; my father and Johnson's mother were brother and sister; I have heard the Johnsons speak of the birth of the child, and his removal by order of James Johnson; I never saw or heard of the child, J. N. Bolling, being at Johnson's, or having any communication whatever with his family; never heard Johnson say why said child was taken away; from frequent visits, I know the child was not nurtured by his mother, and was never recognized as a member of the Johnson family.

XX.—Knew the Bolling family from shortly before said marriage; saw James Johnson and Lucinda Bolling on one occasion at a neighborhood gathering, but did not see them associating together.

## For Defense.

Tandy Babb—Am acquainted with defendant; is his sister; she married Josiah N. Bolling; I have heard members of the Bolling family speak of Josiah N. Bolling; it was said by them that he was a son of James Dunklin; I have frequently heard Maj. T. C. Bolling (cousin of Josiah N. Bolling, and nephew of Lucinda Bolling,) say that James Dunklin was the father of the said J. N. Bolling, and was so recognized by the whole family, and there was a striking resemblance between them; the Bolling family regarded J. N. Bolling illegitimate; I never saw James Johnson; J. N. Bolling, my brother-in-law, never recognized the Johnsons as his family.

X.—Josiah N. Bolling lived in Laurens county; married Amanda Babb, my sister, the defendant in this case; was never married but once.

Amanda Bolling—Was the wife of Josiah N. Bolling; never heard him speak of himself as the son of James Johnson; have heard him frequently say he was not; Josiah N. Bolling showed me a house, and said his father lived there, and his name was James Dunklin; does not know that Lucinda Bolling was ever married.

Phyllis Bolling—Knew Lucinda Bolling well; lived on same plantation with her; four or five months after her marriage, the

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\*child, J. N. Bolling, was born; the mother kept the child some three days after birth, before it was sent away; Mrs. Johnson sent the child away because Mr. Johnson would not allow it to remain; would not allow her to "suckle" it; because, as he said, it wasn't his child; frequently heard the Bolling family say James Dunklin was the father of the child.

X.—Josiah N. Bolling was the son of Lucinda Johnson; witness lived with Bolling family before said parties were married; saw them married; Johnson came courting a very short time—perhaps three months.

B. Gunnels—I have heard Mary Perrit and her husband say that James Dunklin did not deny, but said there was no doubt but that he was the father of Josiah or Newton Bolling; Mary Perrit was a sister of Lucinda Johnson.

Andrew McKnight—Thornberry Bolling said to me that Josiah N. Bolling was an imperfect child, and he intended to give all his property to him and one other; said James Dunklin was his father; I heard Samuel Bolling speak of James Dunklin as the father of the child, and fought on the subject; I have heard James Dunklin say that he was the father of J. N. Bolling; J. N. Bolling has said more than once, in my presence, that James Dunklin was his father, and that Dr. Irby Dunklin was his half-brother; Thornberry Bolling was uncle of J. N. Bolling.

Mrs. Ann H. Sullivan—Knew Lucinda Bolling and others of Bolling family; never heard her mention Newton's name nor his father's, nor say who was his father; the wife and daughters of Lucinda's brother often spoke in my presence, and said that Newton's father was Lucinda's brother-in-law, James Dunklin, and censured both for such conduct; this was over fifty years ago; Lucinda was never married before she married James Johnson; Newton was born four or five months afterwards; saw the baby at my father's when Phyllis was carrying it to Mrs. Bolling; have heard Mrs. Kinman, the midwife, say that James Johnson would not suffer his wife to keep the child, Newton, who could not have been

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more than two weeks old when taken \*from his mother; never heard James Johnson speak of Newton or claim to be his father, or deny it; heard the wife of Lucinda's brother say that James denied being the father; the child was removed because James denied being the father; and this was the reason given by the Bolling family; never heard Newton claim any one for his father.

It was conceded that the declarations of divers persons as to the illegitimacy of Josiah N. Bolling were the declarations of persons deceased at the time of trial. The plaintiffs, at the taking of the testimony and on the trial, objected in turn to any and all testimony directed to showing that anybody else than James Johnson either was, or was believed to be, the father of Josiah N. Bolling, or that James Johnson denied being the father of Josiah N. Bolling, or that Lucinda's family connection regarded Josiah N. Bolling as the child of any other person than James Johnson.

The Circuit decree was as follows:

This case was heard by me at the extra term of the court for Laurens county in July, 1881. The questions involved are somewhat new in this State, and deserve more consideration than can be given to them by a Circuit judge. I shall, therefore, state my conclusions very briefly.

The action is brought for the partition of a tract of land, the property of J. Newton Bolling, deceased, who died intestate, leaving surviving him a widow, Amanda Bolling, but no children or other lineal descendants. The plaintiffs claim that they are the brother and sister and the representatives of a deceased brother and sister, and entitled to one-half of the land. The defendants claim that they are the representatives of the widow, now deceased, and entitled to the whole tract of land, basing their claim upon the alleged illegitimacy of J. Newton Bolling, deceased.

I have examined the testimony and find nothing to show any relationship between any of the plaintiffs and the intestate, except Elizabeth Wilson and Sarah Monroe. If there is any such evidence it has escaped me.



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As to these two, the only evidence \*is that they were regarded and perhaps treated as the children of James and Lucinda Johnson, who were husband and wife. This, however, is sufficient if J. Newton Bolling was a legitimate child of the same parents.

The evidence is clear that Lucinda Johnson, whose maiden name was Bolling, about four and a half or five months after her marriage with James Johnson, gave birth to a son; that this son was sent off by James and Lucinda Johnson, within two or three days after his birth, to the mother of Lucinda Johnson; was nursed by a colored woman, and never afterwards became a member of the family of James and Lucinda Johnson; that from declarations of various persons, relatives of the family, some now dead, he was regarded as the son of one Esquire Dunklin, a brother-in-law of Lucinda. The same kind of evidence, on which Elizabeth Wilson and Sarah Monroe base their claim to being the legitimate children of James and Lucinda Johnson in the case, assigns an illegitimate birth to the intestate. He did not bear the name of Johnson, but Bolling, the maiden name of his mother, and not a single witness says that he ever was regarded as legitimate. The fact that James Johnson was visiting Lucinda as a suitor for some three months before marriage is not, in my judgment, such access as to affect him with the charge of having improper relations with her, in the absence of any circumstances to show that such a condition of things then existed between them.

The intestate was born in 1808 or 1809, and the evidence is such as must be relied on in these cases. I think that as a matter of fact, the intestate, J. Newton Bolling, was an illegitimate child of Lucinda Johnson, and that the evidence is sufficient to remove any presumption of legitimacy arising from the fact that he was born four and a half or five months after the marriage of his mother. It is, therefore, ordered and adjudged that the complaint be dismissed with costs.

The plaintiffs appealed upon the exception stated in the opinion, and also upon the following:

2. Because, upon the facts proved, the pre-

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siding judge on the \*circuit ought to have decreed that J. N. Bolling was in law a child of James Johnson.

3. Because, it having been proved that J. N. Bolling was born in lawful wedlock, the presiding judge on the circuit ought to have decreed that according to the evidence the alleged illegitimacy of J. N. Bolling was not proved.

4. Because the said J. N. Bolling and the plaintiffs having been born in lawful wedlock, the plaintiffs are entitled to a share of the estate of J. N. Bolling.

Mr. W. C. Benet, for appellants.

Marriage is proof of paternity, and the old maxim of the civil law, *pater est quem nuptiæ demonstrant*, subject to certain exceptions, is still the approved dogma. Fraser's Parent and Child 1, 62. Impotency of the husband and his absence from the realm were once the only exceptions. But the rule was extended to include proof of non-access. Strange 925; 1 Sim. & S. 153; 2 Kent 211-212; 2 Greenl. Ev. 145. Another exception is open cohabitation of the wife with a paramour. 5 Car. & P. 604. See, further, 2 Phil. Ev. (Cow. & H.) 488, note 379, 314, note 305; Steph. Dig. Ev. 159; 5 Wait Ac. & Def. 48; Schoul. Dom. Rel. 308. The husband here was not impotent nor extra quatuor maria, and there is not "perfectly satisfactory proof" that he had no access at time of the conception; and this is necessary. 2 Kent 21, note 5; 1 Turn. & R. 138; 6 How. 580; Schoul. Dom. Rel. 306; Reeve Dom. Rel. 270; 3 Car. & P. 215, 425; 2 Munf. 442; 1 S. C. 85; 15 Id. 421; 5 Id. 411; 3 Allen 148; 3 Paige 139; 1 Desaus. 595; 2 Bay 480; 10 Rich. 66; 1 Ad. & E. 444; 1 Bish. Mar. & D., § 435; see particularly Stegall v. Stegall, 1 Brock. 256, which is directly in point. There is no satisfactory proof here of non-access by the husband. There is no proof of open cohabitation with another man; only vague rumors of an illicit intercourse with Dunklin—a scandal that arose after the birth of the child. This case is unlike Shuler v. Bull, 15 S. C. 421. But adulterous intercourse with another man—short of open cohabitation—is not sufficient. Shelf. M. & D. 711; 2 Myl. & K. 349. These rules apply, equally, to antinuptial generation. Shelf. M. & D. 797; 2

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\*Munf. 442; 1 Brock. 256. The declarations of husband and wife were inadmissible. 5 Car. & P. 604; 3 Phil. Ev. 1555; 22 Md. 337; 1 Allen 209; 75 Ill. 315; 2 Greenl. Ev., § 151. Hearsay is admissible on questions of pedigree, only where it proceeds from persons proved aliunde to be relatives of the family. 1 Phil. Ev. 230-236; 1 Greenl. Ev., § 103; 1 Whart. Ev., §§ 201, 216; 2 Russ. & M. 166; 2 Best Ev. 845; 3 Wall. 187; 6 Wall. 642.

Mr. James Farrow, same side.

Mr. J. W. Ferguson, contra.

As appellants here claim collaterally, a question of pedigree is involved. On questions of pedigree, declarations of deceased persons connected with the family are admissible. 3 Bouv. Inst., § 3071; 1 Greenl. Ev. 103; 3 Phil. Ev. 287; 3 Stark. Ev. 1100; 4 Campb. 401; 10 Pet. 434. As to the extent of such evidence, see 3 Stark. Ev. 1114-1117; 3 McC. 230, and cases cited. A child born in wedlock is not necessarily lawful. 8 East 204; 1 S. C. 87; 15 Id. 421. It is not necessary to prove impossibility of access—authorities supra, and Whart. & S. Med. Jur., § 302; 4 T. R. 358; 1 Phil. Ev. 433; 3 Id.

288. Presumption of access does not arise before marriage as during coverture. The marriage, during pregnancy, raises no presumption unless the woman was so far gone as to make it apparent. Whart. & S. Med. Jur., & 302; 8 East 207; 1 Chit. Bl. Com. 458; see, too, 3 Stark. Ev. 1100.

August 9th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Josiah Newton Bolling died intestate in 18—, seized and possessed of certain real estate situate in Laurens county. He left a widow, but no lineal descendants. The plaintiffs commenced this action for the partition of his lands, claiming to be heirs-at-law with the widow. Their right to this partition involved the question of the legitimacy of the deceased. During the pendency of the action, the widow died, and the present defendants were made parties as her heirs-at-law. Considerable tes-

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timony was taken, whether orally \*before the Circuit judge, or before some officer of the court, does not appear in the brief. It was taken, however, and is set out in full.

Judge Fraser, who heard the case, found, as matter of fact, that the deceased was the illegitimate child of Lucinda Johnson, the mother of the plaintiffs, and, upon this finding, he dismissed the complaint with costs. The plaintiffs have appealed, and the question which the appeal requires us to consider is, whether the judge erred in this finding. The case before us is a case in chancery, and is embraced within the appellate jurisdiction of this court, so that, although the appeal involved a question of fact almost entirely, yet it is within our cognizance, subject to the principles heretofore decided as to such appeals.

A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. 1 Blacks. Com. 367. "Pater est quem nuptiæ demonstrant" is the rule in the civil law, says Mr. Blackstone, and this holds with the civilians, whether the nuptials happen before or after the birth of the child. In England, and in this country, however, the nuptials must be precedent to the birth, and while a post-nuptial birth is not conclusive upon the question of legitimacy, yet it raises a presumption which will stand until overthrown by sufficient and competent testimony. At one time, in the early history of such cases, nothing short of proof of impossibility of access, on the part of the husband, was regarded as sufficient to destroy this presumption. But such is not the law now. It now stands as any other question of fact, resting upon the testimony for and against it. Shuler v. Bull, 15 S. C. 421, and the cases there cited; State v. Shumpert, 1 S. C. 85.

While a legitimate child is one born in lawful wedlock, and a bastard is one begotten and born out of lawful wedlock, yet it

does not follow that every child born in lawful wedlock is legitimate, nor does it require one to be both begotten and born out of lawful wedlock to be a bastard. The true test is whether the husband of the woman who gives birth to the child is its father; and this must, of necessity, in every case, be a question of fact. Where the child is born after lawful wedlock, and after the lapse of the usual period of gestation, it should re-

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quire \*a very strong state of circumstances to overthrow the presumption of legitimacy, such as impossibility of access, absolute non-access, abandonment, or something equally as conclusive. But where the birth is so soon after the marriage as to render it certain, according to the laws of nature, that the child could not have been begotten during the wedlock, then it is more of an open question, depending on the weight of the testimony, aided in favor of the legitimacy, somewhat, by the marriage, but, perhaps, not to the extent of requiring such strong opposing evidence as in other cases. In every case, however, the question is still one of fact, to be determined in each special case by the principles hereinabove stated: to be administered and applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families.

Judge Fraser, after a careful consideration of the testimony submitted to him, came to the conclusion that the deceased was illegitimate, and refusing the claim of those who never recognized their now alleged relationship to the deceased until after his death, and his property had become subject to partition, turned the property over to the heir of his widow, who, notwithstanding his bar sinister, had, in the face of it, and against all attendant reproach, united her destiny with his in early life, and had stood by him until his death. There is some justice in this result at least. But the question for this court to determine is, whether the decree of Judge Fraser can stand.

The first ground of appeal claims that J. N. Bolling, having been born of the wife of James Johnson after marriage, the law requires said Bolling to be considered and treated in the distribution of his estate as a child of James Johnson until the contrary be established by competent testimony, which must be either—First, impotency of the husband; Second, impossibility of access between husband and wife; or, Third, birth of the child during or within a competent time after the mother's cohabitation with some other man than her husband. It is true that birth during lawful wedlock presumes legitimacy which will stand until the contrary be established by lawful testimony; and if this ground had stopped at the first paragraph it would have been unobjectionable. But we

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know of \*no law which requires the proof of either one or all of the facts mentioned in



the specifications as indispensable to the overthrow of this presumption. Either one of these facts will certainly have that effect; but there is no authority for saying that they are indispensable, one or all.

We have examined the cases relied upon by the appellants, and have extracted from them the principles as laid down above. In most of these cases the birth of the child took place during the coverture and within a competent time thereafter for the husband to have been the father during said coverture; and even in those cases, the presumption was not regarded as conclusive. Nor did they indisputably require the presence of the facts mentioned in this ground to overthrow it. The rules established in the Banbury Peerage Case, 1 Sim. & S. 153, were in reference to questions applicable to cases of a like character to those above referred to. These rules hold the presumption rebuttable by such facts and circumstances as are sufficient to prove to the satisfaction of the jury that no sexual intercourse took place between the husband and wife at a time when, by such intercourse, the husband, by the laws of nature, could be the father of such child.

The true doctrine, sustained by all of these cases, is found in 1 Phil. Ev. (C. & H.'s notes) 630, where he says: "If a child be born after the marriage of the mother and during the husband's life, it is presumed to be legitimate. It was formerly an established doctrine of the courts that this presumption in favor of legitimacy could not be rebutted, unless the husband was incapable of procreation, as from impotency, or old age, or was absent beyond the seas during the whole period of the wife's pregnancy. This doctrine was not, however, conformable to the more ancient legal authorities, but in later times it came to be established that the presumption in favor of legitimacy of the child of a married woman might be rebutted if it were shown that the husband had not opportunity for sexual intercourse within such a period of time before the birth of the child as would admit of his being the father. And, in the present day, even where a husband and wife have had opportunities for sexual intercourse at a time when the hus-

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band might have \*become the father of the child, a court and jury are at liberty to infer from all the circumstances of the case that no sexual intercourse took place. But when a jury believes that sexual intercourse took place between husband and wife at a time when it might have led to the conception of the child whose legitimacy is disputed, it would seem that they ought not to find the child a bastard. If, however, there was an opportunity of access, though the wife was notoriously living in adultery, it does not necessarily follow that the child is not legitimate."

These principles, as it appears from the terms employed by Mr. Phillips, were intended to ap-

ply to cases of adulterine bastardy, and their effect is to throw the protection of a very strong presumption in such cases around the legitimacy—so strong as to cast the burden of destroying it on the party impeaching it; which, however, when assumed, may be done by any competent testimony sufficient to satisfy the mind of the tribunal before whom the question is made, to the contrary. This certainly is the law in this State since the cases of the State v. Shumpert and Shuler v. Bull, *supra*.

Whether this protecting principle applies as strongly to antenuptial conception and birth afterwards, as in this case, the authorities are not very definite. In the case of Wright v. Hix, 12 Geo. 162, Judge Lumpkin thought it applied whether the bastardy originated before or during the marriage. "If a man," says he, "marries a woman pregnant by another person, the law presumes the child to be the husband's; and whether she was at the time a reputed virgin or grossly encephalic, the books make no difference. In both cases the law says, presumably, it is his child; still he may show, by whatever proof he may command, that he has been made the innocent victim of fraud and artifice. And the same proof may be adduced by any one whose interest and right it is to contest the legitimacy of the pretender; and inexpressibly hard would it be if such privilege was not allowed." But whatever doubt there may be as to where the burden of proof lies in any case, the authorities are uniform as to the character of the evidence which may be submitted. Any competent testimony bearing upon the question is admissible, and, if it satisfies the mind, it is sufficient.

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\*Now, how does Judge Fraser's finding of fact stand when examined by the light of these principles and tested by the rules heretofore established as to appeals involving questions of fact in chancery cases? Is there an absence of all testimony to sustain that finding? Or, even, is the manifest weight of the testimony against it? We think both of these questions should be answered in the negative. We find, in the decree, the substance of the testimony stated in a condensed form, and presented so as to show its full force. It is as follows: [Here follows the statement of the evidence contained in the Circuit decree, *supra*.] It was further in testimony that James Johnson became a suitor of Lucinda about three or four months before the marriage, and, on one occasion before, at a neighborhood gathering, they were both present, not, however, associating with each other. The only testimony on the other side was the fact that the birth took place during coverture. There was no evidence that this birth was premature. In the face of these facts, we cannot say that there was an entire absence of testimony to support the finding of the Circuit judge, nor that the weight of the evidence is against it.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN absent at the hearing.

### 18 S. C. 73

HARDIN v. HOWZE.

(April Term, 1882.)

#### [1. *Homestead* ¶216.]

The case of *Howze v. Howze*, 2 S. C. 229, determined the conditions upon which the claimant there would be entitled to a homestead, but it did not settle the existence of those conditions; and whether a homestead ever had been assigned in that case was, in this case, a question of fact for the jury.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 400–403; Dec. Dig. ¶216.]

#### [2. *Homestead* ¶18.]

At that time there was no statute covering the claim for homestead in that case, and the claim, therefore, rested alone upon the constitutional provision, which secures a homestead on two essential conditions: That the claimant is the head of a family, and that he is in possession of a dwelling-house and outbuilding on the land claimed as a homestead.

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When these \*conditions do not exist, or have ceased, the exemption cannot be claimed by virtue of the constitution alone.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 22; Dec. Dig. ¶18.]

#### [3. *Appeal and Error* ¶1200.]

*Howze v. Howze*, supra, held (erroneously but controllingly) that the claimant was entitled to a homestead if the land contained a dwelling-house occupied by the deceased father of claimant, and if claimant was the head of a family; the Circuit judge, therefore, erred here in charging the jury that the right of claimant to this homestead expired with his minority, the former adjudication having fixed no such limitation.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4672; Dec. Dig. ¶1200.]

Before Pressley, J., Chester, November, 1881.

Action by John O. Hardin against William C. Howze, S. C. Howze et al., commenced August 24th, 1880. The opinion states the case.

Mr. G. J. Patterson, for appellant.

Messrs. J. & J. Hemphill, contra.

August 9th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. William Howze, late of Chester county, died in 1865, leaving a minor son, S. C. Howze, surviving, and others, his heirs-at-law. William C. Howze administered on his estate, and, finding it insolvent, he commenced action in 1869, to marshal the assets. Samuel C. Howze, the minor, was made a party, and answered by guardian ad litem. In his answer he claimed a homestead: the Circuit judge ordered a writ to issue to three commissioners therein named, to wit, to Elihu Lynn, John O. Hardin and Stephen R. Ferguson, commanding

them to admeasure and lay off a homestead to this defendant. This order bears date September 23d, 1869.

From this order, and before action by the commissioners, an appeal was taken to this court. 2 S. C. 229. This court, in accordance with the previous case of *In re Kennedy* [2 S. C. 216], held that the ante-bellum debts of the deceased (all of his debts being ante-bellum, as he died in 1865), interposed no obstacle in the way of the homestead, nor did the fact of his decease being before the adoption of the constitution of 1868 present

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any \*objection, and that the right of the claimant to the homestead depended upon the facts, whether William C. Howze died in possession of a dwelling-house \* \* \* and whether the claimant was the head of a family. These facts not appearing in the proceeding, the case was remanded, the homestead to depend upon further investigation as to these.

On the return of the case to the Circuit Court, that court, April 19th, 1871, passed an order, directing C. S. Bryce, heretofore appointed receiver, to sell the real estate described in the pleadings: "So much as has been adjudged liable to the claim of, and assigned for homestead of S. C. Howze, one of the defendants, to be sold subject to said right of homestead. That the fee-simple estate of the remainder, if any, be sold," with other provisions in the order as to the distribution of the proceeds of sale not necessary to be mentioned here. On October 24th thereafter, two of the commissioners named in the original writ issued in 1869, to wit, Hardin, the present plaintiff, and Ferguson, with one Heath, not named in the writ, made a return in which they reported that, in pursuance of a writ of admeasurement of homestead for S. C. Howze, they had laid off and assigned to the said S. C. Howze, two hundred and seventy acres for homestead, which is the land now in dispute. It does not appear that this paper was ever recorded, nor that any action was taken thereon by the court. S. C. Howze seems to have been in possession, which he retained until after he became of age, when he went to Texas, whether to remain permanently or not does not fully appear. In his own testimony, he stated that he was twenty-eight years of age; that he left South Carolina in 1879, and went to Texas on a visit, and had intended all the time to return as soon as he made money enough to pay expenses; that he was farming in Texas, on shares.

Under the order of April 19th, 1871, C. S. Bryce, the receiver, sold the real estate of William Howze according to the terms of the order, to Hemphill, who, having transferred his bid to Hardin, the plaintiff, the receiver executed a deed to Hardin on November 8th, 1871, in which he conveyed three



hundred acres, more or less, to him, "subject, nevertheless, to the right and claim of

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S. C. Howze to a homestead in the same, \*as has been or may be adjudged by the decree and judgment of the court in that behalf."

This action is to recover possession of the land by Hardin, who claims under the deed from Receiver Bryce. The defendants all lived on the land, when the action commenced, except S. C. Howze. The jury found the land in dispute for the plaintiff, except a portion which, previous to the action, had been conveyed by plaintiff to D. B. Cloud. This was excepted in the verdict.

The judge charged as is set forth in exceptions one and two below, and declined to charge as requested in exceptions three, four, five, six and seven. The defendants have appealed upon the following grounds:

1. "Because his Honor charged that the homestead was awarded in the case of Howze v. Howze, in the land in dispute, to S. C. Howze, until such time as he should arrive at the age of twenty-one years, and that after that time the purchaser was to take the land so assigned.

2. "Because his Honor charged that if S. C. Howze has attained twenty-one years, the plaintiff is entitled to recover the premises in dispute, or so much thereof as he has not parted with.

3. "Because his Honor refused to charge that the court in Howze v. Howze having decided that S. C. Howze was entitled to homestead, is conclusive that it was a homestead in accordance with the provisions of the constitution on that subject, and an intent to the contrary cannot be inferred.

4. "Because his Honor refused to charge that such homestead must have been assigned to S. C. Howze solely on the grounds that he was the head of a family, entitled under the constitution, and that the duration of enjoyment of said homestead is unlimited as to time.

5. "Because his Honor refused to charge that an intent on the part of the court in Howze v. Howze to decide as to the duration of S. C. Howze's homestead otherwise than in accordance with the constitution, is not to be inferred, except upon conclusive proof of such intent.

6. "Because his Honor refused to charge

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that there could be \*no valid sale made of any reversionary interest in lands assigned to S. C. Howze for homestead, in Howze v. Howze.

7. "Because his Honor refused to charge, that it having been adjudged that S. C. Howze is entitled to a homestead in the lands in dispute, and the said lands having been assigned to him as a homestead by a court of competent jurisdiction, the plaintiff cannot impeach it in this collateral proceeding, either by showing that S. C. Howze was

not entitled to homestead at all, or by showing that it had not been assigned to him as a homestead in accordance with the constitution, to wit, a homestead of unlimited duration."

We will consider the exceptions in the inverse order in which they are presented. The seventh assigns error, because the Circuit judge declined to charge that plaintiff could not impeach the homestead in this collateral proceeding, either on the ground that he was never entitled thereto, or that it had never been assigned to him, when it had been adjudged that he was entitled to it, and when it had been assigned to him by a court of competent jurisdiction.

It does not appear that the right of S. C. Howze to this homestead had ever been adjudged. The case of Howze v. Howze, supra, determined the conditions upon which he might be entitled, but it did not settle the fact that these conditions were present. The case was remanded to the Circuit Court to make this inquiry, so that the judge could not have properly charged the first branch of this request. The second was a question of fact which was beyond his province; whether, in fact, a homestead had ever been assigned, was for the jury.

In the third, fourth, fifth and sixth exceptions, the appellants contend that the homestead which S. C. Howze obtained, was obtained by virtue of the constitutional provision on the subject of homestead; that such a homestead is of unlimited duration, and that the judge should have so charged. At the time S. C. Howze made his claim, there was no act of assembly under which it could be secured. The act of 1868 did not meet his case. That provided a way for the widow and minor children of a deceased head of a family, who, at the time of his death, was entitled to a homestead, which this act

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continued for their \*benefit. Gen. Stat. 476, § 6. The father of S. C. Howze died in 1865, years before the constitution was adopted. He was not, therefore, entitled to a homestead at his death. Such being the fact, the act of 1868 did not cover the claim of S. C. Howze, and the court so held. But it also held, that if he was entitled to it, it was under the constitutional provision, and the case was sent back to ascertain whether the constitutional requirements were in existence.

No doubt it was true, then, if S. C. Howze was entitled at all to his claim, it was directly under the constitution and independent of any act on the subject. Yet, what necessity was there for the judge to charge this. The material part of the request was as to its duration, and it would have been error for the judge to charge as requested on that question. For, while there is nothing in the constitutional provision which fixes a definite period or limit to a homestead, there is certainly nothing in it which makes it un-

limited. The language of the constitution is: "That a family homestead of the head of each family \* \* \* such homestead consisting of a dwelling-house, outbuildings, \* \* \* shall be exempt from attachment, levy or sale on any mesne or final process from any court."

This provision neither creates or confers any new title or property upon the claimant, but simply stays the arm of the court from touching that already in existence, to wit, the family homestead, and in favor of the head of the family. When these two conditions exist, and are present together, to wit, the head of a family and a family homestead, consisting of a dwelling-house, &c., then the constitutional homestead is in existence, free from the process of any and all courts. Standing together, they occupy a charmed circle, thrown around them by the constitution, which no process can invade; but, disunited and apart, there is no exemption or protection so far as the constitution is concerned.

Apart from the acts on the subject, the question in every case would be, Is there a head of a family, and is that head in possession of a dwelling-house and out-buildings, such as are specified in the constitution as the material for homestead? If so, the process of the courts is paralyzed, and it stands

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thus paralyzed as long as these conditions are present. But when these conditions disappear, what is there in the constitution to stop the courts? We see nothing.

This does not apply to homesteads obtained under the acts of assembly which have been passed in pursuance of the constitution. Such homesteads are governed by the acts allowing them, both as to their duration and all other qualities; but we are discussing a homestead derived solely from the constitutional provision itself as in this case. Admitting, then, that S. C. Howze derived his homestead, if any, from the constitution, and in accordance with its provisions, yet that homestead, depending as it did for its existence upon the presence of the two conditions mentioned, and the duration of these conditions not necessarily being unlimited, it would have been error for the judge to have charged that, after assignment, the homestead was necessarily unlimited as to time.

This claim is a peculiar and isolated claim; such a case can never arise again. The father of the claimant died before the adoption of the constitution, and before any act on the subject of homestead was passed. If it was now before the court for the first time, no doubt the claim would be dismissed upon several grounds. Standing as it does, however, we have considered it upon its own peculiar facts, and upon principles applicable to the case as made.

Exceptions one and two complain because

the Circuit judge charged that the homestead expired when S. C. Howze reached his majority. We know of no authority to sustain the position of the charge. The homestead which was assigned, if any, was under the principles laid down in *Howze v. Howze*, supra.

That case was, no doubt, decided erroneously, but still it was a decision of the court of last resort in the State, and it was the law for all time in that case, and authority in all other similar cases until overruled. It held that the right of S. C. Howze to the homestead which he claimed, depended, not upon his minority, but upon the two questions of fact which the case was sent back to have determined upon a new trial, to wit, whether the land upon which the homestead

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was claimed contained the dwelling-house of the deceased William Howze, and whether S. C. Howze was the head of a family.

We cannot see, therefore, what the minority of S. C. Howze had to do with the case. Under the case of *Howze v. Howze*, his right depended upon the fact that he was the head of a family, and this without regard to the question whether he was a minor or not, and if he became entitled to it upon that ground, there can be no reason that it should be lost when he becomes of age, and because he arrives at age. If he obtained it while under age, because he was the head of a family, why should he not hold it after reaching his majority, if he still remains the head of a family?

We do not think that the questions raised by respondent can be considered in this case. It is admitted that the principles laid down in *In re Kennedy* and in *Howze v. Howze* were erroneous, but when the claim of this party was adjudicated, these principles controlled, and his rights became fixed; and whatever those rights may be, they are beyond assault. We think there was error in the charge of the judge as to the duration of this homestead, and on that account the case must be remanded for a new trial.

The main questions in this case, and those which should control in the new trial, are chiefly questions of fact. First, was a homestead ever assigned to S. C. Howze in accordance with the opinion of this court in the case of *Howze v. Howze*? If so, the plaintiff bought, subject to this homestead; if not, he bought free from it. The dates of the different orders and papers, the statements in the brief, and the language in plaintiff's deed, leave it in great doubt whether, as a matter of fact, any homestead was ever legally laid off and assigned, in such way as to have become complete and a bar to the purchaser at the sale ordered by the court. Whether S. C. Howze is still the head of a family in the sense of those terms as used in the constitution, is another question of fact, and, if not, whether the homestead, though once as-



signed, under the peculiar circumstances of this case, can be protected?

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded for a new trial.

### 18 S. C. \*81

#### \*STATE v. MANCKE.

(April Term, 1882.)

#### [1. *Intoxicating Liquors* ⚭101.]

A city license, dated in July, to retail liquors to December 31st, gave no license to sell in the January preceding, although the tax had then been in part paid, and it was customary to pay in two installments.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 107; Dec. Dig. ⚭101.]

2. This case distinguished from *City Council v. Corleis*, 2 Bailey 186.

#### [3. *Intoxicating Liquors* ⚭80.]

A grant of license by a city council without the payment of the county license required by the act of 1880 (17 Stat. 459), would be void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 83; Dec. Dig. ⚭80.]

#### [4. *Statutes* ⚭250.]

Semble. An act commencing "on and after the passage of this act," &c., but which no otherwise names a special day for the act to take effect, goes into operation on the day of its approval by the governor.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 331; Dec. Dig. ⚭250.]

#### [5. *Statutes* ⚭255.]

An act approved December 24th, 1880, if governed by the terms of the act of 1879 (17 Stat. 69), and, therefore, not of force "until the twentieth day after its approval by the executive," became of force immediately after twelve o'clock midnight of January 12th, 1881.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 336; Dec. Dig. ⚭255.]

#### [6. *Intoxicating Liquors* ⚭15.]

The act of 1880 (17 Stat. 459) is not unconstitutional.

[Ed. Note.—Cited in *State v. Berlin*, 21 S. C. 294, 53 Am. Rep. 677.

For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 17, 18; Dec. Dig. ⚭15.]

Before Wallace, J., Richland, March, 1882.

The opinion states the case.

Messrs. U. R. Brooks, R. A. Lynch, for appellants.

Messrs. Solicitor Bonham, Abney & Abney, contra.

August 9th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant was indicted for retailing without a license on January 15th, 1881, in the city of Columbia. He admitted that he had sold spirituous liquors as alleged in the indictment, but insisted that, at the time, he had a license from the city council of Columbia. He produced the following papers:

"Columbia, S. C., January 13th, 1881.

"Received from Julius H. Mancke, fifty dollars on account of license for the current year.

"\$50. Richard Jones,  
["Seal.] City Treasurer."

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"\*This must be displayed in a conspicuous place.

"No. 853. City License.

"State of South Carolina,  
Columbia, July 20th, 1881." }

"Mr. J. H. Mancke—Licensed by the city council of Columbia to carry on the business of retailing in this city at corner of Washington and Richardson streets until December 31st, 1881.

"R. Jones, City Clerk and Treas.

"Richard O'Neale, Jr., Mayor."

It was in evidence that the license for the last two years had been \$100 each year for the city of Columbia; that the city generally gave persons taking out license the privilege of paying the \$100 in two installments; that the license of defendant for the year previous expired on December 31st, 1880, and that the receipt above, given on January 13th, 1881, for \$50 was for the first installment of the city license for 1881; and that it was understood that the other \$50 would be paid when called for.

The license above given on July 20th, 1881, was issued when the second \$50 was paid, and no other license was issued for that year. The city clerk was directed by the mayor to issue no licenses until the city tax of \$100 was paid, and also the county tax of \$100, imposed by the act of 1880. The defendant never offered to pay the county tax or proved that he had paid the same. The Circuit judge held that the act of December 24th, 1880, was of force on January 13th, 1881, when the defendant paid the first \$50 on account of license, and that, before getting license, the defendant should not only have made his arrangements as to the city license, but have shown that he had paid the county tax of \$100 imposed by the act of 1880. Under the ruling of the judge, the jury found the defendant guilty, and he appeals to this court upon the following exceptions:

1. For that his Honor charged the jury that the act entitled "An act to further regulate the sale of spirituous liquors in this State," approved December 24th, 1880, took effect and became of force on the day of its approval by the executive.

2. For that his Honor charged the jury

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that the receipt \*issued by Richard Jones, clerk of the city council of Columbia, dated January 13th, 1881, and bearing the impress of the seal of the corporation, for \$50 on account of license for the year 1881, was not such evidence as would show that the city

council had granted a license to the defendant to sell liquor from the first day of January, 1881.

3. For that his Honor should have charged the jury that no other day being specially named in the act prohibiting the sale of spirituous liquors, the act did not go into effect until twenty days after its approval, and that the city council having granted a license to the defendant to sell liquor during the year 1881, before the act took effect, to wit, on January 13th, 1881, the jury should bring in a verdict of not guilty.

4. That the act entitled an act "to further regulate the sale of intoxicating liquors in this State" is unconstitutional and void— (1) Because it violates section 21 of article I. of the constitution of South Carolina in this, that it impairs the obligation of the contract entered into between the city of Columbia and the defendant in the matter of license. (2) Because it violates section 38 of article I. of the constitution by depriving the defendant of his property by statute. (3) Because it violates section 9 of article I. of the constitution of the United States in this, that the act does not exempt from its provisions imported liquors to be sold in bulk.

5. That this act did not go into effect until the twentieth day after approval of the act.

Did the defendant have a license to retail when he sold spirituous liquors on January 15th, 1881? He certainly did not have any written evidence of a license in terms. His license for the year 1880 had expired, and the only evidence of a license which he then had was the receipt for \$50, given on January 13th, 1881. It is true, that afterwards, when the grand jury had returned "no bill" on indictments which had been given out in like cases, the clerk of the council, on July 20th, 1881, did issue a license for the last half of the year, and it is insisted, under the authority of the case of *City Council v. Corleis*, 2 Bailey 186, that the license granted in July had reference back and covered also the first six months of the year.

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\*That case does hold that "the grant of a license to retail spirituous liquors from a day past, is a release of the penalties for retailing without license subsequent to that day, although prior to the taking out of a license." But this case is not at all analogous to that, which was a civil action for a penalty which the plaintiff had waived. Here the license was granted on July 20th, and does not name any day in the past from which the license was to run; but, on the contrary, is only prospective in its terms, "until December 31st, 1881." And instead of the intention being that it should have retroactive operation, the exact contrary is true. Mayor O'Neale testifies that he instructed the clerk not to issue a license until the party had complied with the State

law; and the clerk testifies that no license was issued to the defendant for the first six months of the year 1881. So that even if the act of 1880 had never been passed, the defendant had no license to retail on January 15th, 1881.

But on December 24th, 1880, was approved the "Act to further regulate the sale of intoxicating liquors in this State" (17 Stat. 459), which, among other things, provides that "no license for the sale of intoxicating liquors shall be granted by any municipal authorities in any city, town or village in this State, except upon the payment by the person applying for the same to the treasurer of the county in which such city, town or village is located, the sum of \$100 in addition to the license charged by such city, town or village, for the use of such county," &c. The city council of Columbia was positively inhibited by this law from granting license to any applicant for the year 1881, without proof that such applicant had paid to the treasurer of the county of Richland \$100 in addition to the license charged by the city. There is no evidence that the defendant made such payment to the county, and if the municipal authorities of the city had actually granted a license to him without such payment (of which there is no evidence), such pretended grant, being in direct violation of the law, would have been absolutely void.

It is argued, however, that the act of 1880 did not take effect until "the twentieth day" after its approval by the governor, according to the act of 1879, which provides "that no act or joint resolution, enacted or passed by

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the general assembly of \*this State, \* \* \* shall take effect or become of force until the twentieth day after its approval by the executive, unless some other day be specially named in the body of the act as the day upon which such act shall take effect," &c. The first section of the act of 1880 commences with these words: "That from and after the passage of this act, no license," &c.; but it is contended that, although in the body of the act, these words do not name specially any other day upon which the act was to take effect, and, therefore, it was not made an exception to the rule established by the act of 1879.

By section 22, article III. of the constitution, every act of the legislature becomes a law as soon as it is approved by the governor, unless its operation is postponed by some competent authority. *Ex parte DelHay*, 3 S. C. 564. Although it is recognized that one legislature cannot absolutely bind another upon subjects of substantial legislation, yet the legislature of 1879 endeavored, by the act of that year, to establish a convenient and just regulation in a matter merely administrative in its character, to which subsequent legislatures have conformed by so de-



claring when it was their intention that an act should go into operation immediately upon its passage. We have no doubt that it was the intention of the legislature to make the act of 1880 an exception, and to give it the force of law upon its approval by the governor. It is not usual to insert in an act that it is to take effect "from and after its passage." That sentence could not have been put in the body of this act for no known purpose, except to take it out of the provisions of the act of 1879 and put it into immediate operation. The year was about to close, and there were many reasons why the act should go into operation immediately.

But assuming that such was the intention of the legislature, it is insisted that the words used were not sufficient to accomplish the purpose; that no other day is specially named as the act requires. It was substantially admitted in the argument, that if the identical words "from and after the passage of this act" had been expressed in a separate section at the end of the act (as in the immigration act approved on the same day), there could have been no reasonable doubt about it.

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We incline to \*think that they are sufficient, as they stand, to indicate the intention of the legislature to put the act in force immediately. "From and after the passage of this act" referred to the whole act, and meant from and after the day (December 24th) on which the act should be approved by the governor, as certainly as if that day had been "specially named." The only reason why the day of the month was not named, was because it could not then be foreseen on what day it would be approved by the governor.

But for the purposes of this case it is not necessary to make this ruling. There is no doubt that the act was approved by the governor on December 24th, and, counting that day, the twenty days fixed by the act (as December had thirty-one days) expired at twelve o'clock on the night of January 12th, which was before defendant paid his first \$50 on January 13th, and took his receipt, which, he claims, was substantially a license from the city authorities. He certainly had no pretense of license before that day. In any view, then, the act was in operation on January 13th, 1881, and the city council had no authority to grant a license unless the applicant produced the evidence that he had paid the \$100 to the county, which the act required. *Arnold v. United States*, 9 Cranch 119 [3 L. Ed. 671]; *Krom v. Levy*, 60 N. Y. 126.

In the case from Cranch, Judge Story said: "It is contended that this statute (passed July 1st) did not take effect until July 2d. We cannot yield assent to this construction. The statute was to take effect from its passage; and it is a general rule that when

the computation is to be made from an act done, the day on which the act is done is to be included." In the New York case, it was said: "The New York statute fixing the time from which a statute shall take effect, provides 'every law, unless a different time be prescribed therein, shall commence and take effect \* \* \* on and not before the twentieth day after the day of its final passage.' The act prohibiting appeals to this court in cases involving less than \$500, was passed on May 2d, 1874, and did not provide when it should take effect. The twenty-second day of May was the twentieth day after its final

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\*passage, and consequently it became a law the instant that day began."

There is nothing in the objection that the act of 1880 is unconstitutional. We have just seen that the defendant had made no contract with the city council in regard to license for the year 1881, before the act went into operation, and, therefore, no question can arise as to impairing such a contract.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

#### 18 S. C. 87

Ex parte BROWN AND WIFE et al. Ex parte LAYNE, GIBBES v. GREENVILLE AND COLUMBIA RAILROAD CO. STATE, ex relatione ATTORNEY-GENERAL, v. SAME.

(April Term, 1882.)

#### [1. Interest ⇨22.]

Claims for damages sued against a corporation itself while in the hands of receivers and reduced to judgment, (in one case by consent of the officers of the corporation, who were also the receivers,) and afterwards presented and allowed as original claims against the receiver's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment—such order not having fixed the amounts due.

[Ed. Note.—Cited in *Fraser & Dill v. City Council of Charleston*, 23 S. C. 373, 379.

For other cases, see *Interest*, Cent. Dig. § 43; Dec. Dig. ⇨22.]

2. The decision in *Ex parte Brown and Wife*, 15 S. C. 518, considered and declared.

#### [3. Receivers ⇨163.]

[Judgments were recovered against a railroad corporation, the property of which afterwards passed into a receiver's hands. The judgment creditors appeared before the court of equity having jurisdiction of the winding up of the affairs of the corporation, and obtained an order that the receiver pay the amounts of the judgments in preference to the claims of certain lien creditors. No order was made concerning interest. *Held*, that interest was not payable by the receiver; that the judgments were ordered paid, not because they were judgments, but because they were claims which a court of equity should recognize.]

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 313; Dec. Dig. ⇨163.]

Before *Fraser, J.*, Richland, December, 1881.

At the hearing of this appeal, Hons. A. P. ALDRICH and J. H. HUDSON, Circuit judges, sat in the places of the CHIEF JUSTICE and Mr. Justice MCGOWAN, who had once been of counsel in the causes. This appeal is a sequel to the case to be found reported in 15 S. C., at page 518. The opinion fully states the case.

Mr. W. C. Benet, for Brown and wife et al., appellants.

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\*Mr. J. E. Bacon, for Layne, appellant.

Mr. James Conner, for respondents.

August 21st, 1882. The opinion of the court was delivered by

Mr. Justice HUDSON. In 1872 the Greenville and Columbia Railroad Company was adjudged insolvent by the Circuit Court of Richland; but its president and directors were authorized to continue in the management and control of the road, subject, however, to the orders of the court. On an appeal heretofore heard by this court, it has been held that the effect of the orders of May and June, 1872, on circuit, was to make the officers of said company receivers of the road, though not so designated, *eo nomine*.† During the period when these orders were in force, to wit, in 1874, the aforesaid petitioners, except Mrs. Layne, received bodily injuries from an accident whilst traveling as passengers on the cars of the said company. To recover damages for these injuries, they instituted actions against the company in the Court of Common Pleas for Anderson, which, being transferred to Abbeville, judgments were there recovered at a term held April 22d, 1878.

The action of Elizabeth J. Layne was instituted by her as administratrix of the personal estate of her deceased husband, to recover damages for his death, caused by the bursting of the company's locomotive. Mr. Layne was an engine-driver in the employment of the company. This action was brought to trial at Newberry, September 15th, 1877, when, by way of compromise, the plaintiff was allowed to take judgment for \$2,000, of which sum \$500 was to be paid in cash, and the balance in monthly installments of \$90. Such was the arrangement between the plaintiff and the attorneys representing the company.

On November 23d, 1878, at a term of the Circuit Court held for the county of Richland, at Columbia, Judge Pressley, on due application, and for good cause shown, duly appointed James Conner, Esq., receiver of the property of the said company, and, by an appropriate order, conferred upon him the requisite powers, duties and responsibilities per-

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taining to that office. Thus, the \*status of the company became clearly defined, and

creditors, in compliance with the order of the court, began to come forward and establish their claims before the master. Accordingly the petitioners came in, and, by special allegations in their respective petitions, claimed the right to establish their claims against the receiver, and to be paid out of the fund in his hand arising from current income, in preference of mortgagees and other existing lien creditors.

In March, 1880, it was referred to the master to inquire into and report upon the merits of these claims; and on May 17th, 1880, he reported against their right to priority. On July 26th, 1880, the Circuit Court, sustaining the master, decreed that the petitioners had no equity to a share of income in the hands of the receiver superior to the equities of mortgagees and other lien creditors. On appeal to this court, the decree of the Circuit Court was reversed, the higher equity of the petitioners sustained, and the causes were remanded to the Circuit Court for adjudication in accordance with the judgment of this court. *Ex parte Brown and Wife*, 15 S. C. 518.

On November 1st, 1881, the Circuit Court, in order to carry out the judgment of this court, referred it to the master to ascertain and report the amounts of the several demands of the petitioners. On a hearing before the master, under this order of reference, a contest arose as to the sums to be recovered in each case; and after hearing argument, he reported that the petitioners were each entitled to recover and to receive out of the fund in the hands of the receiver, the amount of the principal, interest and costs of the judgment recovered against the company in the several actions at law before they presented their petitions to be paid from the receiver's fund.

At this reference, as also at the previous one, the parties mutually agreed that they would not renew the controversy which was originally had before the court at Abbeville and Newberry, to wit, the right of the petitioners to recover damages, but would accept the amount found by the jury in each case as the correct assessment of the damages. The petitioners thereupon claimed that they should recover on said verdicts or judgments all interest and costs, whilst the receiver

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claimed \*that the demand of each petitioner against the fund in his hand did not rest upon the judgment, but upon the original cause of action, and was, therefore, unliquidated, and could not be augmented by any interest or costs.

On exceptions to the master's report awarding to each claimant the full amount of his judgment, interest and costs, the Circuit judge reversed the same and sustained the proposition of the receiver. The Circuit judge held that these claims are for unliquidated damages, and bear no interest; that they are

† 15 S. C. 304, 518.



not enforceable against the receiver's fund as judgments. Against this fund (he continues) they never have been in judgment, and the judgments from Abbeville and Newberry were only used in evidence by consent as a convenient mode of ascertaining the amount of damages in each case, it being far less expensive, and just as reliable, as to have summoned the witnesses and had a trial de novo, which might have been insisted upon. If these claims had been merged in the judgments, they would have lost that high equity on which alone they were entitled to be paid. They cannot throw off their character as judgments in order to get a standing on the equity side of the court, and again resume it in order to recover interest. Reasoning thus, the Circuit judge allowed to the petitioners the principal of their respective judgments and the costs thereon, but disallowed the interest.

From this judgment the petitioners appeal, and allege for error in the Circuit decree, that it holds that these judgments were not recovered against the receivers; that these claims are not enforceable in the Court of Equity as judgments; that they are for unliquidated damages, and do not bear interest. In this judgment the Circuit judge is correct. In the judgment of this court, in which the equitable character of these claims is established, no weight whatever is given to them because they were sued to judgment against the corporation; but, on the contrary, this court took occasion to say that those actions unnecessarily embarrassed and complicated the matter. They were adjudicated solely upon the ground of the meritorious character of the original cause of action. In fact, this court says, in that judgment: "These claims are pressed in this case, not on account of

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\*their rank as judgments, but on account of the cause of action on which those judgments are based. It would have been more regular to have based the claims in the Court of Equity at once on these several causes of action. This, however, would have opened the cases anew, and led to a very long and expensive investigation." In the further consideration of the questions then before the court, these claims are treated, not as judgments, nor allowed as such, but are dealt with as unliquidated demands presented for proof before the Circuit Court sitting in equity, and, as such, were adjudged to have superior equities to be paid from the receiver's fund. That judgment expressly holds that these claimants, so far as they seek payment from the income of the road in the receiver's hand, cannot be treated as lien creditors.

Against the corporation they hold judgments, and these judgments, as liens, take their due rank with other judgments against the company. Against the receiver's fund, however, they come divested of their charac-

ter as judgments, and rest solely upon the equities of the original cause of action. Counsel for the appellants are in error in supposing that the judgments recovered at Abbeville and Newberry are judgments against the receivers. Those actions have none of the forms of suits against receivers, but are, in every feature, actions at law against the company, and the judgments are entered up accordingly. There is naught in the actions, nor in the defenses, which impresses upon them any equitable character, nor special claim to priority. Not until these petitions were filed on the equity side of the court in Richland, were suits instituted against the receiver, and against the fund in his hand they have never been put in judgment, the amount to which they are respectively entitled being still a matter of contention. When that contention is ended, and the amount of each definitely fixed by final judgment, then, and not till then, will they bear interest.

Had they never brought suit against the company at Abbeville and Newberry, but delayed the presentation of their claims until 1879, when they were eventually, and in due form, presented against the receiver, with a special claim of payment out of the fund in his hands, it is evident that the only recovery

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\*which could have been had would have been the amount of damages received from the injuries in 1874, without interest. Now, the recovery of judgments against the company does not alter the case, nor affect, in the slightest, the amount to which they are entitled out of the receiver's fund. In the subsequent suit against him, he could have treated each claim *res integra*, and demanded proof anew. This was dispensed with only as a convenient mode of saving expense and shortening litigation; and the parties went to trial upon the equities of the claims, and the question of priority, taking the findings of the juries as the basis of recovery, if recovery could be had.

From this view of the case, it is contended by the counsel for Elizabeth J. Layne, that her claim must be excepted, because the judgment in her behalf, at Newberry, was by special consent, and stipulated to be paid in certain installments. We do not regard this as altering the case. Notwithstanding this stipulation of counsel for the company, it stands, nevertheless, just as the others do—as a judgment against the corporation. In asking to be paid out of the receiver's fund prior to lien creditors, for damages resulting from the death of her husband, Mrs. Layne can take nothing from this consent judgment more than the other petitioners from their judgments recovered against consent. As claims upon the receiver's fund, in a court of equity, all stand upon the same footing, and are based, not upon judgments recovered against the corporation, but upon the high equities inhering in the original cause of action.

Upon the quantum of damages or question of interest, her counsel also insists that interest on the judgment should be allowed, at least from the date when this court decided that the petitioners are entitled to prior payment from the receiver's fund. But it must be borne in mind that, in that judgment, this court did not fix the amount of recovery, but only the right of priority to which claims of this character are entitled. Hence, that judgment does not give a day from which interest is to be computed, because it fixes no sum to be recovered. The controversy was as to the right to be paid out of income, and not as to the amount. That question was never raised and brought directly in issue until it was submitted to the master by the

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\*order of the Circuit Court of date November 1st, 1881, referring it to him to ascertain and report the amount of each of these claims.

Wherefore, it is the judgment of this court that the judgment of the Circuit Court be affirmed, and the appeals in these cases dismissed.

Mr. Justice McIVER concurred.

Mr. Justice ALDRICH, dubitante. I am not so well satisfied with the conclusion reached by the court as expressed in the opinion of his Honor, Judge Hudson, and now proceed to give the reasons of my doubt.

The jurisdiction of law and equity are now blended in one court; therefore, in administering the law, we should be careful to preserve the equity of the case. Let me illustrate by taking the case of Mrs. Layne. So far as she is concerned, no damages can restore the slaughtered husband, or alleviate the mental agony of the bereaved wife. The verdict is not intended as compensation, but to afford the widow a scanty support for the loss she has sustained from the negligence of the company in whose service her husband lost his life, at the post of duty. The liability of the company was incurred when the accident happened. The extent of that liability was fixed when the jury assessed her damages. It does seem to me, in equity and good conscience, the verdict should bear interest.

We have said the railroad company is liable. Instead of paying these lawful debts at once to the injured parties, every obstruction that the courts afford has been thrown in the way. In the case of this bereaved widow, she has been compelled to maintain a protracted litigation, incurring long delay and heavy expense, thus diminishing the compensation for the grievous burden she has been compelled to bear, and thus adding suspense, anxiety and hope deferred to her sad fate. Now she is turned away on a technical construction without interest, the corporation having used the damages awarded to her in the prosecution of their business. It is true,

the judgments were not recovered against the receiver, but against the corporation. The

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receiver \*represented the corporation; and can there be a doubt, if the cases had been again submitted to a jury, they would have provided, in their verdict, against a loss of interest by increasing the damages? I think not. If no receiver had been appointed the verdicts would have borne interest. It is the same company, when the master made his report, that it was when the injuries were sustained.

It does seem to me like straining a point, because the verdicts were accepted as the amount of assessments of the damages instead of bringing a new suit against the receiver, the interest on the same shall not be computed. I do not see, clearly, how this is in derogation of the rights and equities of other creditors. These creditors are entitled to preference, if for no other reason, because of their diligence in pressing their claims to judgment. But, I suppose, I must yield to the weight of authority and the concurring opinion of the three able judges, who have considered the case as carefully as I have. I reluctantly concur and sign the judgment of the court, doubting.

Judgment affirmed.

18 S. C. 94

BELL v. TOWELL.

(April Term, 1882.)

[1. *Wills* ⇨3.]

A will, executed in 1857 by a testator who died in 1881, is governed by the provisions of the act of 1858 as modified in the General Statutes of 1872, and, therefore, passes after-acquired real property, the terms of the will being sufficiently comprehensive for that purpose.

[Ed. Note.—Cited in *Roberts v. Smith*, 21 S. C. 462; *Moore v. Davidson*, 22 S. C. 101; *Welborn v. Townsend*, 31 S. C. 412, 10 S. E. 96.

For other cases, see *Wills*, Cent. Dig. § 3; Dec. Dig. ⇨3.]

[2. *Wills* ⇨441.]

In order to reach the true intention of a testator, his will should be read in the light of the circumstances surrounding him at its execution.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 958; Dec. Dig. ⇨441.]

[3. *Executors and Administrators* ⇨138.]

A testator directed the residue of the estate, after payment of debts, to be kept together on the place whereon testator then lived, and as his children (who were then minors) married or became of age, the executors were empowered to give off such property as they deemed necessary; the property given to the daughters to belong to them and their bodily heirs; if any daughter died and left no issue, the said property to be returned and divided among the other children; if the wife married, the whole estate was to be sold and divided between wife and children, share and share alike; and if the wife never married, at her death the

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whole estate was \*to be sold and equal division



made among the children. Before testator's death, the wife died, and all the children became of age and married. *Held*, that the power given to the executors lapsed and never went into operation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560–566; Dec. Dig. Ⓒ138.]

[4. *Wills* Ⓒ733.]

That the direction for a division among his children, at the death of his widow, required a division at testator's death, the wife being then dead.

[Ed. Note.—Cited in *Key v. Weathersbee*, 43 S. C. 424, 21 S. E. 324, 49 Am. St. Rep. 846.

For other cases, see Wills, Cent. Dig. § 1828; Dec. Dig. Ⓒ733.]

[5. *Wills* Ⓒ506.]

That the limitation to the bodily heirs of his daughters was intended to attach only to the property which it was contemplated might be given by the executors to the daughters, and did not attach to the proceeds of the sale ordered in the concluding part of the will.

[Ed. Note.—Cited in *Mobley v. Cummings*, 35 S. C. 125, 14 S. E. 721.

For other cases, see Wills, Cent. Dig. §§ 1090–1099; Dec. Dig. Ⓒ506.]

[6. *Wills* Ⓒ470.]

While a will should be construed as a whole, the intention of testator cannot be declared to be the same in all its parts, unless so expressed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. Ⓒ470.]

[7. *Partition* Ⓒ77.]

A sale having been directed, a partition cannot be had except by consent of all parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–223; Dec. Dig. Ⓒ77.]

Before Cothran, J., Edgefield, October, 1881.

This was an action by John M. Bell as executor of George Bell deceased, against Angeline M. Towell, Elizabeth R. Landrum, Henrietta M. Timmerman and Emily G. Shaw, commenced in September, 1881, for a construction of testator's will, which is copied in full in the opinion of this court.

The Circuit decree was as follows:

This action is submitted on the complaint and answer of defendants. The plaintiff asks for a construction of the will of his testator, and for a writ of partition of testator's real estate. The testator, George Bell, departed this life August 16th, 1881, leaving of force his last will and testament, the provisions of which are fully set forth in the complaint.

The testator's will bears date in the year 1857. Salome Bell, the wife of the testator, died soon after the date of testator's will, and many years before the death of testator. The will of testator was made when he resided on the Mine Creek Place described in the complaint. The testator removed from said place and resided elsewhere for several years before his death. He owned the Mine Creek Place and the Pinelands, described in the complaint, at the time that he made his will. The testator acquired all the rest of the real estate, described in the complaint, after the date of his will and after the death

of his wife. The will is as follows: \* \* \*

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\*The first question that arises upon the construction of said will, is as to what estate the daughters take under the first provision of said will. The words are as follows: "The property that may be given to my daughters shall belong to them and their bodily heirs. If any one of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children." The daughters take a fee-conditional under these words of the will. If any of them die, leaving no issue, the shares of such go to the other children of testator or their children as purchasers.

The next question of importance in the construction of said will is, whether the shares of the daughters in the entire estate of the testator are subject to the provisions above stated; that is, whether their respective shares in the whole of said estate are to be held as a fee-conditional, and are subject to revert to testator's estate in case of their death, leaving no issue surviving them? Nothing was given off to any of the children of testator under the first provision of the will, nor was the estate kept together and managed as was contemplated by the second provision of the will. The testator survived his wife, and the latter never married, and the sale and division of the property upon her marriage or death, as provided by the second and third provisions, never took place. These two provisions of the will became inoperative, and the scheme of testator was defeated by the death of his wife. The first provision of the will applies to the property of testator owned by him at the date of the will, and the daughters take a fee-conditional in that part of the estate.

The testator died intestate as to all his after-acquired estate, real and personal; and this property acquired by him after the date of his will is divisible among his heirs-at-law under the statutes for the distribution of intestate estates, and does not pass under his will, and is not subject to any of the provisions thereof.

The Mine Creek and Pinelands places are subject to be divided equally between testator's children, the shares of the daughters therein to revert to the estate in case any of them die, leaving no issue. The other

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lands are divisible in equal shares \*in fee among testator's heirs, who are his children, the plaintiff and defendants in this action. It is not necessary that said lands and more particularly those which are herein adjudged to pass under the will, be sold if they can be fairly and equally divided. The personal estate of testator that was not kept on the Mine Creek Place is intestate property, and is divisible among testator's heirs-at-law. It is

therefore ordered that a writ of partition be issued, &c.

From this decree all parties appealed.

Messrs. Norris & Folk, for plaintiff.

Mr. James Aldrich, for Mrs. Landrum, and Messrs. H. W. Addison, Bettis & Wardlaw, for the other defendants.

October 2d, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. George Bell departed this life August 16th, 1881, seized and possessed of a considerable estate, consisting for the most part of eight different tracts of land situate in the counties of Edgefield and Aiken. He left, surviving him, five children, one son, the plaintiff, and four daughters, the defendants. He left a will which had been executed as far back as 1857, when his wife Salome was alive, and his children were all minors, living in his family. At that time the testator owned only two tracts of land, the old homestead whereon the family resided, and an adjoining tract known as "the Pinelands." All the other tracts of land of which he died seized were acquired after the execution of his will. Soon after he made his will, Salome, his wife, for whom ample provision was made, died, and his children all grew up and married before his death in 1881. Upon that event, John M. Bell, one of the children, and the sole qualified executor, instituted these proceedings for construction of the will, which is as follows:

"First. After all my just debts are paid and discharged, the residue of my estate, real and personal, shall be kept together on the place whereon I now live; and as my

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children marry or \*become of age, I empower my executrix and executors to give off such negroes and other property as they may deem necessary; and the property that may be given to my daughters shall belong to them and their bodily heirs. If any one of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children. My will also is, that my beloved wife Salome and children, viz., John M. Bell, Elizabeth R. Bell, Angeline M. Bell, Henrietta M. Bell and Emily G. Bell, shall remain on the said plantation where I now live. My wife (Salome Bell) shall use the proceeds of the farm for the benefit and use of the family and herself; if there shall be anything left over the support of the estate, it shall be disposed of as the executrix and executors may think most advantageous to the estate. And if my beloved wife should marry, then my whole estate shall be sold and equally divided between my wife, Salome, and my five children named, share and share alike with all. If my wife never marries, then at her death my whole estate shall be sold and equal division made among my children. Likewise, I make, constitute and

appoint my beloved wife, Salome Bell, John M. Bell and John Denny, executrix and executors of this my last will and testament."

The Circuit judge held that the property owned by the testator in 1857, when he executed his will, alone passed under it; that by the terms of the first paragraph, the daughters respectively took a life estate in their shares of that property, with limitation over to their brother and sisters "if they should die and leave no issue." But that all the property acquired by the testator, after the execution of his will, did not pass thereunder, but was intestate and subject to division under the statute of distributions in fee-simple, and ordered a writ of partition to issue for that purpose.

All the parties filed exceptions upon appeal to this court. John M. Bell and Mrs. Landrum insist that all the property owned by the testator at the time of his death passed under his will, and that the limitation attached to the property, which the executors were empowered to give off to the children in the lifetime of Mrs. Bell, should be held as ap-

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plicable also to the shares \*of the daughters in the whole estate. And the other daughters, whilst agreeing that all the property owned by the testator at the time of his death passed under his will, insist that by proper construction of the will all the property should be sold and equally divided among the children without limitation, according to the terms of the last paragraph, which has no connection with the other parts of the will.

The first question is, whether the will is to be considered as disposing only of the other property which was owned by the testator at the time of its execution, or as speaking at the time of his death. At common law, a will of personal property was ambulatory, taking effect only at the death, and, as a consequence, disposed of all property then possessed by the testator, without regard to the fact whether it was acquired before or after its execution, only provided the terms of the will were sufficient to cover such property; but, for reasons which it is unnecessary to state here, the rule was different as to real property, as to which the will only disposed of that which was owned by the testator at the time of its execution.

In 1791, it was enacted "that no lands or personal estate, which shall be acquired by any person after the making of his or her will, shall pass thereby (unless the said will shall be republished); but every such person shall be considered as having died intestate as to said lands and personal estate." 5 Stat. 163. In 1808, an act was passed which declared, "That any person acquiring personal property after making his will shall not be considered as having died intestate as to such personal property." 5 Stat. 573. In 1858, it was enacted "That real estate purchased or otherwise acquired after the mak-



ing and publishing last wills and testaments shall pass by and under the same, in the same manner and to the same extent as personal estate now passes." 12 Stat. 700. In 1872, the previous acts upon the subject were repealed; but, at the same time, a provision as to after-acquired property, both real and personal, was adopted in the following words: "Land and personal property which shall be purchased or otherwise acquired by a person after the making of his or her will, shall pass thereby, and no one shall be con-

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sidered as having died \*intestate as to said lands and personal estate." Gen. Stat. 440.

This law is perfectly clear as to all wills executed after its adoption; but the question is made, whether it should apply to wills executed before that time. It will be observed that the common law was restored as to personal property before this will was executed, and, therefore, as to that kind of property, there can be no question here. But the repeal of the act of 1791, as to real property, did not take place until 1858, a year after this will was executed, and it is contended that, as to the lands, the will must be governed by the act of 1791.

The testator did not die until the year 1881. His will, from its nature, could not take effect until that time, and falls under the operation of the law then of force, which declares "that lands and personal property acquired by any person after making his or her will, shall pass thereby, and no person shall be considered as having died intestate as to said lands and personal estate." It has been held that this embraces wills executed before as well as after the passage of the act, provided only the testator died after that time, and the terms of the will are broad enough to cover such property. Means v. Evans, 4 Desaus. 243; Jarm. Wills 146, note.

There can be no doubt that the terms of this will are sufficient to cover all the property of which the testator died seized and possessed. The property is not particularly described, but is spoken of in general terms which are as applicable to property acquired after the execution of the will as to that owned at that time. It speaks of "the residue of my estate, real and personal," after his debts were paid, "the whole of my estate," &c. There is nothing in the will which indicates that the testator intended to limit its operation to the property owned by him at its date. "A residuary clause of all the testator's property of every kind and description whatever, covers all his interest in real estate otherwise undisposed of by the will, whether such interest be vested or future, contingent or reversionary." Williams v. Kibler, 10 S. C. 414; Scaife v. Thomson, 15 S. C. 358.

As the will covers and disposes of the whole estate, what is the proper construction of it? The paper is most unskillfully drawn. It is short and obscure, if not in-

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consistent, in its different parts. The difficulty of giving it satisfactory construction is increased by the fact that it was made more than twenty years before the death of the testator, when the property and the beneficiaries under it were in a very different condition from what they are now. In construing a will the leading object should be to discover the intention of the testator in the state of facts which have actually occurred, and to reach that intention it is necessary to read the will in the light of the circumstances surrounding the testator at the time it was made.

At the time this will was executed, Salome, the wife of the testator, was living and his children were all minors still in his family. He seemed to assume throughout that his wife would survive him, and her welfare during life and that of the young children during the period of nurture were manifestly the first objects of his bounty. He directed that his property should be kept together for the benefit of his wife and children during the life or widowhood of his wife, and in that view he empowered her, as executrix, and the other executors to give off to the children as they married or came of age, "such negroes and other property as they might deem necessary," declaring that "the property that may be given off to my daughters shall belong to them and their bodily heirs. If any of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children." But the state of facts here provided for never actually occurred. Salome died long before the testator, and the children all grew up and married before his death. The power of the executors to give off property under this paragraph lapsed by the death of Salome and never went into operation.

The testator next provided for the possible case of his wife marrying again, but that never occurred, and the provision made to take effect in that event need not be considered. Finally, he directed that if his wife should never marry again, then, at her death, the whole estate should be sold and equal division made among his children. This event has occurred, except that, contrary to his expectations, her death occurred in his lifetime, the effect of which was to destroy the provision made for the wife and to postpone the operation of so much as related to the

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children until his own death, as the will could not take effect until that time. "It may be stated, as a general rule, that when the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under a certain age, or under any other prescribed circumstances, and the event happens in testator's lifetime, the ulterior gift takes

effect immediately on testator's decease, as a simple, absolute gift." 3 Jarm. Wills 618, note; Williams Exec. 1318; Dunlap v. Dunlap, 4 Desaus. 305.

In the last case cited, it is said: "It is certainly a general rule that if the legatee dies before the testator, the legacy shall be lapsed and sunk into the residuum of the testator's personal estate, although the legacy may be given to the legatee, his heirs, executors, administrators and assigns. But there are various exceptions to this rule, and, amongst others, one exception is, when the legacy is given over to others, after the death of the first legatee, for in such case the legatee in remainder shall have it immediately." The last paragraph of the will is operative as if Salome had survived her husband and died unmarried immediately after.

If Salome had survived her husband, and the executors had given off property to the children, it is at least doubtful even in that case (as none of the children died "without issue" in her lifetime), whether the words of the will were sufficient to create a good limitation over in that property, but without considering that question, we do not think that we are at liberty to take the words of limitation from the context in which they appear and transfer them to the last paragraph, which simply requires that upon the death of Salome all the property shall be sold and equal division made among the children.

It is true that in seeking after the intention of the testator, all parts of a will should be construed in relation to each other, so as, if possible, to form one consistent whole, but when the several parts of a will undertake to provide, each for a different state of facts, it cannot be affirmed, in the absence of any such expression, that his intention was the same in all the cases. Under such circumstances, we cannot venture to take part of a provision made for one state of facts, and

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interpolate it upon another provision made for a state of facts entirely different. It may be possible, but we cannot hold that it was the intention of the testator, to limit over the property directed by the last paragraph to be sold and equally divided among the children. The words of limitation, by their place in the will, and the manner in which they are stated, indicate that they were intended to apply to the property which the testator understood might be given off under the first paragraph, which never went into effect. If the testator intended that the limitation should apply to the property to be taken in the final division, he should have so said, and in that case he would probably have directed the property itself divided, instead of ordering it to be sold and the proceeds divided.

The whole estate passes under the will and

must be administered according to the last paragraph, without regard to the words of limitation used in connection with the property which it was contemplated might be given off to the children by the executors under the first but inoperative paragraph of the will.

As the will positively directs a sale, the property itself cannot be partitioned except by consent of all parties.

The judgment of this court is that the judgment of the Circuit Court be modified according to the principles and conclusions herein announced.

18 S. C. 103

STATE v. TURNER.

(April Term, 1882.)

[1. *Criminal Law* ⇨1059.]

An exception, "that the judgment is contrary to the law and the evidence," will not be considered by this court.

[Ed. Note.—Cited in *Weatherly v. Covington*, 51 S. C. 56, 28 S. E. 1.

For other cases, see *Criminal Law*, Cent. Dig. § 2671; Dec. Dig. ⇨1059.]

[2. *Intoxicating Liquors* ⇨124.]

The late statutes forbidding the sale of liquors in any quantities has superseded and rendered nugatory the act of 1783 (4 Stat. 565), forbidding its sale in quantities less than three gallons.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 133; Dec. Dig. ⇨124.]

[3. *Intoxicating Liquors* ⇨162.]

A sale of spirituous liquors without license, outside of incorporated cities, towns and villages, in any quantities, is a violation of the act of 1880. 17 Stat. 459.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 178; Dec. Dig. ⇨162.]

[4. *Intoxicating Liquors* ⇨6.]

The power of the legislature to regulate the sale of spirituous liquors has been too long and too well settled to admit, now, of question; and the act of 1880, *supra*, is not unconstitutional.

[Ed. Note.—Cited in *State v. Berlin*, 21 S. C. 294, 53 Am. Rep. 677; *State ex rel. George v. Aiken*, 42 S. C. 233, 247, 20 S. E. 221, 26 L. R. A. 345.

For other cases, see *Intoxicating Liquors*, Cent. Dig. § 4; Dec. Dig. ⇨6.]

[5. *Criminal Law* ⇨1206.]

The act of 1878 (16 Stat. 453), declaring that where imprisonment was authorized by a statute, a person convicted thereunder might be

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sentenced \*to imprisonment in jail or penitentiary, with or without hard labor, was a general law, applicable to statutes afterwards enacted as well as to those then in force.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3276; Dec. Dig. ⇨1206.]

Before Aldrich, J., Pickens, January, 1882.

Indictment against James Turner for retailing without license. The opinion states the case.

Mr. T. H. Cooke, for appellant.

Mr. Solicitor Orr, contra.



October 6th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant was convicted under an indictment for retailing spirituous liquors without a license, and sentenced to pay a fine of \$200, or be imprisoned in the State penitentiary, at hard labor, for six months. He appeals upon four grounds: 1. "Because the evidence showed that the selling complained of occurred about October 15th, 1881, and that the defendant sold spirituous liquors in quantities of not less than three gallons, which he had the legal right to do, the act of 1783 being still of force in this State." 2. Because his Honor erred in charging the jury that any sale of spirituous liquors without license, in any quantity, outside of incorporated cities, towns and villages, is a violation of the act of 1880, regulating the sale of the same." The third ground makes, substantially, the same point as the second; and the fourth is the general ground that the judgment is, in other respects, contrary to the law and the evidence, which, it has been repeatedly held, will not be considered by this court.

It may well be questioned whether the evidence adduced in this case would enable the appellant to make the point intended to be raised by the first ground of appeal; for it seems from the testimony set out in the "Case," that the defendant agreed to sell three gallons to several different persons, and allowed them to take it away at different times, in such quantities as the purchasers might desire; and then follows this

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statement: "The proof further showed that any one could get whiskey from Turner, and in any quantity they desired. They simply signed a certificate that they would buy three gallons, and they took any quantity from a half pint up, paying for what they took away, and getting the remainder if they desired it. If they did not want it, they were not bound to take it. They all paid at the rate of \$2 per gallon for the whiskey they got." Under this state of facts, it might well be doubted whether the defendant could have escaped conviction, even if there were no other law upon the subject than the act of 1783, sometimes called "the three-gallon law." For selling, as this defendant is represented to have done, nominally three gallons, but really any less quantity that the purchaser might choose to take, might well be regarded as an attempted evasion of the provisions of that act, which would subject a party, so selling, to the penalties of the law.

We are not disposed, however, to rest this case upon that ground, but rather to give the defendant the benefit of the most liberal view of the evidence, and to consider the case as if the defendant had in fact never sold spirituous liquors in any less quantities

than three gallons. The point raised by the first ground of appeal is that inasmuch as the act of 1783 did not forbid a sale of three gallons or more, and inasmuch as that act has never been repealed, it is not now unlawful to sell in quantities not less than three gallons. This proposition rests upon the assumption that because that act made it a penal offense to sell spirituous liquors without a license, in less quantities than three gallons, it thereby authorized the sale of quantities of that amount or larger, for all time to come, or at least until that act was repealed. This assumption is without any foundation whatever.

The right to sell in any quantity was not derived from that act, but was a right existing before any act upon the subject was passed, and the only effect of that act was to limit this pre-existing right. So that whether the act of 1783 has been repealed or not, cannot affect the question now under consideration. While the act of 1783, so far as we are informed, has not in terms been repealed, yet it certainly has been superseded

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by \*subsequent legislation upon the subject. Since the Legislature has forbid the sale of spirituous liquors in any quantities without a license, the previous law forbidding the sale in certain quantities, has unquestionably been superseded and rendered nugatory, as the general proposition must necessarily embrace the particular or special one.

The second ground of appeal, alleging error in the charge of the Circuit judge, cannot be sustained, as it is quite clear that the law was stated to the jury just as it is declared in the act of 1880 (17 Stat. 459). We presume, however, from the course of the argument here, that the main object of this ground was to assail the constitutionality of the act of 1880. The power of the Legislature to regulate the sale of spirituous liquors, has been too long and too well settled to admit of question at this late day. Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and therefore it has long been settled that the law-making power may throw such restraints around that traffic as, in the judgment of that department of the government, may be necessary to secure the peace and welfare of society; and persons who wish to deal in such an article must conform to the regulations prescribed, or they cannot claim the right so to do. There is nothing in the constitution of the United States or of this State which forbids the Legislature from exercising this power. See the License Cases, 5 How. 504 [12 L. Ed. 256]; Heisembrittle ads. City Council, 2 McM. 233; City Council v. Ahrens, 4 Strob. 241.

We do not understand that the power of the legislature to do this is now controvert-

ed, as a general proposition, but the appellant contends that this particular act is open to objection because of what is called its discriminating features, and because it tends to deprive the citizen of his property and of his right to sell and dispose of it. The act in question does not deprive any citizen of the right to his property or forbid his using or disposing of it, but simply prescribes the regulations to which he must conform in disposing of it, so as to prevent his using or disposing of it in such a manner as would be detrimental to the interests of society. There is no discriminating feature in the act, for the same regulations apply alike to

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every citizen. To obtain a \*license to sell spirituous liquors the law requires certain conditions to be complied with, and every one, without distinction, who complies with the prescribed conditions, can obtain a license, and no one who fails to comply with these conditions can procure a license.

Another point has been raised in the argument, which, though not taken in the exceptions or grounds of appeal, we propose to consider, inasmuch as it is a point of general importance that ought to be settled. The point is that, as the act of 1880 prescribes simply punishment by imprisonment for a violation of its provisions, without saying imprisonment in the State penitentiary, so much of the sentence in this case as imposes imprisonment in the penitentiary is illegal, as the defendant could only be imprisoned in the county jail. After the decision of this court in the case of *State v. Hord*, 8 S. C. 84, where it was held that a person convicted of a misdemeanor could not be sentenced to confinement in the penitentiary unless such punishment was prescribed by some statute, the act of March 12th, 1878, (16 Stat. 453,) entitled "An act to amend the law respecting the punishment for crime," was passed. That act declares "that in every case in which imprisonment is provided as the punishment, in whole or in part, for any crime, such imprisonment shall be, either in the penitentiary, with or without hard labor, or in the county jail, with or without hard labor, at the discretion of the Circuit judge pronouncing the sentence."

In the face of this act we do not see how it can be claimed that so much of the sentence in this case as imposes the punishment of imprisonment in the penitentiary is illegal. The appellant contends that the act of 1878 relates solely to those cases in which the law then prescribed the punishment of imprisonment, and cannot apply to cases in which the legislature has subsequently passed acts in which the punishment prescribed is by imprisonment simply, without saying imprisonment in the penitentiary, but that all such acts should be regarded as making provisions for themselves, and, in the ab-

sence of any provision as to the place of imprisonment, the rule established by the case of *State v. Hord* would apply.

We see no warrant for thus limiting the

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scope of the act of \*1878. On the other hand, we regard it as a general law applicable to all cases in which punishment by imprisonment is prescribed, and that its object was to define what is meant by the term "imprisonment" whenever it is used in any statute. The object of it, as disclosed by its title, is to amend the law respecting the punishment for crime, and, inasmuch as the law had then recently been determined by the Supreme Court to be, that when imprisonment merely was prescribed as a punishment, such imprisonment could not be in the penitentiary unless the statute prescribing it so declared, the purpose of the legislature clearly was to alter or amend that rule of law by prescribing a rule which should apply "in every case," so that whenever such a punishment should be prescribed, the place of imprisonment should be fixed by the discretion of the judge pronouncing sentence. Hence, whenever a statute is found, whether passed before or after the act of 1878, "in which imprisonment is provided as the punishment," such imprisonment shall be either in the penitentiary or in the county jail, according as the judge pronouncing the sentence may, in his discretion, regard the one or the other most appropriate to the circumstances of the case.

We deem it proper to add that we do not desire this case drawn into a precedent for the practice of going outside of the points raised by the exceptions or the grounds of appeal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 108

SHARP v. KINSMAN.

(April Term, 1882.)

[1. *Appeal and Error* ¶1135.]

An order refusing a motion for non-suit not disturbed, no error of law being shown.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4454, 4455; Dec. Dig. ¶1135.]

[2. *Trial* ¶296.]

An error in a charge is immaterial where the jury are subsequently told not to consider the matter embraced within such instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ¶296.]

[3. *Trial* ¶193.]

The charge in this case held to be a charge on facts.

[Ed. Note.—Cited in *State v. Addy*, 28 S. C. 13, 4 S. E. 814; *Norris v. Clinkscales*, 47 S. C. 513, 25 S. E. 797.

For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. ¶193.]



[4. *Landlord and Tenant* ⇨275, 277.]

When a tenant holds over after the expiration of his lease, the landlord has no right to take the law into his own hands and eject the tenant without legal process.

[Ed. Note.—Cited in *Rush v. Aiken Mfg. Co.*, 58 S. C. 145, 151, 36 S. E. 497, 79 Am. St. Rep. 836.

For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1167, 1174; Dec. Dig. ⇨275, 277.]

[5. *Landlord and Tenant* ⇨139, 277.]

But if the tenant is wholly out of possession, leaving on the land an immature crop, the landlord may enter the premises and appropriate the crop without the aid of legal process.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 498, 1171; Dec. Dig. ⇨139, 277.]

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[6. *Trial* ⇨193.]

\*The question of damages is exclusively a matter for the jury, and the Circuit judge erred in intimating his opinion thereon.

[Ed. Note.—Cited in *Shieder v. Southern Ry.*, 83 S. C. 459, 65 S. E. 631.

For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. ⇨193.]

[7. *Set-Off and Counterclaim* ⇨22.]

In action by tenant against landlord for damages in entering upon the leased premises, seizing the crop and carrying it off, a balance due by the tenant for rent cannot be asserted as a counter-claim.

[Ed. Note.—Cited in *Humbert v. Brisbane*, 25 S. C. 514.

For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 29; Dec. Dig. ⇨22.]

Before Thomson, J., Charleston, June, 1880.

This was an action by William Sharp against Henry W. Kinsman, commenced January 14th, 1880. The facts of the case are stated in the opinion. The presiding judge sustained a demurrer to the counter-claim, overruled a motion for nonsuit, and charged the jury as follows:

The plaintiff says that the defendant, Kinsman, on the 5th, 6th and 7th January, 1880, forcibly broke into and entered lands of the plaintiff. He claims that he is still the owner of the land. The man who rents land for a year, is entitled to the possession of it for a year, and I presume that he made this statement—that the land was his—meaning for a year. He then says that on a certain farm on Charleston Neck, the said farm being in possession of the plaintiff, and without the leave of the plaintiff, the said owner did forcibly enter and carry away the vegetables of the plaintiff, and otherwise injure the premises of the plaintiff, to the damage of \$1,000. Now, what does the defendant say to that? The defendant says that the plaintiff rented about twenty acres of this farm. The defendant says that the plaintiff rented—he does not say that Green rented with the plaintiff. The question has been made in the testimony that Green was a partner, but the defendant's statement is that he was not a partner. The defendant, on the stand, stated that the plaintiff rent-

ed twenty acres of his farm, and, with a colored man, Green, was to pay rent. Does the proof correspond with his statement in the papers?

Now the next question is, that some time previous to last Christmas, the plaintiff abandoned the place and went away, no one could tell where, and, thereupon, this defendant made arrangements with the colored man, Green, to care, tend and gather said crop, which was done by the said man, Green—he

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\*says, in other words, that finding this person gone, that he and Green made an arrangement to care and gather the crop, and I don't think the testimony, to any considerable extent, changes this. If Green was a partner, the plaintiff would have been affected by the notice that Green had, but Green not being a partner, the notice to Green is equal to no notice at all. I have put the parties where they have put themselves.

There is a good deal of disputed law here in relation to tenancy and notice to quit. Three months' notice, where there is a tenancy for a year, should be given, and the law requires that three months' notice, in writing, should be given; and, moreover, that is reciprocal, and if the tenant wants to quit, he should give the landlord three months' notice. You may consider first whether this notice has been given. It is rather a question of law to determine whether the parties are entitled to notice or not. I don't think it necessary, in the consideration of this case, to make any ruling upon the point whether or not there was any necessity to give three months' notice, because there is another question which I will submit to you, upon which I think the case should properly turn.

We will suppose, now, that notice was actually given. We will say that, for the sake of the case, that notice was required and that notice was given, and that at the end of the year he did not quit, but still remained on the place. Did that authorize the defendant to go and take the crop to pay himself? Suppose the notice was given, and that it was the duty of the man to quit, and, moreover, we may admit that he told the party that he would leave. The declaration of the tenant that he is going to leave does not constitute notice to quit. But we will assume that notice to quit was duly given, and that it was the duty of the party to leave; what was the next step on the part of the landlord? It was to have a trial before a trial justice to have him ejected—the law provides this. Did the landlord do this?

It seems that the plaintiff was there in January, February and March, and gathered turnips and carried them off. I don't know who is in possession now—possession will continue until a change of that possession occurs. About the end of the year this man

returns. He was off and returned again in

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a few days. \*What was the duty of the landlord? Suppose this had been for a debt? He would have gone to an attorney to issue an attachment. What I instruct you here is, that the defendant had no right to enter that land in such manner as he says he did. His duty was simply, at the end of a year, to take out a landlord's warrant and distrain upon the crop. He could have taken out a distress warrant, or he could have instituted proceedings to have him ejected; but it seems that he went on the place and took this crop. It does not appear that he went with any malicious intent, but it was, nevertheless, an illegal act. The law does not allow a man to take another by the collar and say, leave. He is bound to use the means which the law has given him. Thus it was that here the defendant committed an error. I have no doubt that he did it unintentionally; I suppose he thought it was cheaper, and you may find no very great harm in all this except that the act was illegal.

A man, however, must bear the consequences of an illegal act, and the question of damages is a question wholly for you. A counter-claim was set up here, but this is an action for tort, and no discount can be allowed. The law is always disposed to let its hand fall upon one who is not willing to abide by its provisions. I do not know that there was any ill-feeling shown in this case. You are bound to give the plaintiff the full value of the property that was taken. The defendant says he sold it for twenty dollars. You are authorized to give that and so much more as in your opinion would prevent the defendant from doing it again. A little smart money, as it is called. I don't think this is a case for vindictive damages, but I don't think, on the other hand, that the defendant is to be wholly excused. You should give the plaintiff the value of what has been taken, and then as much more as you think the defendant should pay; not punitive damages, but such an amount as you think would prevent a similar act again. I must say that the defendant appears to be a man of unexceptional character, but he appears to have been mistaken here. If you come to the conclusion that this plaintiff was wholly out of possession, and that all the other had to do was to enter and take possession, then it would go very far in mitigation of dam-

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ages, but it would not justify him \*in taking the crop, even if he was entitled to full possession—he had no right to take the crop—he could do that only under cover of law. If you think that the plaintiff was wholly out of possession, that would go very far to mitigate any damages that might arise in your mind, but he had no right to take the crop without process of law.

The jury found a verdict for plaintiff for

\$200, and judgment was entered accordingly. Defendant appealed.

The first, second, fifth and ninth exceptions are sufficiently stated in the opinion; the others were as follows:

3. Because his Honor erred in charging the jury that the defendant's statement is, that he (Green), was not a partner, when no such statement was made by the defendant, and when, as a matter of fact, Green, the witness of the plaintiff, testified that he was a partner.

4. Because his Honor erred in charging, as follows: "Green, not being a partner, the notice of Green was no notice at all. I have put the parties where they have put themselves."

6. Because his Honor erred in charging the jury on the facts in the case contrary to the provisions of the constitution of the State.

7. Because his Honor erred in overruling the counter-claim, the same having grown out of the same transaction.

8. Because his Honor erred in charging the jury: That in this case the jury was bound to give the value of the property, and, also, smart money.

Mr. J. B. Cohen, for appellant.

Messrs. McCrady & Sons, contra.

October 7th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The original plaintiff in this case having died pending this appeal, the action has been continued by an order of this Court, in the name of Warren Kinsman, as his administrator.

The object of the action was to recover

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damages for an alleged \*trespass on a certain piece of land claimed to be in the possession of William Sharp. It seems that Sharp had rented about twenty acres of land from Kinsman for the year 1878, and also for the year 1879, and one of the questions in the case was whether the tenancy continued in 1880, the alleged trespass having been committed early in January, 1880, when the defendant entered upon the land and took up and carried away some of the vegetables growing on said land.

When the plaintiff closed his testimony the defendant moved for a non-suit upon the ground that by the plaintiff's own showing the lease terminated on the first day of January, 1880, and that the plaintiff had failed to show that he was in possession, either legally or illegally, when Kinsman entered, and also because the testimony showed that Kinsman had entered by the consent of one Green, the partner of the plaintiff, and was not, therefore, guilty of any trespass in so entering. The motion was refused, and this constitutes the basis of defendant's first ground of appeal. The determination of the motion for a non-suit depended entirely upon



the view which the Circuit judge took of the testimony adduced by the plaintiff, and we see no error of law in the conclusion which he reached.

The second ground of appeal alleges that the Circuit judge "erred in holding that a tenant, under a lease for a year, is entitled to three months' notice to quit, and in failing to make the distinction between a tenancy for a year and a tenancy from year to year." It is true that the jury were told that "three months' notice, where there is a tenancy for a year, should be given, and the law requires that three months' notice in writing should be given," and that no distinction was drawn between a tenancy for a year and a tenancy from year to year; but the jury were told immediately afterwards: "I don't think it necessary, in the consideration of this case, to make any ruling upon the point whether or not there was any necessity to give three months' notice, because there is another question which I will submit to you, upon which I think the case should properly turn." So that even if there was error in what the judge said to the jury as to the necessity for

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notice to terminate a tenancy \*for a year, yet such error would be immaterial, inasmuch as the jury were subsequently told that it was unnecessary to consider the question of notice in this case.

The third, fourth and sixth grounds of appeal will be considered together, as they all make, substantially, the same point, to wit: that the judge erred in charging the jury on the facts. These grounds, we think, are well taken. One of the questions of fact in the case was whether Green was a partner or a mere employé of Sharp, and the judge, in effect, took that question away from the jury, and instructed them that he was not a partner.

The fifth ground of appeal is based on a misapprehension of the judge's charge, and need not, therefore, be considered. We do not understand that the judge charged as is imputed to him in this ground of appeal, but that his charge on this part of the case simply amounted to this: that where a tenant holds over after the expiration of his lease, the landlord has no right to take the law into his own hands and proceed to eject the tenant, but that his duty would be to call to his aid the process of the law; and in this there certainly was no error.

The ninth ground of appeal alleges that the Circuit judge erred in charging the jury as follows: "If you think the plaintiff was wholly out of possession, that would go very far to mitigate any damages that might arise in your mind, but he had no right to take the crop without process of law." We cannot assent to the correctness of this instruction as we understand it. If the judge meant, as we suppose he did, to say to the jury that even if the tenancy of the plaintiff had been terminated, and the possession of the land had

been surrendered or abandoned, so that there was no obstacle in the way of defendant's entering, still he could not take the growing crop without process of law, then we think there was error in the charge. If a tenant rents a piece of land for a year, upon which he plants a crop which will not mature so that it can be removed by the end of the year, and at the expiration of his lease abandons or surrenders the possession of the land, and the landlord enters and appropriates the growing crop left there by the outgoing tenant, we do not see how he can be said to have committed any trespass.

The eighth ground of appeal complains of

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error in the charge \*as to damages. It does seem to us that while the jury were not told in so many words that they ought to give what was called "smart money," yet the manifest tendency of the charge upon the subject of damages was to invite the jury to give something more than the value of the property taken, and that the judge plainly indicated his opinion that they should give more; and in this we think there was error, for the question as to the amount of the damages was exclusively for the jury without any intimation of opinion from the judge as to what they should give by way of damages.

The only remaining question is that raised by the seventh ground of appeal as to whether the counter-claim should have been allowed. This being an action of tort, the counter-claim set up for the balance of the rent due for 1879, could not be pleaded unless it was based upon a cause of action arising out of the "transaction set forth in the complaint as the foundation of the plaintiff's claim," or unless it was "connected with the subject of the action." Code, § 173, subd. 1. The "transaction" set forth in the complaint as the foundation of the plaintiff's claim was the alleged trespass in January, 1880, and certainly the claim for rent in 1879 could not be said to have arisen out of that "transaction." Was it connected with "the subject of the action?" The subject of the plaintiff's action was not the land, but the violation of plaintiff's right to the possession of the land. In speaking of the proper signification of this phrase as used in this section of the code, Pomeroy, in his work on Remedies, sec. 775, p. 801, says: "It seems, therefore, more in accordance with the nature of actions, and more in harmony with the language of the statute, to regard the 'subject of the action' as denoting the plaintiff's principal primary right to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on." See, also, cases cited in note 2 to section 785 of Pomeroy on Rem., p. 808. We think, therefore, that the counter-claim was properly disallowed; but on account of the errors hereinbefore specified there must be a new trial.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

18 S. C. \*116

\*WILMINGTON, COLUMBIA AND AUGUSTA R. R. CO. v. LING.

(April Term, 1882.)

[1. *Principal and Surety* ⇨ 42, 123.]

In action by a railroad company against the sureties on the bond of a station agent, who was in arrears to the company when the bond was executed, and continued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury "that if the plaintiffs knew when the bond was given, that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them."

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 87, 308; Dec. Dig. ⇨ 42, 123.]

[2. *Principal and Surety* ⇨ 122.]

But in charging further "that each default of the agent, after the bond was given, in failing to pay over to the company the money collected by him, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them," he erred in failing to limit the discharge to defaults occurring after the first.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 302; Dec. Dig. ⇨ 122.]

[3. *Trial* ⇨ 198.]

The judge erred in refusing to charge the jury "that, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 467-470, 476; Dec. Dig. ⇨ 198.]

[4. *Trial* ⇨ 198.]

He also erred in refusing to charge "that the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do so."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 467-470, 476; Dec. Dig. ⇨ 198.]

Before Wallace, J., Darlington, September, 1881.

Action by the plaintiffs against Joseph J. Ling, Isaiah L. Wright, James M. Hunter and Ira M. Harrell, commenced August 20th, 1878. The opinion states the case.

Mr. J. H. Rion, for appellant, cited the authorities referred to in the opinion, and also the following: 2 De G. & J. 609; 3 Hurlst. & C. 437; 59 Ga. 685; 18 Wall. 662; 64 N. Y. 385; 1 Pet. 61; 1 Story Eq., § 190. Upon the point that a verdict for plaintiffs should have been directed, the learned counsel cited Code,

§ 289; 35 Barb. 651; 15 N. Y. 251; 37 Barb. 343; 13 S. C. 115; 4 Otto 284.

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\*Messrs. Boyd & Nettles, contra, cited 8 S. C. 122; 6 Id. 289, 411; 14 Id. 177; 1 Dow 272, 294; 3 Moak Eng. R. 265; 10 Bush 23; 2 White & T. Lead. Cas. 707; 11 Wheat. 59; 3 Macn. & G. 378; 58 N. Y. 541; 8 Law R. Ex. 73.

October 13th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, appellant, a railroad corporation under the laws of this State, employed the defendant, Joseph J. Ling, to act as their agent at Timmonsville, in the county of Darlington. Some four months after the said Ling had been acting as such agent, to wit, on May 1st, 1870, he executed and delivered to the plaintiff a bond with the other parties named as his sureties, conditioned generally for the faithful discharge of his duties, and especially that he would well and truly account for and pay over to the said company all moneys that might come into his hands, or for which he might be accountable by reason of his appointment.

At the time this bond was given, Ling was behind some \$497.40. The testimony does not show whether the sureties were aware of this fact or not, when they executed the bond. Ling continued in office until February 17th, 1873, when he was dismissed, at which time he was a defaulter to the amount of \$1,737.48, which sum was afterwards reduced by certain cash receipts to \$1,526.57. The account between Ling and the company, introduced in evidence, embracing his monthly standing, showed that he was frequently behind from the beginning of his agency. These sums had been carried forward until finally, upon his dismissal, after the credits above referred to had been allowed, the balance against him amounted to \$1,526.57. For this balance the action below was brought on the bond of indemnity.

Wright, one of the sureties, was never made a party, and Ling died before the trial, so that at the trial the action stood against the two sureties, Hunter and Harrell. These defendants relied upon two defenses. First, "that Ling, before the execution of the bond sued on, having been agent of the appellants at Timmonsville, had committed default by failing to pay over moneys collected, and was

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indebted, when the bond was executed, in a considerable sum by reason of said default; that the appellants, knowing these facts, concealed the same from the defendants, Hunter and Harrell, and impliedly held out Ling as a trustworthy person and competent agent, when they knew or had reason to believe the contrary." Secondly, "that shortly after the execution of the bond, Ling made default as



agent, and thereafter continued to make defaults by failing to pay over money collected by him; that these facts were known to the appellants, but, instead of dismissing Ling from their employment, they gave no notice to his sureties, condoned his faults, connived at the same, and continued him in their employment as agent." The defendants claimed that, on the first ground, the bond was void as to them, and, on the second ground, that if ever liable on the bond they had been discharged from that liability by the fraudulent conduct of the appellants. The action was submitted to a jury under the charge of the presiding judge, and the verdict was for the defendants.

His Honor, Judge Wallace, charged the jury, "that if the plaintiffs knew, when the bond was given, that Ling was in default and indebted to them in his pre-existing agency, and yet concealed this fact, and held him out to them as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them;" and, secondly, "that each default of Ling, after the bond was given, in failing to pay over to the company the money collected by him as their agent, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that, if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them."

He declined to charge the following requests of the plaintiffs: 1. "That, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties. 2. That the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part

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to do \*so. 3. That there is no proof whatever that the plaintiffs held out Ling as competent and trustworthy, or in any way imposed upon the sureties; and that in law the railroad company did nothing that would discharge the sureties. 4. That there is no fact for the jury to find but the default and the amount of the default; and there is no law in the case to prevent the recovery by the plaintiff of the amount proven."

The appeal is founded upon the charge, and the refusal to charge, as hereinabove.

The charge of the judge, so far as reported, seems to have been directly upon the two grounds of defence relied upon by the defendants and set up in their answer. It was nothing more than a declaration by the judge, that if the evidence in the case sustained the averments in the answer as to matters therein alleged as a defense, in law the defendants

had a good defense. Subject to the modification hereinafter suggested, we think the principles laid down were sound. The law requires good faith in parties contracting with each other; and the high moral principle, that misrepresentation or concealment of a material fact in reference to the matter contracted about, or any device by the one to prevent the other from being fully informed, will vitiate the contract, is found in all text writers upon the subject of contracts, and is sustained by numerous decisions, not only in this State, but in all the courts where the English common law prevails.

This principle applies in its fullest force to contracts on suretyship. Judge Story (1 Eq. Jur. § 324) says: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction; any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, information or surprise taken of the surety by the creditor, will undoubtedly furnish a sufficient ground to invalidate the contract." See also Ad. Eq. \*179, where the same doctrine is announced.

The propositions of law, charged by the judge, were in accordance with these principles, except that he went too far in holding in the second proposition, that if the appellants knew of Ling's default accruing after

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the execution of his bond, and yet, notwithstanding this, they continued to employ him, condoning his default, and giving no notice to his sureties of his misconduct, that this would discharge the sureties entirely. This, no doubt, was good law, so far as it warranted the discharge of the sureties from the culpable defaults occurring subsequent to the first default, after the execution of the bond, but it was error to hold that the sureties would be entirely discharged thereby, even though there had been a fraudulent concealment of the first default. Because, in any event, the first default was a breach of the bond, and against this the fraudulent continuation of the employment of the agent afterwards was no defense. The judge should have limited the discharge, even upon the facts supposed, to the defaults occurring after the first.

We think the judge was in error, too, in refusing to charge the two first requests of the appellants. We have carefully examined the cases referred to by counsel on both sides, and although there is some conflict in the decisions, we think the weight of the argument is in favor of the position, that there must be some positive act of concealment or misrepresentation on the part of the obligee in cases like this before the court, as to some fact which it was his duty to discharge, before the sureties can be relieved. Silence, merely, especially as to facts within the reach of proper inquiry by the sureties, will

not be sufficient. The law stands between the parties perfectly impartial, ready to rebuke fraud, concealment, or misrepresentation on the part of either, but carelessness and want of proper vigilance are left to their own fruits. There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear. *Stafford v. Newsom*, 9 Ired. 507; *De Colyar on Prin. and Sur.* 367; *Atlas Bank v. Brownell*, 9 R. I. 168; *Roper v. Sangamon Lodge*, 91 Ill. 518.

We were at first inclined to think that the presiding judge, in his charge, had laid down the law applicable to such cases in its fullest extent, subject to the modification hereinabove. He required actual concealment or misrepresentation to be found as a fact by the jury before relieving the sureties. This seemed to be all that the plaintiffs could

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claim. But upon examination of the cases, where this question has been discussed, while we do not find any legal adjudication of what will constitute concealment or misrepresentation in such form as to be applied as a test in every case where the question is presented, yet we find several decisions in other States, where certain facts have been held not to amount to such concealment. For instance it has been held as matter of law that it was no fraud upon the sureties, that the principal was behind in his accounts at the time he gave his bond of indemnity and no notice given to the sureties, and also that the obligee was not legally bound to notify the sureties of each and every default of the principal. See *The Guardian of the Stakely Union v. Stratter*, 22 L. T. Eng. 84; *Roper v. Sangamon Lodge*, 91 Ill. 518; *Pittsburg, Fort Wayne and Chicago Railroad Co. v. Shaffer et al.*, 59 Pa. St. R. 350; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85; *Taft v. Gifford*, 13 Met. 187.

It is the business of the surety to see for himself that his principal performs the duty which he has guaranteed. The surety is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts. Now the principle, as laid down in these cases referred to above, is precisely what the appellant requested the judge to charge in his two first requests, and which, being refused, is made grounds of exception.

The strongest adverse case is the case of *Phillips v. Foxall*, 3 Moak's Eng. R. 264. But that case, when analyzed, does not conflict with the principles above. That case turned upon a demurrer. The defendant set up the defense, that the plaintiff had condoned the default of the servant in not paying over money collected, which the defense directly charged had been embezzled by the servant, and which fact was known to the employer,

and, notwithstanding this, he had continued the servant in his employment without notice to the sureties of the embezzlement. The plaintiff demurred to this plea. The court overruled the demurrer and sustained the plea. The court said: "We think that in a continuing guarantee for the honesty of the servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and instead of dismissing

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the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." The ground of the defense in that case was the dishonest act of the servant—embezzlement—known to the plaintiff. The ruling of the court on the demurrer, which admitted the truth of the charge against the servant, was right, and the defense was properly admitted.

But there is a broad distinction between a case of that kind and a case where it simply appears that the agent is behind in his accounts. Knowledge on the part of the employer of dishonesty and corruption in his agent, without disclosure, would amount to a fraudulent concealment, but a falling behind in current accounts by an agent is not always the result of dishonesty. We do not think that simply the failure on the part of the employer to give notice to the sureties that the agent is behind in his accounts at the time he executes the bond, or that he has fallen behind since the execution of the bond, is such a fraudulent concealment of material facts as, in itself, without more, should discharge the sureties. These facts might properly go to the jury with other facts bearing upon the question of fraudulent concealment and have such weight as would be proper, but standing alone they would not be sufficient to discharge the sureties.

We think the appellant was entitled to the charge requested in the two first requests. The other requests of appellant were properly refused, involving, as they did, questions of fact mostly.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded for a new trial.

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\*CATHCART v. SUGENHEIMER.

(April Term, 1882.)

[1. Evidence ¶340.]

In action by a former lunatic to recover a lot of land sold during his lunacy under proceedings to which he was no party, instituted by his committee, the defendant may introduce in evidence the record of the probate court ad-



judging the plaintiff to be a lunatic and appointing a committee of his person and estate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1294-1301; Dec. Dig. ☞340.]

[2. *Judicial Sales* ☞45.]

It is the well settled policy of the law to support judicial sales in all cases where the court has jurisdiction.

[Ed. Note.—Cited in *Iseman v. McMillan*, 36 S. C. 36, 15 S. E. 336; *Connor v. McCoy*, 83 S. C. 170, 65 S. E. 257.

For other cases, see *Judicial Sales*, Cent. Dig. § 83; Dec. Dig. ☞45.]

[3. *Insane Persons* ☞71.]

An action at law for the recovery of the property of a lunatic or damages for its detention, must be brought in the name of the lunatic by his committee, but where equitable relief is sought in the Court of Chancery, it seems that the committee may sue alone and without using the name of the lunatic as a party plaintiff, and that the judgment will be as binding upon the lunatic's estate as if he were personally present.

[Ed. Note.—Cited in *Griffin v. Griffin*, 20 S. C. 489; *Barnwell v. Marion*, 54 S. C. 232, 32 S. E. 313; *Peiper v. Shahid*, 101 S. C. 366, 85 S. E. 905.

For other cases, see *Insane Persons*, Cent. Dig. § 118; Dec. Dig. ☞71.]

[4. *Subrogation* ☞16.]

And where in such action the property of the lunatic has been sold for the purpose of paying his debts, the proceeds of sale have been so applied, and the purchaser has bona fide erected costly improvements, the purchaser is subrogated to the rights of the creditors to whom the payment was made and may retain possession until re-imbursed.

[Ed. Note.—Cited in *Moore v. Smith*, 24 S. C. 318; *Kincaid v. Anderson*, 33 S. C. 265, 11 S. E. 766; *Bailey v. Bailey*, 41 S. C. 337, 338, 19 S. E. 669, 728, 44 Am. St. Rep. 713; *Hunter v. Hunter*, 58 S. C. 393, 36 S. E. 734, 79 Am. St. Rep. 845; *Sims v. Steadman*, 62 S. C. 305, 40 S. E. 677; *Hunter v. Hunter*, 63 S. C. 93, 41 S. E. 33, 90 Am. St. Rep. 663; *Chambers v. Bookman*, 67 S. C. 455, 46 S. E. 39.

For other cases, see *Subrogation*, Cent. Dig. § 42; Dec. Dig. ☞16.]

[5. *Insane Persons* ☞30.]

[Cited in *Barnwell v. Marion*, 54 S. C. 232, 32 S. E. 313, to the point that the legal relation of a committee to a lunatic is analogous to that of guardian and ward.]

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 43, 45, 61; Dec. Dig. ☞30.]

[This case is also cited in *Elias v. Enterprise Bldg. & Loan Ass'n*, 46 S. C. 188, 192, 24 S. E. 102, and distinguished therefrom.]

Before Cothran, J., Fairfield, February, 1882.

The opinion states the case.

Mr. L. F. Youmans, for appellant.

Messrs. J. H. Rion, A. S. Douglass, contra.

October 13th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. In June, 1874, John H. Cathcart was found a lunatic under proceedings in the Court of Probate for Fairfield county. On September 2d, 1874, Samuel Cathcart was appointed the committee of the person and estate of the said lunatic.

Finding the estate embarrassed to the extent of insolvency and the creditors already pressing for payment or threatening to commence suit, the said Samuel Cathcart, as committee, commenced an action in the Court of Com-

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mon Pleas, alleging the \*lunacy of John H. Cathcart, his appointment as committee, the large indebtedness of the lunatic and the necessity of selling the whole estate for the payment of the debts, and making Hopkins, Dwight & Trowbridge, and Samuel C. Clowney, as clerk of the court, who held mortgages upon certain tracts of land of the lunatic, parties defendant, but omitting to make the lunatic a party by name and service of process, as he was at that time in the lunatic asylum.

The creditors were called in and a referee appointed, who reported that the claims against the lunatic, so far as presented before him, amounted to about \$56,000, besides interest, and that he could perceive no means of discharging this heavy indebtedness without a sale of the whole estate. The court confirmed the report of the referee and (after exempting a homestead) adjudged and ordered that the real estate of said lunatic should be sold in different tracts at public auction by the sheriff of Fairfield county, on the first Monday of January, 1875, one-third of the purchase money to be paid in cash, and the other two-thirds upon a credit of one and two years, the proceeds of sale to be turned over to the clerk of the court, subject to further order.

The sale was made as ordered and the defendant, Doreth Sugenheimer, became the purchaser of a lot in the town of Winnsboro' at the sale, and after complying with the terms of sale, received a deed of conveyance from the sheriff under said order. The sheriff made his report on sales, which was confirmed by the court, May 5th, 1875. The purchaser was let into the possession and has retained it ever since, and has paid, in taxes and for repairs, something over a thousand dollar, besides \$4,025, the purchase money, which went to pay the debts of the lunatic as established.

On July 24th, 1876, the Probate Court, upon the application of the said lunatic, John H. Cathcart, passed an order superseding the commission of lunacy, and ordering the committee to turn over to him, the said John H. Cathcart, all the books and papers belonging to him, and in January of this year, 1882, the said John H. Cathcart commenced this action against the defendant for the lot of land purchased by her as aforesaid, and

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\*damages for the detention thereof. She claims title under the said proceedings of court and the deed of the sheriff made in accordance with the decretal order therein, and sets up special equities arising out of

the payment of the purchase money and the other facts of the case.

Judge Cothran directed a verdict for the defendant, and Cathcart, the plaintiff, appeals to this court upon the following exceptions: 1. Because his Honor erred in admitting as evidence the record in the case of Samuel Cathcart, Committee, v. Hopkins, Dwight & Trowbridge, and S. C. Clowney, as clerk of the court, the same being as to the plaintiff *res inter alios acta*. 2. Because his Honor erred when he held that the plaintiff was not a necessary party to the action above stated, brought by said committee. 3. Because the charge of his Honor was otherwise contrary to law.

It was not error in the Circuit judge to admit in evidence the record of the case of Samuel Cathcart, Committee of the Estate of John H. Cathcart, Lunatic, v. Hopkins, Dwight & Trowbridge, and Samuel C. Clowney, as clerk of the court, et al. The plaintiff, before he was declared a lunatic, was the owner of the land sued for. The defendant claimed from him, through the proceedings of court, and offered the record with a view to show that the plaintiff had been regularly declared a lunatic, and the court had pronounced a judgment and ordered a sale of the land, which sale divested the title of the lunatic and transferred it to the purchaser at that sale. That is to say, it was offered as a link in her chain of title. "A judgment or decree is admissible, though *res inter alios acta*, to form a link in a chain of title, but recitals in the record are not sufficient to make out the chain as to strangers. Against them the facts must be independently proved." 2 Whart. Ev. § 821; *Wardlaw v. Hammond*, 9 Rich. 454.

The precise point seems to have been ruled in the old Court of Appeals, in one of the many trials of the case of *McCreight v. Aiken*. It seems that the committee sued alone, and when the record of the proceeding, which declared the party a lunatic, was offered, it was objected that it was not admissible in evidence for the reason that the lunatic had

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not been made a party. In a \*subsequent case involving the same transaction (*Rice* 58), Judge O'Neill said: "The first ground contends that the proceedings in equity, establishing the plaintiff's lunacy, were not admissible in evidence, but the case of *John R. McCreight v. David Aiken*, decided here, December, 1836, shows that they are admissible between parties other than the lunatic."

It does not, however, follow from the admission of the record in evidence, that it must be regarded as conclusive of everything contained in it as against the plaintiff. It was received for what it was worth, still leaving as undecided the question as to its legal effect—whether John H. Cathcart, the lunatic, was substantially a party to it and represented therein, or an entire stranger and not in any way bound by a proceeding in

which he, although a lunatic in the asylum, was not by name made a party. The admission of the record still left the real question of the case to be the legal effect of the proceedings as to the property of the lunatic which had been sold by the order of court.

There is no doubt that this land was purchased and paid for bona fide at a judicial sale, that is to say, at a sale where the property was sold under an order of court designating it and authorizing its sale. It is the well settled policy of the law to support judicial sales if it can be done without injury to any one, or the violation of any principle. The purchaser at such sale is in no danger of losing his property by proof that the order was erroneously given. It cannot be collaterally attacked for error or irregularity. The only ground upon which the title can be successfully assailed, is that the court which rendered the decree of sale, in doing so, acted without jurisdiction either of the subject-matter or of the parties. *Freeman on Void Judicial Sales* 42 (and authorities).

Did the court, in ordering this land sold, act without jurisdiction? It has not been denied that the subject-matter was within the jurisdiction of the court, but it is insisted that John H. Cathcart, although a declared lunatic at the time, should have been made a party by name in the proceedings instituted by the committee in his behalf, and that the omission to name him was a failure to make a necessary party, and the whole proceeding must therefore be declared void, and the

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plaintiff, never having \*been divested of his title, may now recover the lot purchased by the defendant.

There seems to be some confusion in the authorities as to the precise character of the relation which one appointed a committee of a lunatic, bears to the person and property of said lunatic. This much, however, is certain, that in this State the relation is not the same as it is in England. It was said by the Chief Justice, in the case of *Ashley v. Holman*, 15 S. C. 106: "There is no doubt that the Lord Chancellor, under the sign manual of the King, was the special custodian of this important class of society there, and that committees were his agents and responsible to him. It was not a subject-matter over which his court had jurisdiction, but it was a power conferred upon the Lord Chancellor as the representative of the Crown, to be exercised as a special and personal duty. But whatever may have been or may now be the law in England on the subject, or whatever may have been its origin there, this principle has never prevailed practically in this country." We must, therefore, look for light only to the nature of the relation and our own law as shown by the decided cases.

We may take it as also certain that the mere appointment of a committee to take charge of the person and property of a lunatic, does not ipso facto transfer to the



committee legal title to the property of the lunatic, as the appointment of an assignee in bankruptcy transfers to him the legal title of the bankrupt by the express terms of the act. The title of his property still remains in the lunatic, even after the appointment of his committee. In this respect the relation may be regarded as analogous to that of guardian and ward.

In the case of *McCreight & McCreight v. David Aiken*, 3 Hill 338, Robert McCreight had been declared a lunatic, and the plaintiffs, his sons, appointed his committee. They brought an action at law for a gig and other personal property alleged to belong to the lunatic, and to have been unlawfully taken from him by the defendant. Judge Butler non-suited the plaintiffs, saying that "the legal relation of a committee to a lunatic is analogous to that of a guardian to his ward. For any trespass to the person or property of a minor, an action must be

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brought in his name by his guardian, and why should not an action be brought in the same way for a trespass on the person or property of a lunatic? Such a person has a legal existence that is under the protection of the law, and he can take and hold property, real and personal." This ruling was affirmed by the old appeal court, and it seems to be settled in South Carolina that in an action at law, for the recovery of the property of a lunatic, or damages for its detention, the action must be brought in the name of the lunatic by his committee, as in such action he only can recover who has the legal title. *Petrie v. Shoemaker*, 24 Wend. 85.

But, as we understand it, the rule is not peremptory when the relief prayed for is equitable in its character, and is sought through the forms of Chancery. It is the settled doctrine of this State, that the Court of Equity takes special charge of infants, lunatics and other persons under disabilities, and in doing so exercises large powers over their property under the control of trustees for their benefit, even when such persons under disabilities are before it only substantially and by representation. The doctrine is well stated in the case of *Spencer v. Godfrey*, Bail. Eq. 468: "The jurisdiction of the Court of Equity to dispose of the real estate of infants and other persons under disability, has been too long exercised to be now questioned, and a conveyance or mortgage executed by the master in pursuance of an order of the court, which was intended to operate on the title of infants, is binding on them, if they are parties to or represented in the proceeding in which the order was made." This case was approved in *Moore v. Hood*, 9 Rich. Eq. 327 [70 Am. Dec. 210], so far as it decided that infants equally with adults are bound by a decree until it is reversed or vacated.

It seems that all that is considered absolutely necessary to the exercise of this be-

neficent power, is that the party incapable of acting for himself shall be substantially and fairly represented before the court, and the court should be satisfied that the proposed action is for the benefit of such incompetent person: Some seeming inconsistency, as to who are necessary parties, has arisen from overlooking this difference between the practice in actions at law and in equity. Judge

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O'Neill says that "all the confusion has arisen from confounding a rule of practice in Chancery with one at law." *Rice* 59.

The proceeding in this case was not an action at law for the recovery of property of the lunatic, but regarding the committee as a trustee, and the lunatic as cestui que trust, it was a proceeding on the equity side of the court to anticipate a compulsory and ruinous cash sale of property belonging to the lunatic to pay his debts by obtaining an injunction against creditors and an order for sale on credit. The relief prayed for was purely equitable, and the question is, whether Samuel Cathcart, when he instituted the proceedings expressly as committee in behalf of the lunatic, so represented him and his interest that he may be regarded as a privy in the action and bound by the sale made thereunder.

The question is one of form rather than of substance. For, at the time the extraordinary powers of the Court of Equity were invoked in his behalf, John H. Cathcart was non compos mentis, and incapable of doing anything toward the protection of his person or property. For that very reason the court had put him in charge of a guardian, who instituted the proceedings expressly, and in terms, for his benefit. They concerned only him and his property, and were, undoubtedly, intended to be his proceedings. Possibly, it would have been more regular if he had been joined as a co-plaintiff with his committee; but if that had been done, there is no reason to suppose that the judgment would have been different; and if he had been made a defendant by name and nominal service, it is not perceived who could have answered for him but his committee, already before the court, as plaintiff.

As was said in the case of *Executors of Brasher v. Van Cortlandt*, 2 Johns. Ch. 242: "If he had been joined, it would seem to be mere matter of form. \* \* \* If he be made a defendant, he is to answer by his committee. When the committee is made defendant, there can be no use in joining the lunatic also, for the custody of the estate is no longer in him, but in this court under the administration of the committee. \* \* \*

This question of necessary parties is always,

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more or less, a matter of discretion, depending on convenience. In this case it would be quite absurd to bring in a party who has no capacity or power of action, except by the

very persons before the court as his trustees, and where the court is only to look to the certainty of the debt and to the state of the assets in order to provide for its payment." See *Cooley Const. Lim.*, ch. V., p. 97.

The old Court of Equity, in this State, did not regard it necessary that the lunatic should be formally made a party to sustain an order made by that court concerning his rights, or even the sale of his land at the instance of his committee. *Ex parte Drayton*, 1 Desaus. 136; *Sims v. McLure*, 8 Rich. Eq. 286 [70 Am. Dec. 196]. The case from Desaussure is very meagerly reported, but it seems to have been much like this case. Upon petition of committee, the court ordered the lands of the lunatic, Thomas Drayton, sold, and the commission of lunacy was afterwards superseded. In the case from Richardson, J. S. Sims was appointed committee of one Thaddeus C. Sims, a lunatic, and, without making the lunatic a formal party, filed the bill to set aside sales of certain slaves made by the said Thaddeus, and certain judgments confessed by him before the inquisition. The proof as to some of the charges was held to be insufficient, but the bill was sustained and a reference ordered as to other charges.

By way of suggesting the best practice, Chancellor Wardlaw in that case said: "The practice of instituting such a suit in the name of the committee only, is sustained by high authority. *Story Eq. Pl.*, § 64; *Ortley v. Messere*, 7 John. Ch. 139. But where, as in this State, the maxim of the common law, that one cannot stultify himself, is not recognized, it is certainly better to follow the general rule of pleading to make all parties to the suit who are materially interested in the object of it, and not to litigate and indulge concerning the estate of any person, even a lunatic, who is not before the court." In the case he referred to from New York, where, under their statutes, a different practice prevails, Chancellor Kent said: "The general practice is to unite the lunatic with the committee, as was done in 2 Vern. 678, but there does not appear to be any use in it or any necessity for it, as the committee have the exclusive custody and control of

ception that "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." Where the lunatic is sued, the code directs that the summons be served by delivering a copy to the committee or guardian, and to the defendant personally, but we discover no direction where the lunatic or his committee is the party who sues.

In such case it would seem the merest form whether the title of the case should be "John H. Cathcart, lunatic, by his committee, Samuel Cathcart," or, as in this case, "Samuel Cathcart, committee of the estate of John H. Cathcart, lunatic." We do not consider that these provisions of the code change the old practice in this particular, so as to require us to declare this sale void. *Mitford's Ch. Plead.* (6 Am. edit.) 31 and note; *Person v. Warran*, 14 Barb. 488; *Fields v. Fowler*, 2 Hun 400; *Ashley v. Holman*, 15 S. C. 97. In the last case cited, which has been decided in our State since the adoption of the code, the Chief Justice, in delivering the judgment of the court, says: "If this was an action in behalf of the lunatic for an unsettled demand on account of wages earned by his labor, then the lunatic himself should have been party plaintiff, but this is not an action strictly for the wages of the lunatic. It is a case in Chancery by a trustee against the representatives of a former trustee seeking an account," &c.

But if, from the increased strictness latterly required in this State on the subject of making parties, the lunatic must be regarded as a necessary party, though merely a formal one, we think there is merit in the

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equitable defense set up. It is quite \*certain that the defendant purchased the lot bona fide, relying upon the orders of court, and that improvements have been made, and that the purchase money went towards satisfaction of plaintiff's debts. It does not appear that he made any offer of the money thus expended for his benefit. We cannot see why the purchaser in this case should not be entitled to be subrogated to the claims which she by her purchase paid.

Wherein did this sale differ from that of the property of a decedent for the same purpose? "If, by a sale of the lands of a decedent, his debts are paid, and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has by his purchase paid. And he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled." *Freeman on Void Judicial Sales* 51. As Judge Story says in *Bright v. Boyd*, 1 Story 478 [Fed. Cas. No. 1875]: "Such principle has the highest and most persuasive equity, as well

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\*the estate and rights of the lunatic. The lunatic may be considered a party by his committee, and, like trustees of an insolvent debtor, the committee hold the estate in trust under the direction of the court." *Story Eq. Pl.*, § 65.

It is true that the code, § 134, provided that "every action must be prosecuted in the name of the real party in interest," but this does little more than give expression to the general principle long established, that all parties interested in the subject-matter of the suit should be made parties. The code does no more, but on the contrary declares an ex-



as common sense and common justice, for its foundation."

The judgment of this Court is that the judgment of the Circuit Court be affirmed.

### 18 S. C. 132

#### WHEELER v. COUNTY OF NEWBERRY.

(April Term, 1882.)

[1. *Counties* ⚡206.]

Where a creditor of a county desires to enforce an audited claim, should he proceed by mandamus or by ordinary civil action?

[Ed. Note.—Cited in *Duke v. Williamsburg County*, 21 S. C. 416; *Jennings v. Abbeville County*, 24 S. C. 545.

For other cases, see *Counties*, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. ⚡206.]

[2. *Counties* ⚡206.]

The act of 1878 (16 Stat. 311), authorizing the appointment of a commission to ascertain the indebtedness of the several counties of the State, did not constitute such a commission a court, and therefore an adjudication by it upon a claim against their county, not submitted to it by the claimant, is no bar to a subsequent action in the Court of Common Pleas upon the claim.

[Ed. Note.—Cited in *State ex rel. Myers v. Appleby*, 25 S. C. 103; *State ex rel. People's Bank of Greenville v. Goodwin*, County Supervisor, 81 S. C. 425, 62 S. E. 1100; *Id.*, 59 S. E. 37.

For other cases, see *Counties*, Cent. Dig. § 329; Dec. Dig. ⚡206.]

[3. *Counties* ⚡198.]

An audited claim against a county does not bear interest until judgment recovered thereon.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 335; Dec. Dig. ⚡198.]

[4. *Counties* ⚡208.]

[A county is a political subdivision of a state, and can sue and be sued.]

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 338; Dec. Dig. ⚡208.]

Before Kershaw, J., Newberry, November, 1880.

Action by David H. Wheeler, individually, and as survivor of Wheeler & Hiller, against the county of Newberry, commenced in September, 1879. The opinion states the case.

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\*Messrs. Jones & Jones, for plaintiff.

The position of counsel upon the plaintiff's ground of appeal was as follows:

If, however, none of the above propositions are sufficient to entitle the plaintiff to interest, then we say he is certainly entitled to interest from the time certificates of indebtedness were issued to other creditors for past due claims; for the resolution approved March 22d, 1878, directs certificates to be issued not only to the creditors whose claims have been passed by the commission appointed under the act of the legislature, approved June 11th, 1877, but also to those persons whose claims "may hereafter be adjudged valid by some court of competent jurisdiction." The said resolution further says: "Said certificates to bear interest at

the rate of seven per cent. per annum, from the date of issue, which shall be the same date in each case." The plaintiff's claim has been adjudged valid in this case by a court of competent jurisdiction, and he is, on that ground, entitled to interest, at least from the time others receive it on their past due claims.

Mr. F. Werber, Jr., for defendant.

October 18th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff had an open account (\$643.80) against the county of Newberry for lumber, alleged to have been delivered in 1870. He presented the account to the county commissioners, who approved it, and ordered it paid October 22d, 1870. The treasurer made payments as follows: May 1st, 1874, \$109.85, and on May 15th, 1876, \$139.37. This action was brought for the balance due and interest. The defendant answered, insisting that as the county of Newberry was not a body corporate, it could not be sued, and that the demand sued on was res adjudicata. That it had been examined by a "commission" appointed by the governor, under the act of 1877, "to investigate and ascertain the actual bona fide indebtedness of the various counties in this State, and to regulate the manner of paying the same" (16 Stat. 311), and that said commission reported upon the claim and scaled it down to \$132.03,

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\*which was a conclusive adjudication of the true and bona fide amount due.

On the trial the plaintiff proved the sale and delivery of the lumber, that the board of county commissioners had audited the claim and ordered it paid, that "payment was deferred for want of funds," and that he never put his claim before the said "commission," which did, however, consider it ex parte, and reject all but the amount of \$132.03. Judge Kershaw charged the jury that the county of Newberry was a body corporate, and might be sued; that "the commission," appointed by the governor, was not a court whose decisions were binding on parties who did not accept it as a board of arbitration; that the plaintiff, if they believed the proof, was entitled to recover the amount of his account, but not interest.

The plaintiff appealed because interest was not allowed him, and the defendant having failed in a motion for a new trial, appealed upon the following grounds:

1. Because his Honor erred in holding and charging the jury that the county of Newberry is a body corporate, so as to be sued in this action.

2. Because his Honor erred in holding that the "commission," created by the act of the general assembly, approved June 11th, 1877, was not a court of subordinate and special jurisdiction to pass upon the validity of claims sued on in this action, in order to in-

investigate and ascertain the true and bona fide indebtedness of Newberry county.

3. Because his Honor erred in refusing to charge as requested, that the plaintiff's claim, having been considered by the said "commission" and sustained in part and in part rejected, was *res adjudicata*.

4. Because his honor erred in holding that the approval of the board of county commissioners of the claim sued on could be proved by the endorsement of "Mathew Gray, chairman," in one instance, and by the signatures of Henry Kennedy and Simpson Young, members of the board of county commissioners, in the other, when, it is submitted, to prove such approval the records of the board of county commissioners should have

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been \*produced, or at least the written approval of the said board signed by all the members.

5. That his Honor erred in refusing a new trial on the minutes.

We have lately had occasion, in the case of *The County of Richland v. Miller*, 16 S. C. 244, to consider the force and effect of the audit of a board of county commissioners with reference to the question as to what is and what is not within the scope of their authority, but the court has never been required to consider how a creditor, having a claim already audited, should proceed to enforce it against the county—whether, considering the audit as a judgment of the tribunal established for the purpose of deciding county claims, he should seek to enforce it by mandamus, requiring the county commissioners to have the money raised to pay it, or sue upon it in the Court of Common Pleas to get thereby an enforceable judgment against the county. There is some want of uniformity in the practice of the different States upon the subject, and until the point is made and argued before us we will make no ruling upon it. For the purposes of this case it is enough to say that it has been the practice in this State, to sue the county, which by the express terms of the act is "a body politic and corporate," and as such, authorized "to sue and be sued." *Ex parte Williams*, 7 S. C. 72; *Greenville County v. Runion*, 9 S. C. 4; *Ostendorff v. County Commissioners of Charleston*, 14 S. C. 403; *Holmes & Calder v. County of Charleston*, Id. 146; *Edmonston v. County of Aiken*, Id. 622.

We do not think that the Circuit judge was in error when he charged the jury that "the commission" appointed by the governor was not a court with judicial power to determine authoritatively county claims. It was not intended to do more than to obtain information which would lead to the exposure of fraud and possibly to further action by the county commissioners or the legislature. After the report called for by the act was made for Charleston county, another act (1878) was passed, "to provide for funding the debt of Charleston county and for the payment of

the expenses incurred in ascertaining the same." 16 Stat. 692. The scheme for settling the county claims provided by this act, with the right of appeal to the Court of Common

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\*Pleas, was accepted by the creditors who presented their claims, and the indebtedness of Charleston county was thus settled. *Holmes & Calder v. County of Charleston*, supra.

No such act was ever passed for the settlement of the indebtedness of Newberry county. The joint resolution of the legislature (1878) to authorize the county commissioners of certain counties "to fund the past indebtedness of certain counties and provide a mode of liquidating the same" (16 Stat. 681), did include the county of Newberry, but that resolution only authorized the county commissioners "to issue certificates of indebtedness to all holders of claims for the amounts reported to be due by the commission appointed to investigate and ascertain the bona fide indebtedness of the county, and as may hereafter be adjudged valid by some court of competent jurisdiction." This itself is conclusive that the commission was not claimed to be a court of competent jurisdiction, and their reports binding on the parties as judgments. The county commissioners could not issue their certificates upon the authority of the commission alone, but had to wait until judgment was rendered by a competent court, which might adjudge as valid the whole or a part of their ascertainment, or for a larger amount. *Ex parte Childs*, 12 S. C. 118.

It is not necessary to consider whether the endorsement of the county commissioners, on the back of the account—"approved and ordered to be paid"—was of itself sufficient proof of the audit, or whether parol evidence of the fact was admissible. The pro rata payments made by the county treasurer afforded evidence of the audit. Besides, as we understand, the plaintiff did not rest upon the audit, but seems to have proved the account itself, relying upon the audit simply as an admission of those in authority.

The terms of the resolution also settle the question of interest. The county commissioners could not issue the certificate until the claim was adjudged to be valid by the court, and the terms of the resolution are, "said certificates to bear interest at the rate of seven per cent. per annum from the date of issue, which shall be the same date in each case." The certificate does not issue upon the authority either of the audit of the county

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commissioners or the report of the commission, but by virtue of the judgment in the Court of Common Pleas. A judgment only bears interest from its recovery, and the certificate which issues in satisfaction of that judgment is made to conform to it. In the case of *Holmes & Calder*, in reference to claims against the county of Charleston before referred to, it was held, in express



terms, that "an open account audited by a board of county commissioners does not draw interest from the date of audit."

It is the judgment of this court that the judgment of the Circuit Court be affirmed and the appeal dismissed.

### 18 S. C. 137

#### STATE v. EVANS.

(April Term, 1882.)

[1. *Burglary* ⚡20; *Criminal Law* ⚡970.]

Defendant was convicted under an indictment that alleged a burglary in "a gin-house, situate within the curtilage of the dwelling-house." Held, that judgment should be arrested, because the indictment failed to allege that the gin-house was within two hundred yards of the dwelling-house and appurtenant to it, two averments that were essential under the statute. Gen. Stat. of 1882, § 2483.

[Ed. Note.—Cited in *State v. Anderson*, 24 S. C. 116; *State v. Jeter*, 47 S. C. 5, 24 S. E. 889; *State v. Turner*, 82 S. C. 282, 64 S. E. 424.

For other cases, see *Burglary*, Cent. Dig. §§ 51-54; Dec. Dig. ⚡20; *Criminal Law*, Cent. Dig. §§ 2445-2462; Dec. Dig. ⚡970.]

[2. *Burglary* ⚡20.]

And the defendant having been tried, convicted and sentenced for statutory burglary, the conviction cannot be referred to the indictment as sufficiently charging the higher offense of burglary at common law.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 51; Dec. Dig. ⚡20.]

Before Aldrich, J., Abbeville, February, 1882.

The opinion states the case.

Mr. T. P. Cothran, for appellant.

Mr. Solicitor Orr, contra.

October 21st, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. George Evans was convicted of burglary and sentenced to three years in the penitentiary under an indictment in the following terms: "That George Evans, late of the county and State aforesaid, on February 7th, 1882, with force and arms, at Abbeville court house, in the

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county \*and State aforesaid, in the nighttime of the same day, the dwelling-house; that is to say, the gin-house, situate within the curtilage of the said dwelling-house of one James D. Fooshe, in the county and State aforesaid, feloniously and burglariously did break and enter," &c. The testimony showed that the gin-house was eighty yards from the dwelling-house of J. D. Fooshe, within the common enclosure; was used for storing cotton in the seed and ginning, and as a shelter for his stock; and was an appurtenance of the dwelling-house.

Upon being arraigned for sentence, the defendant made a motion in arrest of judgment upon the following grounds: 1. "That the indictment was fatally defective in not

alleging that the gin-house, the subject of the burglary, was within two hundred yards of the dwelling-house of the prosecutor. 2. That the indictment was fatally defective in not alleging that the said gin-house was an 'appurtenant' to the dwelling-house of the prosecutor." The motion was refused. He now appeals to this court, and renews the motion upon the grounds stated.

It appears that the evidence brought the case within the definition of burglary under the statute, so far as the subject of it was concerned, for the gin-house was shown to be within eighty yards of the dwelling-house of the prosecutor. The question, however, is not as to the facts proved, but as to the sufficiency of the allegations in the indictment. "An indictment is the complaint of the State against the accused. It should charge some offense cognizable by the court, and this offense, whatever it may be, should be clearly and distinctly set forth. The crime charged should be described with certainty, for no latitude of intention will be allowed to include anything more than is expressed." *State v. McKettrick*, 14 S. C. 353. Nor can the evidence supplement the statements of the indictment. "Every indictment must contain and set forth all the necessary ingredients of an offense, and no omission, in such statements, can be supplied by innuendo or evidence." *State v. Henderson*, 1 Rich. 184. "In setting out an offense against a statute, the defendant must be brought within all the material words of the statute, and nothing can be taken by intendment." *State v. O'Bannon*, 1 Bailey 144.

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\*It is true that it is not necessary to set out the very words of the statute; but, according to these principles as to the particularity required in criminal proceedings, we do not think that the indictment was sufficient under the statute, which is as follows: "With respect to the crimes of burglary or arson, and to all criminal offenses, which are constituted or aggravated by being committed in a dwelling-house, any house, out-house, apartment, building, erection, shed or box, in which there sleeps, &c., \* \* \* shall be deemed a dwelling-house; and of such a dwelling-house, and of any other dwelling-house, all houses, out-houses, buildings, sheds and erections, which are within two hundred yards of it, and are appurtenant to it, or to the same establishment of which it is an appurtenance, shall be deemed parcels." Gen. Stat. 1882, § 2483.

This statute was intended to enlarge the field within which burglary could be committed, but in doing so it required two things as essentially necessary to constitute the new statutory offense; the out-house in which the offense is committed must be within two hundred yards of the dwelling-house and appurtenant to it. Neither of

those ingredients of crime were alleged in this indictment, and, therefore, it was not good under the statute. The indictment containing no such allegations, proof upon these points was inadmissible.

But it is insisted that the terms of the indictment, even if not full enough under the statute, are sufficient to sustain a conviction for burglary at common law, inasmuch as it charges the offense to have been committed "in a gin-house situate within the curtilage of the dwelling-house," which fulfills the definition of burglary at common law, viz., "the breaking and entering the dwelling-house of another, &c., and the term dwelling-house includes all out-houses contiguous to the dwelling and parcel thereof, if within the curtilage." *State v. Sampson*, 12 S. C. 567 [32 Am. Rep. 513].

This court has held that the act of 1866, re-enacted in the general statutes, enlarged the limits within which burglary might be committed, but did not repeal the common law offense, and also that it was not repealed by the act of 1878, which increased its punishment. *State v. Branham*, 13 S. C. 389.

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\*But it may be a question whether the statute, which does not use the word "curtilage" at all, and seemingly in lieu thereof made a new provision as to burglary, so far as out-houses are concerned (in requiring that they must be within two hundred yards of the dwelling-house and appurtenant thereto) did not repeal as inconsistent with that provision so much of the common law offense as relates to "curtilage," or to out-houses which may or may not fall within it, leaving the common law offense of burglary still in existence, but limited to the single case of being committed in the dwelling-house. This question was suggested, but not argued before us, and we make now no ruling on it.

Assuming that the common law offense still exists unimpaired as to out-houses within the curtilage, as it did prior to the act of 1866, and this could be considered as an indictment under it, the indictment does not charge that the gin-house was "contiguous" to and "parcel" of the dwelling-house, only that it "was situate within the curtilage of the dwelling-house," making it necessary to institute the inquiry, whether a gin-house eighty yards from the dwelling-house, and used for ginning cotton and sheltering stock, was within the curtilage, a term which, although often defined, seems still to lack certainty. It was long ago held in this State that "a house to be parcel of the mansion-house, must be somehow connected with or contributory to it, such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a

distinct use." *State v. Ginns*, 1 N. & McC. 585.

It is not necessary in this case, however, to make any such inquiry. The case was tried as one under the statute. Judge Aldrich reports that "it was an indictment under the statutory provision punishing as burglary the breaking and entering any house within two hundred yards of the dwelling-house and appurtenant thereto," and the punishment imposed—three years in the penitentiary—shows conclusively that he so regarded it; for if the defendant had been convicted of burglary at the common law, the punishment, under the statute of 1878,

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could not \*have been less than imprisonment "in the penitentiary with hard labor during the whole life of the prisoner." The defendant having been tried for the offense of burglary under the statute, and never having had an opportunity to defend himself as against the common law offense, the conviction, not sustained under the former, cannot be referred to the indictment as sufficiently charging the latter offense. As we understand it, burglary at common law is a different offense from burglary under the statute, is considered of higher grade and is punished much more severely.

The judgment of this court is that the judgment of the Circuit Court be reversed and the judgment arrested.

18 S. C. 141

MILLER v. HALL

(April Term, 1882.)

[1. *Appeal and Error* ⇨1022.]

A finding of fact by one of two referees concurred in by the Circuit judge, affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

[2. *Interest* ⇨37.]

A bond executed January 1st, 1873, conditioned for the payment "of \$1,195 in five equal annual installments, with interest payable annually from date upon the whole amount unpaid and at the rate of ten per centum per annum, the first installment payable January 1st, 1874, being \$239, besides interest, and the last installment of like amount on January 1st, 1878, and the same amount with all interest due, payable on the first day of January of each intervening year," bears annual interest at the rate of ten per cent. a year after maturity of the last installment as well as before.

[Ed. Note.—Cited in *Baum v. Raley*, 53 S. C. 40. 30 S. E. 713.

For other cases, see *Interest*, Cent. Dig. § 78; Dec. Dig. ⇨37.]

Before Kershaw, J., Abbeville, February, 1881.

Hon. THOMAS B. FRASER, judge of the Third Circuit, sat in the place of Mr. Justice McGOWAN, who had been of counsel in the cause.

It was an action by Jacob Miller against Wiley Hall, commenced in March, 1879, for



a specific performance of the bond recited in the opinion of this court, or for a sale of the land. The covenant referred to in the opinion was as follows:

Agreement and covenant this day entered into between Jacob Miller and Wiley Hall, both of the county and State aforesaid.

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\*First. Jacob Miller agrees to sell to said Wiley Hall two hundred and thirty-nine acres of land according to metes and bounds of a plat thereof made by Jas. A. McCord, Esq., deputy surveyor, which, when finished, is to be attached to this agreement; at and for the price of five dollars per acre, making in the aggregate the sum of one thousand one hundred and ninety-five (\$1,195) dollars, for which sum the said Wiley Hall has this day executed to the said Miller a penal bond, payable in five annual equal installments with interest from date at ten per centum and payable annually. The said Jacob Miller to retain the title to the said land until the whole of the said bond for the purchase money and interest thereon is paid in full. Then good titles to be made to the said tract of land.

Second. Wiley Hall agrees to pay five dollars per acre for the said tract of land, making the sum of one thousand one hundred and ninety-five (\$1,195) dollars, for which he has this day executed a bond with interest at ten per centum payable annually, the said bond payable in five equal annual installments. The said Wiley Hall agrees to enter upon the said premises without titles and after payment of the said bond in full, then, and not till then, to receive titles to the said tract of land.

Witness our hands and seals this the first day of Jan., 1873.

The cause was referred to O. T. Calhoun and M. P. De Bruhl, Esqs., as referees. Referee Calhoun reported in favor of a credit of \$60 claimed by defendant to have been paid January 1st, 1874, and that the bond bore simple interest at seven per cent. after maturity, and found the balance due by defendant to plaintiff on September 1st, 1879, to be \$555.94. Referee De Bruhl found the balance on the same day to be \$666.81, he having disallowed the alleged credit of \$60, and having calculated interest after the maturity of the bond at ten per cent., payable annually. The cause came up for a hearing on exceptions to this report, and the Circuit judge filed the following decree:

This case was heard upon the reports of two referees, who differed in opinion and made separate reports, to both of which exceptions were filed. The referees do not differ in their findings of fact, except in the item of the credit for \$60 claimed by the defendant. It appears to me that the weight of the evidence is against this credit, and as to that I concur with Mr. De Bruhl in rejecting it.

The main question in the case is as to the

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mode of calculating the interest. The principle of construction on this question is explained in *Langston v. South Carolina Railroad Company*, 2 S. C. 248. The legal rate applies unless displaced by the positive terms of the contract, and yields only so far as it is thus excluded. The interest was to be "at the rate of ten per centum per annum, to be payable annually, from date, upon the whole amount unpaid, the first installment (\$239), besides interest, payable on January 1st, 1874, and the last installment of like amount, on January 1st, 1878, and the same amount, with all interest due, payable on the first day of January of each intervening year." This statement of the bond presents the two questions made upon its construction, first as to how far the rate of ten per cent. is to be applied to it; and next, whether annual interest is to be allowed after the maturity of the bond.

1. I consider that the rate of ten per cent. was established by the contract, not only for the detention of the principal sums due, but also for the detention of the interest when not paid each year. The rate applied to the "whole amount unpaid," and those words require this construction.

2. So also do they qualify the requirement in regard to payment of the interest annually. The interest was to be "payable annually, from date, upon the whole amount unpaid." This construction is supported by the decision of the Court of Errors in *Wright v. Eaves*, 10 Rich. Eq. 584, and would be in accordance with that case even without the words in the bond, "upon the whole amount unpaid," which seem to me to be conclusive, and to require that the interest be calculated with annual rests upon the whole amount unpaid, after, as well as before, the last payment became due. The bond in *Wright v. Eaves* was without those words, but in other respects very like this, and the Court of Errors decided that the interest was payable annually after, as well as before, maturity, thereby reversing the Circuit decree to that extent.

The report of Mr. De Bruhl does not contain a statement of his calculation of the interest, whereby its accuracy might be tested and his mode of calculating the same exemplified, and a further reference will be necessary. It is ordered and adjudged that the reports herein be so modified as to con-

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form to the principles of this decree, and that the exceptions which accord therewith be sustained, and the other exceptions be overruled. That it be referred to the master to ascertain and report the amount due upon the bond aforesaid, in accordance with the said reports, as modified by this decree.

Defendant appealed on the following exceptions:

1. Because his Honor erred in overruling defendant's exceptions to the report of M. P. De Bruhl, Esq., one of the referees.

2. Because his Honor erred in overruling defendant's exceptions to the report of O. T. Calhoun, Esq., the other referee.

3. Because his Honor erred in sustaining plaintiff's exceptions to the said report of O. T. Calhoun, Esq.

4. Because there is a patent ambiguity upon the face of the two bonds, and his Honor erred in not giving them that construction which is most agreeable to the rules of law, instead of the contrary.

5. Because his Honor erred in allowing interest at the rate of ten per centum per annum on the bond in suit from its date to the date of the referee's report, and also in allowing compound interest on the said bond at the rate aforesaid, instead of computing annual interest from the date of said bond upon each installment thereof, until it became payable, at the rate of ten per centum per annum, and simple interest upon each installment thereof after it became payable, and upon each installment of interest that was payable annually, according to the terms of said bond, at the rate of seven per centum per annum.

6. Because his Honor erred in making the report of M. P. De Bruhl, Esq., the judgment of the Court.

7. Because the said judgment is contrary to the law of the case and the evidence adduced therein.

[For subsequent opinion, see 18 S. C. 600.]

Messrs. Burt & Graydon, for appellant.

Mr. W. H. Parker, contra.

October 21st, 1882. The opinion of the court was delivered by

Mr. Justice FRASER. On January 1st, 1873, the appellant executed his bond to the

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respondent, the condition of which was "the payment 'of one thousand one hundred and ninety-five dollars (\$1,195) in five equal annual installments, with interest payable annually from date upon the whole amount unpaid, and at the rate of ten per centum per annum. The first installment payable on the first day of January, one thousand eight hundred and seventy-four, being two hundred and thirty-nine dollars (\$239), besides interest, and the last installment of like amount on the first day of January, one thousand eight hundred and seventy-eight, and the same amount, with all interest due, payable on the first day of January of each intervening year." On the same day and year the said parties entered into a written agreement, under seal, that the respondent would convey to the appellant a certain tract of land upon the payment of the above described bond, which appellant thereby again covenanted to pay.

After various payments were made a dispute arose as to some alleged payments and as to the mode of calculating interest on the bond, and this action was brought for specific performance or sale of the land. The burden of proof as to the alleged payments was certainly on the appellant, and this court concurs with the Circuit judge that the weight of evidence is against the credit claimed for sixty dollars, and that it was properly disallowed.

The only other question presented to this court by the appeal is as to the mode of calculating interest, and it is conceded that this must be governed by the contract between the parties.

In the case of Mobley v. Davega, 16 S. C. 73 [42 Am. Rep. 632], there was a note "with interest from date at twelve and a half per cent. per annum, interest payable annually," and the mortgage contained the further words, "till paid," and the court held that interest was payable annually as well after as before maturity. The words here are "interest payable annually from date upon the whole amount unpaid, at the rate of ten per centum per annum." The words "till paid," it is held, will carry the interest agreed on beyond the period of maturity of the payments. The words "whole amount unpaid" cannot certainly refer to amounts not paid before maturity, because the rate as to this is fixed by the other words in the bond, and the

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word "unpaid" is more properly applicable to the amounts not paid when due, and which the obligor was then bound to pay, and which he had no right to pay before.

It does not appear to this court that there is any good reason for applying the term "unpaid" as used in this bond to any portion of the principal or interest, which, if tendered, the obligee had a right to refuse. The words must have some meaning, and their clear import is that any amounts not paid when due according to the condition of the bond, continue to bear interest at the rate of ten per centum per annum, payable annually, until the bond is paid up. This is the contract of the parties.

The court therefore concurs with the Circuit judge as to the mode of calculating interest on the bond. The reports of the two referees have been recommitted by the Circuit judge to the master "to ascertain and report the amount due upon the bond aforesaid in accordance with said reports as modified" by the Circuit decree, and upon the coming in of the master's report a final decree can be made on the Circuit.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

Mr. Justice McIVER concurred.

Mr. Chief Justice SIMPSON, dissenting. Where annual interest is agreed to be paid



on money foreborne, the general rule is that it stops at the maturity of the principal sum. It is not illegal, however, for a party to contract to pay annual interest after the maturity of the principal sum, as well as before, so that in every case, where the question arises whether annual interest should be computed after the maturity of the principal sum, it must be decided upon the construction of the contract. The true meaning and intent of the parties as derived from the terms of the instrument must be inquired into, and, when ascertained, will govern. See appendix to Johnstone's Digest, where the cases on this subject are collected and analyzed.

It has been decided that where a certain sum has been promised at twelve months, or

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any shorter period after date, with \*interest, payable annually, that this is a contract to pay the interest annually, after the maturity as well as before. This is inferred from the word "annually," as there could be no other purpose in using this word, but to convey the idea that the interest was to be paid at the end of each year, till the debt was paid. *Singleton v. Lewis*, 2 Hill 408; *O'Neill v. Bookman*, 9 Rich. 80.

It has also been decided, that where a principal sum is promised at two or more years after date, with interest from date, payable annually, that the obligation of the debtor to pay annual interest stops at the maturity of the debt, because the term "annually" is satisfied by such a construction, the promise of the debtor being to pay the principal sum at the end of the two or more years, with the interest of each intervening year as it accrues, which, not being paid, would bear interest as these amounts fell due, respectively, as if a note had been given for these unpaid annual interests at the end of each intervening year. *Gibbes v. Chisolm*, 2 N. & McC. 38; *O'Neill v. Sims*, 1 Strohh. 115; *DeBruhl v. Neuffer*, Id. 426.

But where the promise is to pay a principal sum at the end of two or more years, with interest payable annually "till the whole debt is paid," these words, or any of similar import would require the party to pay annual interest after the maturity as well as before, because such is the plain meaning of the contract, the promise of its terms being to pay the debt at a fixed time and also annual interest on it, not as in the former case up to that time, but continually until the whole debt is paid. Thus, as has already been said, each contract depends upon its own terms, the question in every case being what was the understanding of the parties as expressed in the instrument under consideration.

Now apply these principles to the case before the court. Here the appellant gives bond that he would pay the respondent \$1,195, in five equal annual installments

from date, with annual interest on this sum. Suppose that the bond had stopped at this point, could the instrument be construed otherwise than that the appellant promised to pay the principal debt within five years, and also the annual interest that might ac-

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cure thereon \*within that time? Could it be said that he had promised to pay annual interest after the five years? I think not, because the bond, as to all of the installments, would mature at the end of the five years, and while there is a promise to pay the interest on each installment at the end of each intervening year, there is nothing which shows that he was to pay the annual interest after the five years.

The bond in question, however, does not stop at this point; it provides further, "that the interest is to be paid annually on the whole amount unpaid," and the majority of the court has reached the conclusion that this term "unpaid" has the same effect as if the term "till paid" had been employed. It is conceded that if these latter terms had been used, this would carry the annual interest to the ultimate payment of the whole debt, because such would have been the distinct promise of the debtor. But, as I understand the case, the term "unpaid" was not used by the parties here synonymously with "till paid." Look at the bond. Its evident purpose was to bind the appellant to pay the respondent \$1,195, the price of a certain tract of land. The appellant was to have five years to pay this sum as a whole, to be paid, however, in installments of one-fifth annually, the whole amount to be realized in five years, at the end of which time the ultimate maturity of the bond as a whole was to take place.

Now it was uncertain whether each installment would be met at the period of its special maturity. It was not known but what some of them, though falling due within the five years, might remain unpaid up to that time, and no doubt the term "unpaid" was employed to denote that if any of these installments were unpaid as they fell due, they should still carry annual interest up to the ultimate maturity of the bond as a whole, and not beyond the five years as held by the majority, the term "unpaid" having reference to the different installments, but within the five years. And this is the more reasonable when it is remembered that it is by no means certain, if this term had not been used, that the annual interest could have been carried beyond the maturity of each installment.

There is some doubt whether, in the ab-

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sence of this term, the \*bond might not have been construed as containing five different obligations, falling due at one, two, three, four and five years, with annual interest on each, consecutively, in which case, under our

decisions, the first bond being due at one year, with interest payable annually, this term, by its own force, would carry the annual interest until the installment was paid. The other four installments, however, falling due at longer dates than one year, would be governed by the other decisions, which hold that the annual interest stops as the debts become due. The term "unpaid" prevents this as to all of the installments and requires the annual interest to run on upon each, though not paid when due—not indefinitely, however, but until the expiration of the five years, when the whole bond was expected to be satisfied. The limit of the contract, as a whole, was five years, and the intervening stipulations had reference to that period.

Under this theory, the interest on the bond in question should have been computed annually on all installments remaining unpaid from the date of the bond for five years, at the rate specified in the bond; after that time the annual interest to cease and the regular legal interest to attach upon the whole. Differing, as I do, in this construction from the Circuit judge who heard the case, and from the majority of this court, no doubt I am in error; but I have been unable to see the case as my brethren have. Hence this dissenting opinion.

Judgment affirmed.

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18 S. C. 149

STATE v. SMITH.

(April Term, 1882.)

[*Criminal Law* ⚡878.]

Where several distinct offenses are charged in different counts of an indictment, all growing out of the same act or acts, even though subject to different punishments, a general verdict of guilty furnishes no ground for a motion in arrest of judgment or for new trial, provided the jury have been explicitly instructed as to the form and effect of their verdict.

[Ed. Note.—Cited in *State v. Burbage*, 51 S. C. 288, 28 S. E. 937; *State v. Sheppard*, 54 S. C. 181, 32 S. E. 146; *State v. Rountree*, 80 S. C. 390, 61 S. E. 1072, 22 L. R. A. (N. S.) 833.

For other cases, see *Criminal Law*, Cent. Dig. § 2099; Dec. Dig. ⚡878.]

Before Aldrich, J., Anderson, February, 1882.

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\*This was a prosecution against Sherman Smith and four other defendants. The opinion fully states the case.

Mr. W. C. Benet, for appellants.

Mr. Solicitor Orr, contra.

October 25th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The indictment in this case contains three counts. The first charges that the defendants "did unlawfully,

willfully and maliciously and feloniously set fire to the county jail;" the second, that they "did unlawfully, willfully, maliciously and feloniously set fire to the dwelling-house of James H. McConnell;" and the third, that the defendants "did willfully, unlawfully and maliciously mutilate, deface and injure the house, that is to say, the jail of Anderson county, upon real estate in the possession of James H. McConnell." The first two counts, therefore, charge a felony, and the third a misdemeanor.

The Circuit judge, in his charge to the jury, explained the different counts and the effect of a verdict on them, saying: "If they found the prisoners guilty of arson—defining it—they should find them guilty generally; if they did not find them guilty of arson, but of malicious injury, they should write, 'not guilty as to the first and second counts, guilty as to the third count.' If they should find them not guilty of any of the counts, they should say, 'not guilty.' That if they found the prisoners guilty, they could recommend them to mercy." The jury returned a general verdict of guilty, with a recommendation to mercy, whereupon the defendants made a motion in arrest of judgment and for a new trial upon two grounds, which being refused, they now, by this appeal, renew these motions upon the same grounds. As the second ground was abandoned at the argument in this court, it will only be necessary to state the first, which is as follows: "Because his Honor erred in holding that the verdict of guilty, generally, upon an indictment containing a charge of felony, and a count in the same indictment charging a misdemeanor, when the penalties were different, was not a ground for a new trial."

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\*It must be conceded that it is somewhat difficult to reconcile the decisions in this State upon the point presented by this appeal, and we simply propose, after reviewing the cases, to deduce from them what we understand to be the rule upon this subject.

In *State v. Montague*, 2 McC. 257, the indictment was for a misdemeanor, and contained two counts, but what those two counts were does not appear. All that is said upon this branch of the case is: "There are two distinct counts in the indictment, each charging the prisoner with a different and distinct offense, for each of which offenses the law has provided a different and distinct punishment. A general verdict of guilty does not show of which offense he was guilty. The judgment of the court, therefore, cannot be pronounced." A new trial was accordingly granted. In the opinion no authority is cited and no reasoning employed except what has just been quoted. It does not appear that the jury were instructed so to shape their verdict as to indicate which of the two offenses they believed the party



charged to be guilty of, nor as to the effect of a general verdict.

In *State v. Crank*, 2 Bail. 66 [23 Am. Dec. 117], the defendant was indicted for murder. In the first count he was charged with having struck the mortal blow, in the second with having been present aiding and abetting another who struck the mortal blow, in the third and fourth he was similarly charged, only varying the name of the person charged with striking the mortal blow, and in the fifth count he was charged as accessory before the fact. There was a general verdict of guilty, and one of the grounds of the motion in arrest of judgment was, that, under a general verdict upon such an indictment, no judgment could be pronounced, as the court could not know whether the intention of the jury was to find the prisoner guilty of murder in the first or second degree, or of being an accessory before the fact. The court held that the motion could not be sustained, saying: "If therefore, several felonies of the same degree be included in the same indictment and there is a general verdict, judgment may be given on any or all of them, according as they may have been supported by the proof." It will be observed that the material difference between *Crank's* case and the foregoing one is that in the lat-

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ter case the \*punishment was the same under all of the counts, while in *Montague's* Case it was different.

In *State v. Priester*, Cheves 103, Judge Earle, in delivering the opinion of the court, lays down this doctrine, that two distinct offenses with different penalties may be embraced in the same indictment; "but," he adds, "care must be taken to have the verdict framed so as to secure the several counts." This, however, is a mere dictum, inasmuch as in that case the indictment was for unlawfully trading with a slave under the act of 1817, and in one count the defendant was charged with buying corn from a slave, and in the other with selling liquor to the same slave, it being all the same transaction, the liquor having been delivered to the slave in exchange for the corn. And upon a general verdict, the court, on a motion in arrest of judgment, held that there was no misjoinder of two offenses, but that it was the same offense charged in different forms.

In *State v. Anderson*, 1 Strob. 455, the indictment contained two counts, one, under the act of 1834, charging the defendant, as a vendor of spirituous liquors, with delivering liquor to a slave; the other, under the act of 1817, charging the defendant with unlawfully trading with a slave, both charges growing out of the same transaction. There was a general verdict, and the defendant moved in arrest of judgment and for a new trial on the ground, *inter alia*, that no judgment could be rendered upon such a verdict

where the indictment contained two counts, charging different and distinct offenses and punishable differently. The court held that while this afforded no ground for arresting the judgment, yet it did furnish good ground for a new trial, and granted that motion. The reason given seems to have been that, while different offenses might be joint in the same indictment, though not in the same count, yet, on a general verdict, the court would not know on which count to pass sentence. In this case, also, it does not appear that the jury were instructed as to the effect of a general verdict, or that they could so shape their verdict as to indicate what offense they thought the defendant guilty of. Inasmuch as it appeared in this case that the count under the act of 1817 was fatally defective, it is difficult to understand how the court could have reached the result which

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\*they did, in the face of the decision in the *State v. Poole*, 2 Tread. Con. Rep. 494, which, in that very case, it is said has been followed ever since. See *State v. Pace*, 9 Rich. 355, where it was held that a general verdict upon an indictment containing two counts, one of which was so defective as not to warrant any judgment upon it, would be sustained and referred to the good court.

In *State v. Tidwell*, 5 Strob. 1, the defendants were indicted for abduction under the act of 4 & 5 P. & M. ch. 8. The indictment contained four counts. The first, framed under the third section of the act, charged both of the defendants with abducting the girl from the possession of her father; the second, framed under the fourth section of the act, charged that both abducted the girl and that Tidwell married her; the third was like the first count, except that it contained the additional averment that the girl was an heir apparent of her father, and the fourth was similar to the second count, with the additional averment contained in the third. The punishment imposed by the fourth section of the act was greater than under the third section. The jury rendered a general verdict of guilty and the defendants moved in arrest of judgment because the indictment charged two distinct offenses, admitting of different degrees of punishment, and a general verdict of guilty did not show of which offense the jury intended to find the parties guilty. The court held that this furnished no ground for a motion in arrest of judgment. Whether it would support a motion for a new trial does not seem to have been distinctly considered, though the intimation is that it would not in that particular case, inasmuch as the offenses charged were of the same general nature, and the aggravation alleged in one of the counts, while it increased the penalty, could be regarded as embracing the other, and therefore a general verdict should be regarded as having found the highest degree of guilt.

In *State v. Posey*, 7 Rich. 484, the indictment contained four counts for grand larceny and two for receiving stolen goods, one under the statute and the other at common law, both being misdemeanors. The jury found the defendant guilty of "receiving stolen goods, knowing them to be stolen." A mo-

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tion in arrest of judgment was made, upon the ground that it did not appear from the verdict upon which count the finding rests. The court said that after the verdict, the indictment must be regarded as containing only the two counts charging the offense of receiving stolen goods, and held that there was no ground for the motion in arrest of judgment. Although there was no motion for a new trial based upon this ground, yet the court, for the benefit of the defendant, treated it as such a motion, and held that though the uncertainty as to which count the verdict referred to might be a good ground for a new trial, if one count was good and the other bad, or the punishment under the two counts were different in kind, yet in this case there was no such uncertainty, and that even if the sixth count was bad, the verdict might be referred to the fifth, as the offenses charged were of the same general nature, and it was at least doubtful whether there was any difference in the punishment. Accordingly the motion was refused.

In *State v. Major*, 14 Rich. 76, the indictment contained three counts. In the first the three defendants were charged with stealing a colt; in the second, Warren and Hiram Major were charged with the same offense, and Daniel Major was charged as accessory before the fact; and in the third count, all three were charged with a misdemeanor, in receiving the colt knowing it to be stolen. The jury found the following verdict: "Warren T. Major and Hiram Major, guilty; Daniel Major, guilty of petit larceny." One of the questions raised on a motion for a new trial was, whether any judgment could be pronounced upon this verdict. The court held that the offenses charged being distinct and different, and subject to different punishments, there was no means of determining from the verdict of what offense the parties were guilty, and hence no means of ascertaining what punishment should be imposed. The court drew a distinction between this case and that of "the case of a general verdict on an indictment containing several counts, charging offenses of the same general nature, but different degrees, where each higher necessarily includes all the lower grades, distinguished from them by an aggravation of guilt and a corresponding increase in the measure, but not variation in the kind, of penalty, and where the less offense being merged in the greater, the gen-

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eral verdict shall be taken to have found the highest grade, if the proof be applicable to it," as in *Tidwell's Case*, supra; and said it

was rather a case where distinct offenses are charged, for each of which the law prescribes a different and distinct punishment, and that a general verdict not showing of which offense the parties have been found guilty, the court cannot know what judgment to pronounce, as in *Montague's Case*, supra. It will be observed that in this case it does not appear that any instructions were given to the jury as to the form in which they might find their verdict, or as to the effect of a general verdict.

In *State v. Nelson*, 14 Rich. 169 [94 Am. Dec. 130], the indictment contained three counts: The first charging burglary; the second charging another burglary at a different time and place from the first; and the third charging larceny, at the same time and place mentioned in the second count; the alleged value of the property stolen being under \$20. So that the case presented was one in which two distinct felonies and a misdemeanor were charged in different counts of the same indictment; the misdemeanor charged growing out of the same transaction as that upon which the second felony charged rested, with a general verdict of guilty. Upon a motion in arrest of judgment, which the court treated as a motion for a new trial, the rule was laid down in the following language: "Where an indictment charges the same transaction in one count as a felony, and in another as a misdemeanor of such nature that the latter is, or may be, included in the former, it is merged in it, if the higher offense has been consummated; and the jury, even if there were no charge of the less offense in a separate count, might convict of this under the count for the greater, if the evidence, in their judgment, warranted no more. A general verdict is understood to find the higher offense if there is testimony to support it; and the finding of such verdict is not a ground for a new trial even. It is proper, however, that the jury should be distinctly instructed as to the effect of their general finding in such case, and that they are at liberty to distinguish, and, according to their views of the evidence, convict on the one count or the other; and it is more satisfactory that they should do this."

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\*In *State v. Scott*, 15 S. C. 434, the rule, as laid down in *Nelson's Case*, has been recently affirmed by this court.

From this review of our cases, we think that the rule to be extracted from them is, that where several distinct offenses are charged in different counts of an indictment, all growing out of the same act or acts, even though subject to different punishments, a general verdict of guilty furnishes no ground for a motion in arrest of judgment, and no ground for a new trial, provided the jury have been explicitly instructed that the effect of a general verdict will be to find the party accused guilty of the highest offense charged in the indictment, and that they have the right to desig-



nate in their verdict which one of the particular offenses charged they believe the accused to be guilty of.

In the case now before the court, it is conceded that both of the offenses charged in the indictment grew out of the same act; and it appears that the jury were very explicitly instructed how to shape their verdict so as to show distinctly of what particular offense they believed the parties guilty. For the Circuit judge, after explaining what constituted arson, told the jury that if they believed the parties guilty of that offense, their verdict should be guilty generally; but if they did not believe the defendants guilty of arson, but only guilty of malicious injury, then their verdict should be not guilty as to the first and second counts, but guilty on the third count; and if they did not believe them guilty of either of the offenses charged, their verdict should be not guilty. It seems to us, after such instructions, a general verdict of guilty leaves no more doubt as to the offense of which the jury intended to convict the defendants than if their verdict had been guilty of arson, or guilty on the first or second counts.

The judgment of this court is that the judgment below be affirmed.

#### 18 S. C. \*157

#### \*HIRSHKIND & CO. v. ISRAEL.

(April Term, 1882.)

#### [1. *Appeal and Error* ¶1022.]

Concurrent finding of fact by master and Circuit judge affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ¶1022.]

#### [2. *Chattel Mortgages* ¶18; *Mortgages* ¶13.]

A chattel mortgage is not, as matter of law, fraudulent and void, because that it covers also "such goods, wares and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment."

[Ed. Note.—Cited in *Perkins v. Loan & Exchange Bank*, 43 S. C. 45, 20 S. E. 759.

For other cases, see *Chattel Mortgages*, Cent. Dig. § 64; Dec. Dig. ¶18; *Mortgages*, Cent. Dig. § 15; Dec. Dig. ¶13.]

#### [3. *Chattel Mortgages* ¶142.]

A second mortgagee of a stock of goods cannot resist the lien of a former mortgage of such stock upon additions subsequent to the date of the first mortgage and covered by its terms, without showing that such additions were made after the execution of the second mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 228; Dec. Dig. ¶142.]

#### [4. *Chattel Mortgages* ¶18.]

While a second mortgage might be preferred to advances made under a former mortgage after the execution of the second, a first mortgage on a stock of merchandise for an existing debt may cover subsequently purchased goods, and the lien will attach as they are acquired.

[Ed. Note.—Cited in *Armour & Co. v. Ross*, 75 S. C. 207, 55 S. E. 315.

For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 61-66; Dec. Dig. ¶18.]

Before Cothran, J., Richland, November, 1881.

Action by Hirshkind & Co. against Morris Israel, Charles Elias and Jesse E. Dent, sheriff, commenced February 14th, 1879. Afterwards, on motion, certain attaching creditors of Charles Elias were made parties defendant. The case is fully stated in the Circuit decree.

The master, N. B. Barnwell, Esq., to whom all the issues were referred, reported that there was no fraudulent intent on the part of Israel, and that the terms of the mortgage did not constitute fraud in law. Upon the first ground, his findings were as follows:

In support of the first ground a great deal of testimony was taken, in which the validity of the loan, by Israel to Elias, was sought to be impeached, and an effort was made to show that from the conduct of the defendants, Elias and Morris Israel, an inference of the fraudulent nature of the transaction necessarily arose. In my opinion, the facts do not sustain this view, and I find that the transaction between Elias and Morris Israel, at least so far as the latter is concerned, is entirely free from any fraud in fact, and that the debts secured by the mortgage were bona fide transactions, and the mortgage

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given to secure the same was \*not, as a matter of fact, made with any fraudulent intent, nor for the purpose of delaying or hindering the creditors of Charles Elias.

It is clear that at the time of the transaction, i. e., the execution of the mortgage, the defendant Charles Elias was insolvent, but there is no proof that this fact was known to Morris Israel. Prior to that time the credit of Elias was good; he had before borrowed large amounts from the defendant Israel, and repaid them, and, so far as the evidence shows, this mortgage was in fact intended by Israel to operate entirely as a security for his debt, and in no respect whatever does he appear to have contemplated the use of his mortgage as a cover against other creditors. There is no proof of any collusion to that end, in any of the conduct of Israel. The mortgage had a short time to run, it was left with the notes in the hands of the attorneys of Israel, with instructions to enforce the mortgage promptly upon the non-payment of the notes. It is true some delay did occur, but this appears to have been due to the solicitations of Elias, addressed to the attorneys of Israel.

Much testimony was taken in reference to the disposition made by Elias of the money borrowed from Israel, but I cannot see that this has any bearing upon Israel's mortgage, except in so far as it was supposed to discredit the claim of Israel to be a creditor of Elias for the amount alleged to be due him, and for this purpose it was, in my opinion, entirely insufficient; for it must be clear,

and in order that this conveyance be set aside for fraud, the fraudulent purpose must be shown to have been shared in both by grantor and grantee.

What right have we then to infer a fraud against the grantee here from the conduct of Elias? The defendant Israel testifies that at the outset of this transaction, considering Elias as perfectly solvent and in good credit, he made no inquiry as to his liabilities, had no information on this point. He simply examined the value of his stock of goods, estimated them at \$7,000, and took the mortgage, under the impression that at that time there was an ample amount of property to secure him, and in this view the facts would seem to have borne him out, for when, at the time of the seizure of the property, an

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inventory was made, being two months after the date of his mortgage, the value of the stock at its cost price in New York was over \$5,000.

At the trial before me, the fact that, at the sale of the property, which took place before the trial, Israel became the purchaser of a very large portion of it, sold out his share of the purchases to Mrs. Eva Elias, the wife of Charles Elias, and that she subsequently carried on the business, was alleged as bearing upon this question. If this had been done in pursuance of any agreement or understanding between Israel and Elias at the time of the execution of the mortgage, the indirect benefit resulting to Elias' family might have some weight in vitiating the mortgage; but I see nothing in the mortgage to indicate any such agreement. I do not think, therefore, that this is entitled to any weight in determining the question as to any actual intent on the part of Israel to permit his mortgage to be used to delay, hinder, or defraud the creditors of Elias.

The Circuit decree was as follows:

This is an action brought by the plaintiffs, as mortgagees of a stock of merchandise, the property of the defendant Elias, mainly, for the purpose of setting aside, on the ground of fraud, a senior mortgage of the same stock of merchandise given by the said Elias to his co-defendant Israel.

The matter was submitted by consent of counsel upon written arguments; and although I have cause to regret their actual absence, that has been compensated, as far as it could properly be, by the submission of very learned and exhaustive arguments. By an order of the late Judge Thomson, made in this court on April 25th, 1879, it was referred to the master to hear and determine all the issues in this action and report to this court his findings and conclusions, together with the evidence. Pursuant to this order, the master, on June 6th, 1879, began to hold the series of references duly noted in the mass of testimony taken by him, and on July 11th,

1879, made up his report adversely to the plaintiffs upon all the issues made in this cause. To this report the plaintiffs, by their counsel, have filed sixteen exceptions, which will be considered and determined after making a brief statement of the case.

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\*The defendant, Charles Elias, during the year 1878, and for a year or so previously to that time, was a merchant, doing business as such in the city of Columbia. Before that time, whilst merchandising in Camden, he had some moneyed transactions with the defendant Israel, who, it appears, was engaged in the brokerage business (lending money) in the city of Charleston. These were promptly and fully adjusted by Elias, and Israel's confidence thereby secured.

In the fall of the year 1878, Elias applied by letter to Israel for further pecuniary aid, and was invited to Charleston by the latter with favorable assurance. He went accordingly, and then executed the first note for \$1,000, dated October 4th, 1878, at seventy days, due December 13th, 1878; second note for \$500, dated November 11th, 1878, at thirty days, due December 11th, 1878; third note for \$500, dated December 12th, 1878, at ten days, due December 22d, 1878. The last note was made and delivered in Columbia, Israel having gone there on account of these repeated demands for aid, and, as he says in his testimony, "feeling a little uneasy."

Before Israel would consent to make the last loan, he required Elias to give some security for the \$1,500 already loaned, and after "some consultation and dilly-dallying" (in the words of the defendant Israel), and examination of the stock of merchandise, Elias reluctantly consented to give the mortgage, the subject of this contention. The mortgage is of the stock of merchandise then in the store of Elias, and using the words of the instrument, "as well said stock now in the said establishment, as such goods, wares, and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment," embracing in the tenendum of the deed the property "after acquired as aforesaid," and to secure the sum of the three notes, viz., \$2,000. This mortgage was executed December 12th, 1878, and recorded in register's office on December 24th, 1878.

The plaintiffs' transaction with Elias bears date January 10th, 1879, a little more than two weeks after Israel's mortgage was recorded in the register's office, and is evidenced by a note for the sum of \$332.50, secured by mortgage of equal date, of the

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\*stock of merchandise then in the store of the said Elias; this mortgage was recorded January 24th, 1879.

On the 3d day of February following, ten



days after plaintiffs' mortgage was recorded Israel ~~duy~~ appointed J. E. Dent, then sheriff of Richland county, as his agent to seize and sell the said mortgaged property, and on February 10th the seizure was made and Dent took possession of the entire stock. On February 14th, four days after the seizure by Dent, the plaintiffs began this action, and on February 26th, by agreement of all the parties interested, the sale by Dent was allowed to be made, and this contention is over the proceeds of the sale of the mortgaged property.

Exceptions to the Report.—I agree with the learned counsel for the plaintiffs, that the numerous exceptions to the master's report may be substantially expressed in two propositions, viz.: 1. That the evidence adduced shows with reasonable certainty that the mortgage to Israel was executed with the intent to hinder, delay and defeat the other creditors of the mortgagor, Elias. 2. That the said mortgage is void by presumption of law, because such fraudulent intent is apparent upon its very face.

As to the First Proposition.—In these issues the plaintiffs have taken the affirmative, and it is a well established rule of evidence that he who alleges must prove. The charge of fraud is almost criminal, and in the case of obtaining goods under false pretenses, which is a species of fraud, is punished criminally. Still the rule of "proof beyond a reasonable doubt," is not required of the plaintiffs here; nevertheless on account of the very nature of the charge, it does not admit of any relaxation of that other rule, that the charge should be established by the clear preponderance of the evidence. Upon a careful review of the testimony, as reported, I do not find that clear preponderance, and I shall therefore dispose of the first proposition herein, by stating my concurrence in the conclusion reached by the master (for the reasons so well stated by him, and for others perhaps, which might be given), who has found "that the transaction between Elias and Morris Israel, at least so far as the latter is

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\*concerned, is entirely free from any fraud in fact, and that the debts secured by the mortgage were bona fide transactions, and the mortgage given to secure the same, was not, at a matter of fact, made with any fraudulent intent, nor for the purpose of delaying or hindering the creditors of Charles Elias."

As to the Second Proposition.—There is not perhaps in the whole range of the judiciary of this country and of England a more vexed question than the one now under consideration. Mr. Jones, the distinguished author of the latest and confessedly the most valuable work on Mortgages of Real Estate and of Chattels, in a recent number of the *Southern Law Review*, Vol. 7, (N. S.) p. 95, has treated the subject of fraud in chattel mortgages in a most masterly manner. I can

do little more with propriety in the narrow limits of a Circuit decree than to direct attention to that article, and state his conclusions with some of the reasons given. I can certainly hope to add little, if indeed anything, of value, to his vast array of authorities or to the force of his reasoning. If I be then sustained or overruled in the conclusions which I shall announce, which have been attained with some labor, there can be as little cause for exultation on the one hand as for depression on the other, for it appears that the main question involved, to wit: Whether a mortgagor's possession of mortgaged goods with power of disposal, makes the transaction fraudulent per se, or only prima facie evidence of fraud to be passed upon by a jury (or master or referee) upon all the evidence, and the surrounding circumstances of the case, has been passed upon by twenty-six courts of last resort in the Union—thirteen of them holding one way, and thirteen the other. To the many holding the doctrine that the transaction is fraudulent per se, upon a peculiar state of facts, and upon which some observations will be made hereafter, may be added the case of *Robinson v. Elliott*, 22 Wall. 513 [22 L. Ed. 758].

The definition of fraud is always matter of law. The statutes of Elizabeth, thirteenth and twenty-seventh, are declaratory of the common law, and it was said by Lord Mansfield that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained

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every end proposed by these \*statutes." These statutes do not embrace conditional sales, and we have in this State no statute enlarging the operation of the statutes of Elizabeth, as are to be found in some of the statutes of the Union, and upon whose judicial decisions has been engrafted what is styled "the American doctrine of Twyne's Case." And, in this connection, it may be profitable to bear in mind, that in the array of cases holding the doctrine contended for by the plaintiff here, statutory enactments will be found which make the retention of possession by the mortgagor fraudulent as in the case of absolute transfers.

But even in cases of absolute conveyance, the early doctrine announced by Marshall, C. J., in *Hamilton v. Russell*, 1 Cranch 310 [2 L. Ed. 118], although since much discussed, has not been shaken or altered, i. e., that possession consistent with the deed is not fraudulent, and possession inconsistent with the deed is fraudulent in law, and that it is this consistency, or inconsistency, which settles the question of fraud in law.

To a dictum of Judge Buller, in *Edward v. Harben*, 2 T. R. 587, it is said undue importance has been given in the English courts; but Chancellor Harper, in *Smith v. Henry*, 1 Hill 21, acknowledging that the

case was supposed to have been overruled or departed from by subsequent decisions, upon the examination which he had been able to make of the several cases, thought it not impossible to reconcile them. Whether such result was successfully accomplished by that most learned judge, it is now certain, that in England, the case has been questioned, and the doctrine sought to be established by it has been overthrown in the case of *Martindale v. Booth*, 3 Barn. & Ad. 498, and others. In that case Parke, J., and Patterson, J., by different forms of expression, argue that "there is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of chattels." It was conceded to be a badge of fraud "which ought to be left to the jury; then if a badge of fraud only \* \* \* all the circumstances must be taken into consideration.

And I submit that it would be as illegal and as illogical to convict one charged with crime upon a single well-forged link of circumstantial evidence, when all the other

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links of the \*chain were defective, as to adjudge and conclude a transaction to be fraudulent from the existence of a single badge of fraud, however well defined the same might be. In such case "all the circumstances must be taken into consideration."

The foregoing authority and observations apply in the main to absolute sales, not to conditional sales or mortgages, so much affected here by our registry laws, which have wholly changed the character of mortgages at common law, except in those rare cases where possession is transferred to the mortgagee. In England there has not existed until recently, if there is now, any general system of registration similar to ours. See *Life of Lord Campbell* (Am. ed.), Vol. 2, p. 89. Then great stress seems to have been laid on the earlier cases, in the time of Judge Buller, for instance, upon the fact of retention of possession by the mortgagor; such was held to be conclusive evidence of fraud not susceptible of explanation. But Mr. Jones, in the article above referred to, says: "The modern English doctrine, (citing numerous authorities in note 2, p. 97,) and that more generally adopted by the American courts, (see cases cited in note 3, p. 97,) is, that possession by a vendor as mortgagor, is only prima facie a badge of fraud; that the presumptions arising from that circumstance may be rebutted by explanations showing the transactions to have been fair and honest; and that the question of fraud is always one of fact for a jury to determine."

And so Mr. May, on *Fraudulent Conveyance*, p. 101, says: "It by no means follows, though, that because there is no possession given, a transfer is fraudulent, for those cases in which the judges have said that if possession was not given, it was fraudulent, must be taken with reference to the circum-

stances of each case. The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction." In *Arundell v. Phipps*, 10 Ves. 139, Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is prima facie evidence of property in the man possessing until a title not fraudulent is shown under which that possession has followed—that every case from *Twyne's Case* downward supports that, and there was

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no occasion otherwise for \*the statute of King James. There was no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is prima facie evidence of a fraudulent intention, and if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration.

I suggest with the greatest diffidence and at the risk of being charged with iconoclasm, some further observations upon the subject of fraud. There appears to me to be some confusion and much injustice of distinction in the meaning of the familiar terms, legal fraud or fraud in law, and actual fraud or fraud in fact. This enforced distinction has sometimes involved its advocates in the manifest absurdity of maintaining a transaction to be fraudulent in law which they are forced to admit is bona fide in fact. Surely the law, which is boastfully said to be the perfection of human reason, if properly understood and rightfully administered, can effect no such result.

*Actus legis nemini est damnosus.* Would it not be more consistent with the perfection of human reason and with the harmony of legal science, to say that the only real distinction is to be found in the means and manner in which fraud is made to appear? Illustration is sometimes more convincing than argument. Suppose A. should convey his entire estate (being indebted) to B. for very inadequate consideration, and should stipulate in the deed of conveyance for the return of the usufruct to himself. That transaction would be hastily adjudged, and properly, to be fraudulent, fraudulent per se. Suppose an adequate consideration were stated in the deed, but neither paid nor secured to be paid, and the matter of the usufruct were made the subject of a private bargain or arrangement, and B., put upon the stand, disclosed the whole truth about it—the latter too would be adjudged to be fraud, fraud in fact, and by the casuist would be regarded an act of greater moral turpitude on account of the baser means used to accomplish the same purpose as in the former case. But the same law adjudges both transactions, and pronounces precisely



the same judgment on each, by declaring both to be utterly fraudulent, null and void.

These illustrations are of extreme cases, it

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is true, and intermediately are to be found in the multitudinous transactions of men, the infinite diversity of fraudulent acts which so obscure our minds.

To one who marveled what should be the reason that acts and statutes are continually made at every parliament without intermission and without end, a wise man made a good and short answer, which is well composed in verse:

Quesitur ut crescant tot magna volumina legis?

In promptu causa est, crescit in orbe doctus.

Having already referred to the able article of Mr. Jones in the *So. Law Rev.*, supra, in which the authorities are collected, and to the same writer's work on *Chattel Mortgages*, it is but fair that I should refer to a collation of the authorities, which support the views contended for by the plaintiff here; these are collected with great care by Mr. James O. Pierce in an article in the same *Review*, Vol. 2, p. 731; and also to Herman on *Chattel Mortgages*, passim. It is not consistent with the proper limits of this decree to do more than give these references, make the promised observations upon the case of *Robinson v. Elliott*, and review as briefly as I can the case of *Griswold v. Sheldon*, 4 N. Y. 581.

This case is selected for the reason that it stands at the head of the many cases containing the doctrine contended for by the plaintiffs here, and may justly be considered a Pandora's box out of which has come a multitude of evils and distempers, increasing the law's uncertainty. Judge Lowell, an eminent district judge of the United States Court for the district of Massachusetts, in the case of *Brett v. Carter*, reported in Vol. 3, No. 18, *Cent. L. Jour.*, p. 286 [*Fed. Cas. No. 1,844*] referring to this case in 4th Coms., supra, says: "This doctrine has had a remarkable vitality, considering the feebleness of its birth, to have become the law of New York, Ohio, Illinois, and probably of some other States. It is not the law of England, Maine, Massachusetts, Michigan, Iowa, and probably of some other States."

Mr. Jones, the author of the valuable works already referred to, makes the enumeration more fully, as already stated. By reference to the case of *Griswold v. Sheldon*, supra, it will be seen that Judges Brown,

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Ruggles, Jewitt and McCoun, sustained the views of the plaintiffs here, opposed by Judges Mullet, Gardnier, Gray and Paige—an equally divided court. By Sec. 5, 2d Rev. Stat., p. 136 (New York), it is provided that when the possession of the mortgage is not changed, the mortgage in law is presumed to

be fraudulent. Similar statutory enactments are to be found in others of the thirteen States which have adopted the New York doctrine, extending the provision of the statutes of Elizabeth, and the doctrine of *Twyne's Case* to conditional sales.

In South Carolina there has been no statutory enlargement, and the current of decisions by our own courts is unbroken in holding that the possession by the mortgagor, after condition broken, is not regarded even as a badge of fraud. *Gist v. Pressley*, 2 Hill Eq. 323; *Maples v. Maples*, Rice Eq. 300; *Bank v. Gourdin*, Speers Eq. 439; *Fishburne v. Kunhardt*, 2 Speers 556; *Smith v. Henry*, 1 Hill 16, and the class of cases attaching so much and such just importance to the fact of possession by the vendor, will be found upon examination to be cases of absolute sale and obnoxious to the statutes of Elizabeth, made of force here by statute, and re-enacted in the general statutes of the State, but without enlargement.

The plaintiffs here, however, are not content to claim the retention of the possession by Elias, the mortgagor, as merely a badge of fraud or a presumption of fraud, but urge such retention as a conclusion of law that it is fraud per se, and, as such, not susceptible of explanation. Such, it is true, is the nature of a conclusion, for it means, "determination, final decision," and, as such, I maintain that its basis should be irrefragable truth. It should be so potential, so comprehensive, and so complete as to exclude all reasonable possibility of the existence of a state of things different from that which it determines. Whenever, through its operation, the law destroys the right or privilege of a citizen, it becomes the oppressor of those whom it is its duty to protect, and is as merciless, as cruel, and as unjust as the bed of Procrustes. To this doctrine I cannot yield assent. It is not in harmony with the principles of justice; it is not consistent with truth, which, for a time, at least, it may crush; and it may be well to consider, lest in intemperate zeal to prevent fraud,

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we do err in that more reprehensible extreme of perpetrating a judicial wrong.

*Robinson v. Elliott*, 22 Wall. 513 [22 L. Ed. 758]. If this decision of the Supreme Court of the United States were conclusively in favor of the doctrine contended for by the plaintiffs here, while from the manifest difference in the manner and purpose, and length of time of the retention of the mortgagor's possession, I hold it to be altogether otherwise; I am by no means prepared to admit that it would be my duty to surrender unconditionally my convictions to a decision made even by that august tribunal. I should feel constrained to do so if the contention were upon a matter of which that court might or would have in the orderly progress of the cause the right of final arbitrament,

in a case, for instance, involving a constitutional question, wherein the right of appeal would be finally to that court. But in all other cases (and this one is such) it seems to me that the decisions of the court, whilst entitled to the profoundest respect, are to be followed by the State courts only on account of the cogency and value of their reasoning.

If Judge Lowell, of the District Court of Massachusetts, in the case of *Brett v. Carter*, already referred to, could venture "to doubt, both the generality and the justice of the doctrine," as laid down by Mr. Justice Davis in *Robinson v. Elliott*, of whose court that of the learned district judge is an appendant, it could hardly be regarded as an act of judicial rebellion in me to do likewise. I cannot say, however, that I am prepared to distrust the justness of that decision or its correctness in view of the peculiar facts of the case, nor is it necessary, in my opinion, to do so in order to sustain the validity of the mortgage under consideration here.

I claim, to the fullest possible extent, the right to adjudge, as matter of law, the existence of legal fraud wherever it appears upon the face of the instrument itself. The true question is as to the degrees of conclusiveness (so to speak). Was it a presumption of fraud to be explained or rebutted by proof on the part of the mortgagors, or was it a legal conclusion of fraud, not susceptible of explanation? The learned Justice held the latter view; and under the fierce light

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that beats upon every judicial \*trial, always so much brighter than the most luminous report that can be made of it, it would be as far from me as it would be unbecoming to say that the decision was not right. But the facts and circumstances of the case differ widely from those of the case at bar. The main inquiry in both, as in all such, is, for what purpose was the mortgage in fact given? Was it given as a security, pure and simple, or was it for this and something more, such as a personal benefit to the mortgagor, or an injury in the shape of obstruction or hindrance to other creditors?

Mr. Justice Davis found both of these obnoxious features on the face of the Cooledge mortgage. He says: "Manifestly it (the mortgage) was executed to enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom"—this was the unlawful benefit to the debtors. Again he says: "Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length

of time." The Italics are mine. This is the other feature of hindrance to creditors.

Upon the face of the mortgage the covenants for further endorsements are renewals by Robinson for other amounts, and the renewal from time to time of the notes to Mrs. Sloane gave to the transaction the character of continuance, permanency; and it might well have been questioned if, in the face of these covenants, before a renewal occurred, or a further endorsement was made by the mortgagors, they would have been permitted to enforce their mortgage at all. The transaction stipulating for "further endorsements," and "renewals from time to time," extended over a space of twenty-five months; and the catastrophe finally occurred upon the death of one of the mortgagors and the discovery of the firm's insolvency. Neither the sum to be secured nor the time for enforcing the payment was fixed. Such uncertainty of amount, such indefiniteness of time could not be cured by the maxim, "*id certum est*," etc., especially so when these qualities of certain-

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ty and fixedness are absolutely indispensable in determining the question, whether or not the mortgage is a security pure and simple, or a security and something more, that something more being abhorred by the law.

In the case at bar it appears that early in December, 1878, Israel became uneasy upon the subject of Elias' indebtedness to him, and went to Columbia to see about it. He held Elias' notes then for \$1,500, soon to become due. Elias wanted more money. Israel agreed to let him have \$500 more if he would secure him with a mortgage covering that sum and also the \$1,500. Was it more or less than the old, old story of sending good money after bad—sometimes wise, sometimes otherwise, always lawful, not always expedient? Elias was a merchant, and the mortgage given was for merchandise estimated at the time as more than double in value the amount of the mortgage debt. It was duly recorded within the time prescribed by the statute, and the plaintiffs were then bound with notice of its contents. On January 10th, more than two weeks after Israel's mortgage was recorded, the plaintiffs took from Elias the note secured by mortgage of the same stock of goods with which they have come into court. Their mortgage differs from Israel's only in the amount of debt secured, in date, and in the absence of a provision to subject accretions of merchandise to its lien. It was taken on January 10th, held without recording to January 24th, and, so far as appears from the pleadings and proof, no steps were taken for its enforcement until after the seizure of the goods under Israel's mortgage on February 10th. It was four days after this, to wit, on February 14th, that plaintiffs' action was begun.

Thus it appears as matter of fact that



Elias' retention of possession ended four days before the plaintiffs' suit was begun, and it might be interesting to inquire how far this reduction into possession by Israel of the mortgaged goods, would go to cure the vices of his mortgage, if it had any. Authorities to sustain this position may be abundantly found in the decisions of other States, and in the further stages of this case such inquiry may not be unprofitably pursued.

Without referring again to the various allegations of fraud in fact, so-called, these

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having been disposed of by concurrence \*in the master's findings, it only remains to consider that which is claimed to be the especially vulnerable part of Israel's mortgage, and this the plaintiffs allege is to be found in the effort on Israel's part to subject the accretions of merchandise acquired by Elias in the course of trade to the lien of the mortgage; and, on this account, it is urged that the mortgage is fraudulent upon its face. This is the only feature (save in date and amount) in which Israel's mortgage differs in form from that of the plaintiffs, and both, it appears, allowed Elias to retain possession of the goods after condition broken. I am not able to see anything more in this than what may or may not have been a vain effort on the part of Israel to increase his security and so provide against loss. The pleadings and proof in the case have not presented this matter in such manner as to make it a living issue in the case. If Elias' retention of the goods had been of such duration as to have enabled him to dispose of the stock actually mortgaged, and the accretions amounted to a substitution of another stock in its stead, and the proof had made this apparent, this vexed question would have required an answer; but I cannot attach to this provision of the mortgage the character and importance of a shibboleth, and condemn Israel to the loss of his debt either for pronouncing it or for not pronouncing it.

How far such accretions would be affected by the principle decided in the case of *Moore v. Byrum*, 10 S. C. 452 [30 Am. Rep. 58], or the late case of *Parker & Co. v. Jacobs*, 14 S. C. 112 [37 Am. Rep. 724], it is scarcely necessary to inquire; for, as I understand the case, the question of the lien of the mortgages upon accretions to the stock (there being no proof of such) does not arise here, the attempt to bind the accretions by Israel's mortgage having been urged only as evidence of fraud upon the face of the mortgage itself; and for this, in my judgment, it is not sufficient.

Therefore it is adjudged and decreed that the master's report herein, dismissing the plaintiffs' complaint, be and the same is hereby affirmed, that the defendant have judgment against the plaintiffs for their costs, and that the defendant Israel have

leave to move the court for such orders, touching the funds in the sheriff's hands, arising from the sale of the mortgaged goods

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\*as he may be advised are necessary to accomplish the proper distribution of the same.

The points made by the exceptions are sufficiently stated in the opinion of this court.

Mr. J. P. Carroll, for appellant.

Messrs. Melton, Clark & Muller, contra.

October 31st, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. The main object of this action is to set aside, on the ground of fraud, a mortgage on a stock of goods, wares and merchandise, given by the defendant, Charles Elias, to his co-defendant, Morris Israel.

It is conceded that there are only two questions presented by this appeal, one of fact and the other of law. The first is whether the evidence was sufficient to show that the mortgage in question was executed with intent to hinder, delay and defeat the other creditors of the mortgagor; and secondly, whether the mortgage is not, as matter of law, fraudulent and void because it covers not only the stock of goods on hand at the date of the mortgage, but also "such goods, wares and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment;" thereby plainly evincing an intention that the mortgagor should continue business by selling the goods in the usual course of trade, and replenishing the stock from time to time as occasion might require.

The first question is one of fact and it has been determined adversely to the appellants by the master, to whom all the issues in the action were referred, and his conclusion has been concurred in by the Circuit judge. Under these circumstances this court, according to the well settled rule, will not interfere unless the conclusion below is without any testimony to sustain it, or is manifestly against the weight of the evidence. It certainly cannot be said that there is no testimony to sus-

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tain the conclusion reached by the master and concurred in by the Circuit judge; and we think it quite clear that such conclusion is not manifestly against the weight of the evidence. On the contrary, it seems to us that there was but little, if any, evidence of any fraudulent intent on the part of the defendant Israel. If his testimony is to be credited, (and it is not impeached; but, on the contrary, is corroborated in a very material part by the testimony of Mr. Melton,) the transaction, so far, at least, as Israel was concerned, was a bona fide effort to secure a debt justly due him, and we are unable to discover any sufficient reason for imputing any fraudulent intent to him. We do not,

however, propose to enter into a discussion of the testimony, as it is sufficient for us to say that the argument here, together with a careful examination of the testimony, has failed to show any error in the conclusion reached by the master and affirmed by the Circuit judge.

The next question, though much discussed elsewhere, with varying results, has never been determined in this State, so far as we are informed. We do not deem it necessary to go over the discussion, for the very full, satisfactory and conclusive argument of the Circuit judge leaves us nothing to add, and we are quite content to rest our conclusion upon the reasoning employed and the authorities adduced by the Circuit judge in his able and exhaustive decree.

It is alleged, however, that the Circuit judge has fallen into two errors of fact: one in stating that the mortgage to the plaintiffs allowed the mortgagor to retain possession of the mortgaged goods after condition broken; the other in stating that the mortgagor made no additions to his stock of goods after the execution of the mortgage to Israel: and these, perhaps, should be noticed.

Even conceding these allegations to be well founded, we are unable to perceive how this could affect the conclusion reached by the Circuit judge. His argument to show that the mortgage in question was not to be adjudged fraudulent, simply because it contained a provision authorizing the mortgagor to continue business, selling and replenishing his stock in the usual course of trade, does not rest upon either of these statements,

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which were \*simply thrown in—one, perhaps, for the purpose of showing that the mortgage of plaintiffs was subject to the same objection as they were urging against the mortgage to Israel, and the other for the purpose of showing that the position which seemed to have been practically abandoned before the master, that the mortgage of Israel must be postponed to the mortgage of plaintiffs, so far as the goods acquired subsequent to the execution of Israel's mortgage were concerned, did not have the requisite basis of fact to rest upon. This, however, was an independent question, and one which could in no way affect the main question, as to whether a mortgage containing a provision like the one in controversy would thereby be rendered fraudulent per se.

We agree with the Circuit judge that the pleadings and evidence did not present this matter in such a way as to make it "a living issue in this case." In order to present the question fairly whether the lien of the mortgage to Israel should be postponed to that of the plaintiffs, so far as any additions to the stock of goods were concerned, it would not be sufficient to show that such additions were made after the date of the mortgage to Israel, but it would be necessary to go fur-

ther, and show that such additional stock was in the store at the time of the execution of the mortgage to the plaintiffs, for their mortgage does not purport to cover any goods except such as were in the store at the time their mortgage was executed. Upon this point the testimony is silent. There was evidence that additions to the stock had been made after the execution of the mortgage to Israel, but when such additions were made, whether before or after the mortgage to the plaintiffs, does not appear; nor does it appear what portion, if any, of such additional stock was in the store at the date of the mortgage to the plaintiffs.

But waiving all this, it seems to us that under the doctrine established by the case of *Parker v. Jacobs*, 14 S. C. 112 [37 Am. Rep. 724], the lien of Israel's mortgage covered as well the subsequently acquired goods as those in the store at the time it was executed. His mortgage was not given to secure future advances, but an existing debt, and the lien took effect so soon as the goods were acquired by the mortgagor, and is not postponed to the lien of the junior mortgage, as might

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be the case if the advances were \*made and the debt arose subsequently to the execution of the second mortgage, under the principles announced in *Walker v. Arthur*, 9 Rich. Eq. 401.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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STATE v. PUTMAN.

(April Term, 1882.)

[1. *Homicide* ⚡S3, 142.]

An indictment against A., B. and C., for murder, charged A. with shooting the deceased, and B. and C. with being present, aiding and abetting, and the jury found all three guilty of manslaughter. *Held*, that B. and C. were charged as principals and not as accessories before the fact, and that there was no ground for arresting the judgment.

[Ed. Note.—Cited in *State v. Burbage*, 51 S. C. 292, 28 S. E. 937.

For other cases, see *Homicide*, Cent. Dig. §§ 109, 252; Dec. Dig. ⚡S3, 142; *Criminal Law*, Cent. Dig. § 103.]

[2. *Homicide* ⚡S3.]

Persons may be present, aiding and abetting in the commission of manslaughter, and so be guilty themselves of this crime.

[Ed. Note.—Cited in *State v. Davis*, 88 S. C. 211, 70 S. E. 417.

For other cases, see *Homicide*, Cent. Dig. § 109; Dec. Dig. ⚡S3.]

Before Aldrich, J., Anderson, March, 1882

The indictment, verdict, sentence, and notice and grounds of appeal, constitute the brief in this case. They are sufficiently stated in the opinion.

Mr. W. C. Benet, for appellant, cited 1 Arch. Cr. P. & P. 806, 61, 62, 65; Whart. Hom. 35, 157; 2 Bail. 75; 1 Hale P. C. 437-9;



40 Eng. L. & Eq. Rep. 357; 3 Gilman 381; 47 Ill. 323; 10 Ohio St. 460; 2 Bish. Cr. Proc. §§ 3, 4; 33 Gratt. 834; 2 Green Crim. Rep. 289.

Mr. Solicitor Orr, contra, cited 2 Brev. 338; 4 Strob. 138, and note; 2 Bail. 31, 69; 4 Rich. 362; Hawk. P. C., ch. 25, § 64; 1 East P. C. 351.

October 21st, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an indictment for murder, in which Isaac Putman was charged with shooting Giles Guess, and the other defendants, Lilly Putman and Silas

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Putman, were present aiding and abetting therein. The indictment then concludes, "and the jurors aforesaid, upon their oaths aforesaid, do say, that the said Isaac Putman, the said Silas Putman and the said Lilly Putman, him, the said Giles Guess, in manner and form, and by the means aforesaid, feloniously, willfully and of their malice aforethought, did kill and murder," &c. The jury found a verdict "guilty of manslaughter, Silas Putman and Lilly Putman recommended to the mercy of the court."

The defendants, Silas Putman and Lilly Putman, moved in arrest of judgment and to set aside the verdict as to them, and failing, then for a new trial upon the following ground: "Because the jury having found a verdict of manslaughter as to Isaac Putman, who did the shooting, sudden heat and passion, the elements of manslaughter, could not be attributed to Lilly and Silas. Therefore the jury erred in finding them guilty in the same degree as Isaac." The judge refused all the motions, and Silas and Lilly appealed to this court upon the ground that his Honor erred in not arresting the judgment.

This was an indictment for murder against three persons, alleging that one of them did the act, and that the other two were present aiding and abetting therein. It did not charge one as principal and the others as accessories before the fact, but all as principals; as it is sometimes expressed, one in the first and the others in the second degree. There can be no doubt that with reference to the crime of murder the indictment was correctly framed and in exact accordance with established forms. *State v. Rabon*, 4 Rich. 264.

In that case three persons were indicted for murder. The indictment alleged that the fatal wound was given by Abram Rabon, the younger, and that Abram Rabon, the elder, and Duke Rabon were present aiding and abetting in the felony. All the defendants were found guilty, and in delivering the judgment of the appeal court, Judge Evans said: "The defendants might have been charged as principals in the first degree. In *Arch. C. P.* 396, it is said that the pleader may charge the principal in the second degree as a principal in the first degree (for proof that he

was present aiding and abetting will, in such case, maintain an indictment charging him

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with having actually committed the \*offense), or, at his option, as being present aiding and abetting. The better mode, however, is to describe the part which each had in the crime, according to the proof of the facts as is the universal practice, and as has been done in this case. When this mode of pleading is adopted the indictment consists of three parts: 1. That Abram Rabon, the younger, feloniously, willfully and of his malice aforethought, gave the mortal wound. 2. That the other persons were feloniously present aiding and abetting and assisting in the commission of the murder; and 3. The conclusion which the law draws from the parts stated, that all of them are guilty of the murder." The indictment in this case was drawn in accordance with the form here recommended, and if the defendants had all been found guilty of murder, there could have been no question about the sufficiency of the indictment to support the finding.

But conceding that the indictment is according to the most approved form in reference to the crime of murder charged, it is suggested that, the jury having found that no murder was committed—only manslaughter—the condition of things is entirely changed, and the indictment must be read as if it charged only the crime of manslaughter, and that with reference to that crime, which is in its nature sudden and unpremeditated, there cannot be a principal in the second degree, and therefore the allegation in the indictment as to the parties aiding and abetting, should be ignored or stricken out as inappropriate, and the judgment arrested as to Silas and Lilly. This is plausible, but it seems to rest on the view that the charge of being present, aiding and abetting, is equivalent to that of being accessory before the fact.

It is conceded that there can be no accessories before the fact in manslaughter, but the authorities do not sustain the view that being present, aiding and abetting, is identical with an accessory before the fact, which consists in counseling, advising or procuring the act to be done, and may be a great while before. The charge of being present, aiding and abetting, is but one of the forms of charging the parties as principals. "The distinction of principal in the first and second degree was a mere distinction in fact, and is no longer recognized." *State v. Fley* and

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*Rochelle*, \*2 Brev. 338 [4 Am. Dec. 583]; *State v. Posey*, 4 Strob. 138, and in a note, *State v. Green* [4 Strob. 128]. In the case of *Fley* and *Rochelle*, Judge Brevard said: "All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the

crime is perpetrated, not as the chief criminal or more guilty than his associates. It sometimes happens that he is comparatively less guilty than those who stimulate or persuade him to be their instrument. The distinction between principals in the first and second degree has been long since exploded; it is now considered a distinction without a difference."

Upon an indictment for murder the jury may find a verdict for manslaughter. Indeed, this is so well established that an indictment for manslaughter, as such, is rarely, if ever, given out. This being the universal practice, it would seem strange, if the view suggested is sound, that the question made here has never arisen before. The court has not been referred to any case upon the point, and in the short search which the press of business has enabled us to make we have not been able to find one. If a verdict for manslaughter can be rendered upon an indictment for murder against the perpetrator of the deed, why may not the same verdict be rendered against those who are charged as principals in aiding and abetting the crime. This must be allowable, unless the character of the crime of manslaughter is such as necessarily to exclude the possibility of participation or co-operation on the part of others present at the act.

It is true that the characteristic element of the crime of manslaughter is that, although a homicide, it is committed in sudden heat and passion and without malice aforethought. It is defined to be "the unlawful killing of a human being upon sudden heat and passion arising from reasonable provocation." But, as we understand it, this does not necessarily limit the offense to the persons who actually did the deed when several were present and engaged in a common quarrel. The provocation given may extend to others as well as to the principal actor. Although the crime is said to be "sudden and unpremeditated," it need not be on the instant the provocation is received. In its regard for the weakness of human nature the

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law allows a certain time—reasonable time—for the transport of passion to continue before "cooling," and during that time it does not seem to us impossible for others present, affected by the same provocation and passion, to stimulate and incite the principal actor to the perpetration of the deed.

The particular facts of this case are not before us. None of the circumstances of the killing are in the brief. All we know is from the allegations of the indictment that Isaac was charged with doing the act, that Lilly and Silas aided and abetted therein, and that all were found guilty of manslaughter. The jury found that Silas and Lilly co-operated with Isaac in committing the homicide, and

we cannot say that such finding was so impossible or unauthorized as to justify us in arresting the judgment as to them.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 179

CARTER v. DU PRE.

(April Term, 1882.)

[1. *Landlord and Tenant* ⇨243.]

A contract for rent of a farm carries with it, under the statute (16 Stat. 411), a lien on the tenant's crop for the payment of the rent, without an express agreement that there shall be a lien.

[Ed. Note.—Cited in *Sullivan v. Ellison*, 20 S. C. 484.]

For other cases, see *Landlord and Tenant*, Cent. Dig. § 983; Dec. Dig. ⇨243.]

[2. *Landlord and Tenant* ⇨254.]

A wife, holding a preferred lien for rent on the crops made by her husband on lands leased by him from her, is not estopped from asserting her lien, as against a second lien for supplies, by reason of her signing a first lien for supplies (inferior to her rent lien) given by her husband, or because of payments made by him on such first lien for supplies, and to other persons.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1038; Dec. Dig. ⇨254.]

[3. *Trover and Conversion* ⇨49.]

Cotton delivered by this tenant to the landlord for rent having been seized under legal process at the instance of the holders of the latest lien, the landlord is entitled to recover from the sheriff the highest value of the cotton at any time between the seizure and trial, with interest from the date of seizure.

[Ed. Note.—Cited in *Gregg v. Bank of Columbia*, 72 S. C. 464, 52 S. E. 195, 110 Am. St. Rep. 633; *Davis v. Reynolds*, 91 S. C. 442, 74 S. E. 827.]

For other cases, see *Trover and Conversion*, Cent. Dig. § 264; Dec. Dig. ⇨49.]

Before Kershaw, J., Abbeville, February, 1881.

Action by Amanda B. Carter against J. F. C. DuPre, commenced December 29th, 1879.

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The opinion fully states the case, \*but it may properly be added that the cotton made on the leased premises, according to the testimony, was eight bales, exclusive of the seed cotton seized by the sheriff; and that the brief does not show that the presiding judge was ever requested to charge the propositions stated in the second, third, fourth and fifth exceptions.

Messrs. Burt & Graydon, for appellant.

Messrs. Noble & Noble, contra.

October 21st, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was brought by Amanda B. Carter against the defendant, sheriff of Abbeville county, for seizing 2,320 pounds of cotton in the seed, claimed to be her property. It seems that the plaintiff is the wife of Samuel E. Carter



and the mother of Charles P. Carter, who lived in the house with his parents; that she claimed title to the land on which the cotton was made, and that she had rented it verbally to her husband, Samuel E. Carter, for the year 1879, for two bales of cotton.

On February 9th, 1879, Samuel E. Carter and his wife, the plaintiff, executed to John Knox an agricultural lien for guanos, provisions and other supplies to the amount of \$150, and at the foot of the paper Mrs. Carter stipulated as follows: "I hereby agree that John Knox shall collect the above lien before I demand my rent." On March 6th, 1879, Samuel E. Carter and Charles P. Carter executed to George W. Williams & Co. an agricultural lien for \$123.50, to be paid in cotton made on the place, for fertilizers. Under this junior lien George W. Williams & Co. issued an agricultural warrant, and had the cotton in question seized by the sheriff, and the plaintiff, alleging that the cotton had been delivered to her in payment of her lien for rent as landlord, brought this action for the cotton.

The real defendants are George W. Williams & Co., though the sheriff answered and put in a general denial. They denied that the plaintiff had rented the lands to her husband, or that she had any title to the cotton; but if so, they insisted that she was estopped from claiming it, for the reason that she had

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allowed \*Knox to be paid first out of the cotton made on the place, and having done so it was inequitable in her to claim the little balance for her rent to the exclusion of their lien. The case came on to be heard before Judge Kershaw, who charged the jury: "That there must be a contract of renting, either written or verbal, between the landlord and tenant, before the landlord can have a lien for rent; that the plaintiff was not estopped from claiming the cotton in suit as rent by signing the lien to John Knox; that if Samuel E. Carter had delivered the cotton in suit to the plaintiff in payment of rent due, the jury must find a verdict for her, and that if so, the measure of damages was the highest value of the cotton sold at any time between the seizure and the trial, with interest from the date of seizure."

The jury found, for the plaintiff, the sum of \$102.05, and the defendants appeal to this court upon the following grounds:

1. "Because the presiding judge erred in refusing to charge that there must be a contract, either written or verbal, between the landlord and tenant, for a lien upon the crop of the tenant, before the landlord can have a lien for rent such as will displace the rights of other lien creditors.

2. "Because the presiding judge erred in refusing to charge that the plaintiff was estopped from claiming the cotton in suit as rent by signing the lien of her husband, her alleged tenant, to John Knox for supplies.

3. "Because the judge erred in refusing to charge that the plaintiff was estopped from claiming the cotton in suit as rent by paying out of the crop the account of her husband and son with said John Knox, although in said accounts there were charges for whiskey and tobacco and other articles not agricultural supplies, and although her son had even given said John Knox a lien for supplies.

4. "Because the judge erred in refusing to charge that the plaintiff was estopped, or might be estopped, from claiming the cotton in suit as rent by allowing her husband and her son to sell cotton on the place, receive the money and use it, if they found as matter of fact that she allowed them to do so.

5. "Because the judge erred in refusing to charge that the plaintiff was estopped from

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claiming the cotton in suit as rent \*by paying out of the crop the account of her husband and son with the said John Knox, contracted after the crop had been made and 'laid by,' and some of it after the crop had been gathered.

6. "Because the judge erred in charging the jury that if Samuel E. Carter had delivered to the plaintiff the cotton in suit, they must find a verdict for her, although, according to her own testimony, half the cotton was in the field at the time the levy was made, and although the defendant had made a levy under a valid lien, which was not disputed.

7. "Because the judge erred in charging that the measure of damages was the highest value of the cotton sold at any time between the seizure and the trial, although the defendant had in good faith paid for the picking and ginning, and expended money in good faith for the bagging and ties which went to make up the proceeds of sale, and although the plaintiff consented to the ginning and selling."

Much evidence upon questions of fact is printed in the brief, but this being a law case tried by a jury, this court has no right to consider the proper force and effect of that evidence. We are limited to the inquiry whether there was error of law in the charge of the judge.

As to the first exception there seems to be some misapprehension. The judge did charge "that there must be a contract of renting, either written or verbal, between the landlord and tenant before the landlord can have a lien for rent." But if it is meant that the judge should have charged that there must be an express contract also for a lien to secure it, we agree with the judge that no such contract was necessary. As between landlord and tenant the contract for rent once established, *proprio vigore*, gives the lien by force of the statute, which declares, "that each landlord leasing lands for agricultural purposes, shall have a prior and preferred lien for rent to the extent of one-third of all crops raised on his lands and enforceable in

the same manner as liens for advances, which said lien shall be valid without recording or filing. 16 Stat. 411; *Kennedy v. Reames*, 15 S. C. 550.

Exceptions 2, 3, 4 and 5, upon the subject of estoppel, will be considered together. It

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is claimed that as against George W. \*Williams & Co., the plaintiff should be estopped from claiming this cotton as her rent, for the reason that she allowed Knox to be first paid, and in other ways allowed the crops subject to the liens to be disposed of and reduced to the remnant in controversy, which is not enough for both. We cannot say that the judge erred in refusing so to charge. This is not a case for the application of the principle of estoppel. As we understand it, the doctrine of estoppel by conduct "is where one party has been induced by the conduct of the other to do or forbear doing something which he would not or would have done but for such conduct of the other party. The conduct which is claimed to operate as an estoppel must have induced action the disavowal of which would be inequitable." *Bull v. Rowe*, 13 S. C. 370.

Let us apply this rule. What action of George W. Williams & Co. was induced by the conduct of Mrs. Carter in waiving her claim for rent so far as Knox was concerned? She did not sign the lien of the defendants, and had no relation to them which placed her under obligations to husband the crop for their benefit. She had a lien for rent, which she had a right to waive in favor of Knox, and not in favor of George W. Williams & Co. Besides, as the lien of the defendants was junior to the other liens, and, as we suppose, was last registered, it may be that they had notice of the agreement of Mrs. Carter to give way to Knox; but, however that may be, both the liens of the plaintiff and Knox were superior to that of the defendants, and we cannot see that they were induced to take any step by the conduct of the plaintiff, which is complained of.

The jury were instructed that if the cotton had been delivered by Samuel E. Carter to the plaintiff in payment of rent due her, then she was entitled to recover; but he left it to the jury to say whether the cotton had been so delivered. In the view that it had been so delivered to her, it was a trespass to take it even under legal process, and she was not only entitled to recover, but to recover such damages as were recoverable in an action of trespass or trover. "In trover, the jury is not limited to find the mere value of the property at the time of conversion, but may find, as damages, the value at a subsequent time at their discretion." 3 Steph. N. P. 2711.

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The jury may give the \*highest value up to the time of trial. *Kid v. Mitchell*, 1 N. & McC. 334 [9 Am. Dec. 702]. In *Burney v.*

*Pledger*, 3 Rich. 191, Judge O'Neill says: "That the plaintiff is entitled to recover for the value of the property, at the time of the trial, with interest, or for the value of the property at the time of the trial, with hire from the conversion, as may be most beneficial." And in *Rogers v. Randall*, 2 Speers, 38, it was held that the jury have a discretion between the highest and lowest estimates. *Harley v. Platts*, 6 Rich. 318.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 184

HOWARD v. HENDERSON.

(April Term, 1882.)

[1. *Trusts* ⇨131.]

Under a deed executed in 1873, whereby A. conveyed his homestead to B., in trust for A. for life, with remainder to C. (a married woman) for life, with contingent remainders over, the legal estate was vested in A. during his lifetime, by operation of the statute of uses.

[Ed. Note.—Cited in *Breeden v. Moore*, 82 S. C. 538, 64 S. E. 604.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[2. *Trusts* ⇨131.]

It is only where the estate is intended for the sole use and benefit of a married woman, free from the debts and control of her husband, that the statute does not execute the use by reason of there being a trust declared for a married woman; but there can be no such intention in this deed as it was executed subsequent to the constitution of 1868, which secures a married woman's property to her own exclusive use.

[Ed. Note.—Cited in *Breeden v. Moore*, 82 S. C. 539, 64 S. E. 604.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[3. *Trusts* ⇨131.]

The legal title remains in the trustee, in order to protect contingent remainders, only where the deed shows that such was the purpose of interposing a trustee.

[Ed. Note.—Cited in *Ayer v. Ritter*, 29 S. C. 137, 7 S. E. 53; *Snelling v. Lamar*, 32 S. C. 76, 10 S. E. 825, 17 Am. St. Rep. 835; *Robinson v. Ostendorff*, 38 S. C. 71, 16 S. E. 371; *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82; *Uzzell v. Horn*, 71 S. C. 436, 51 S. E. 253; *Pope v. Patterson*, 78 S. C. 343, 58 S. E. 945; *Steele v. Smith*, 84 S. C. 472, 66 S. E. 200.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[4. *Trusts* ⇨131.]

Where, in the same instrument, estates are conveyed to a trustee in trust for different parties, the statute may execute the use in one case and not in the other.

[Ed. Note.—Cited in *Young v. McNeill*, 78 S. C. 150, 151, 59 S. E. 986.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[This case is also cited in *Early v. Early*, 75 S. C. 18, 54 S. E. 827, as to trusts under assignment.]

Before Hudson, J., Aiken, March, 1882.

This was an action by William S. Howard, Sr., against J. R. Henderson and J. F. Henderson, commenced in September, 1881, to



recover the rents of the tract of land described in the deed, which is stated in the opinion of this court. J. R. Henderson died pending action, and his administrator an-

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swered, \*raising no issue of title. J. F. Henderson claimed to be the lessee of W. S. Howard, Jr., and, therefore, that he owed no rent to the plaintiff. The main issue in the case was whether the legal title was in W. S. Howard, Sr., or in W. S. Howard, Jr. Upon that point, his Honor charged the jury as follows:

The plaintiff contends that it is a deed of such purport as to confer upon the cestui que use, W. S. Howard, Sr., a legal estate for life, and not an equitable estate, i. e., that the use is executed by the statute in such case made and provided. The defendant, Henderson, on the contrary, insists that the legal estate vested thereby in the trustee, W. S. Howard, Jr., still abides in him, and for the purposes of the trusts or uses must continue to so abide in him. Therefore he insists that W. S. Howard, Jr., rightfully leased the premises to him for the year 1881, and that to him as his landlord he is alone responsible for rents.

I concur in the construction of the deed contended for by the defendant, J. F. Henderson. The consideration of the deed is chiefly the love and affection of the grantor for the wife and children of his son, W. S. Howard, Jr., and their welfare is the leading object of the deed. The courts have generally held that the statute does not execute a use for the benefit of a married woman, nor in a case where the preservation of contingent remainders is necessary, nor where future duties are devolved upon the trustees. Nearly all these features appear upon the face of this deed, and to execute the use so as to confer a legal estate on W. S. Howard, Sr., for life would evidently be dangerous to, if not destructive of, the estates in remainder, the leading one of which is for a married woman for life.

I hold, therefore, that the legal estate in this land is, under this deed, in the trustee, and in the beneficiaries only an equitable estate, until in the contingent remaindermen the entire estate in fee with the rights of possession shall fully vest.

It is the duty, however, of the trustee to suffer the life-tenant to occupy, use and enjoy the premises during his life, so long as the same can be done consistently with the welfare of the life-tenant, and the preservation of the property for the remaindermen, and this use and enjoyment would be secured to the life-tenant by a court of equity, if

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necessary. Furthermore, \*should the life-tenant remove from the premises or abandon the same, and the trustee, from these or any other good causes, sees fit to lease the prem-

ises, he would be bound to account to the life-tenant for full, fair and reasonable rents and profits; and to enforce such accounting, the court of equity is always open to the cestui que use. In the event, however, that the trustee should, for good cause appearing to him, lease the premises to any one whilst the same are not occupied by the cestui que use, then the cestui que use can bring no action at law against such a tenant of the trustee for rent nor for use and occupation, because there is no contract betwixt them, either express or implied. The trustee alone has the right of action upon the lease, and the remedy of the cestui que trust is against the trustee, and in an equitable action. To such an action, he might, if needs be, make the tenant a party.

The exceptions, so far as they relate to matters considered by this court, raise, in several forms, the one question: Whether the legal title under this deed was in W. S. Howard, Sr., or in W. S. Howard, Jr.

Messrs. Croft & Dunlap, P. A. Emanuel, for appellant.

Messrs. Henderson Bros., contra, cited 1 Ves. 485; 2 S. C. 133; 4 McC. 456; 1 Hill 414; 10 S. C. 386; 16 Id. 545; 3 Id. 100; 1 Speers 366, 591; 7 Rich. 81.

October 25th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought by the plaintiff, appellant, to recover the rent for the year 1881 of a certain tract of land in Aiken county, of which the appellant claimed to be the legal owner. The defendants, respondents, denied the title of the appellant, and alleged that W. S. Howard, Jr., as trustee of appellant, was the legal owner of the land, and that the rent was due to him instead of to the appellant. Although several other questions were raised in the progress of the case, yet the question of title was the main question, and the solution of this question depended upon

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the construction of a deed, introduced in evidence by the defendants, of which the following is a copy:

"This indenture, made the 28th day of October, in the year of our Lord eighteen hundred and seventy-three, between William S. Howard, Sr., of the county of Aiken, and State of South Carolina, of the first part, and William S. Howard, Jr., of the county and State aforesaid, as trustee, as hereinafter set forth, of the second part, witnesseth, that the said party of the first part, for and in consideration of the love and affection he has for Mrs. Georgia V. Howard, wife of the said Wm. S. Howard, Jr., and her children, as well as in consideration of the sum of ten dollars to him in hand well and truly paid by the said party of the sec-

and part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, conveyed and confirmed, and by these presents does grant, bargain, sell, release, convey and confirm unto the said party of the second part, his successors and assigns, all that lot of land lying in said Aiken county, bounded \* \* \* containing two hundred and fifty acres, more or less, and being the homestead or residence of W. S. Howard, Sr., in trust, nevertheless, for the use, benefit and behoof of the said William S. Howard, Sr., during the term of his natural life, with remainder at his death to the said Georgia V. Howard, during the term of her natural life, and upon her death to such child or children of the said William S. Howard, Jr., and the said Georgia V. Howard, as may be living. Together with all and singular, the rights, easements, ways, members and appurtenances to the said lot of land being, belonging, or in any wise appertaining, and the remainders, reversions, rents, issues and profits thereof, and every part thereof. To have and to hold the said lot of land, and all and singular the premises and appurtenances thereunto belonging as aforesaid, and every part thereof unto the party of the second part, his successor in trust, and assigns forever, for the uses and upon the trusts hereinbefore mentioned," concluding with the usual warranty.

The defendants relied upon this deed as conveying the legal title to the land in ques-

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tion to the trustee, W. S. Howard, Jr., \*and, inasmuch as the defendant, J. F. Henderson, had rented the said land for the year 1881 from W. S. Howard, Jr., as trustee, by written lease, which was introduced in evidence, they claimed that the action of the plaintiff could not be sustained. On the other hand, the plaintiff also relied upon this deed, contending that the use provided for in the deed had been executed by the statute, and a legal estate for life had thereby been conferred upon W. S. Howard, Sr., the plaintiff, and that he was, therefore, entitled to his action. The presiding judge concurred in the construction contended for by the defendants, and charged the jury to that effect. Under this charge the jury found for the defendants.

The leading question in the case, as has already been stated, arises upon the construction of the deed of appellant, W. S. Howard, Sr., to his son, W. S. Howard, Jr., above referred to. We think, upon the authority of the cases hereinafter cited, that the judge was in error in his construction of this deed. In our opinion, the statute 27 Henry VIII., executed the use and transmitted a legal estate for life to the appellant, W. S. Howard, Sr., in the land in question. *McNish v. Guerard*, 4 Strob. Eq. 66; *Ramsay v. Marsh*,

2 McC. 252 [13 Am. Dec. 717]; *Bouknight v. Epting*, 11 S. C. 76.

In *McNish v. Guerard*, supra, the conveyance was to John McNish "to have and to hold in trust for the aforesaid children [naming them], and such other children as may be born of the body of Ann McNish, and to be divided among them equally, \* \* \* and until such division, to be occupied and used entirely and especially for the maintenance and support of the aforesaid children." The court, after a careful review of the authorities and the principles applicable to such cases (Chancellor Johnston delivering the opinion), determined that the legal estate in the land, by virtue of the statute of uses, vested, not in John McNish, the trustee, but in the existing children named in the deed, subject to open and admit such other children as Mrs. McNish might have.

In the case of *Ramsay v. Marsh*, supra, Col. Laurens by his will devised to Dr. Ramsay and wife all his lands at Long Cane, &c., to hold the same to them and their heirs in

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trust to and for \*the use and behalf of his granddaughter, Francis E. Laurens, during her life, and in case she should have a child or children, or grandchild or children, living at her death, then he devised the same to such child and to their heirs forever. The court held that the legal estate vested by the statute of uses in the cestui que use.

In the case of *Bouknight v. Epting*, supra, the terms of the deed were, \* \* \* "In consideration of the sum of \$800 to me paid by John Chapman, \* \* \* have granted, bargained, sold and released unto the said John Chapman, for his daughter Elizabeth, wife of George Epting, a certain tract of land, containing, &c., to have and to hold all and singular the premises before mentioned unto the said Elizabeth Epting, wife of George Epting, daughter of the above named John Chapman, her heirs and assigns forever." The court held (Mr. Justice McIver delivering the opinion), that the statute executed the use and that the legal title passed to Mrs. Epting.

The general rule is, as extracted from these and numerous other cases cited and discussed therein, in the language of Mr. Justice McIver: "That where land is conveyed to one for the use of another, or in trust for the use of another, and the person to whom the conveyance is made (the trustee), has no duties to perform, or where there is nothing for him to do requiring that the legal estate shall remain in him in order to enable him to do what is required, there the statute executes the use and the legal estate passes to the person for whose use the grant or conveyance was made." *Bouknight v. Epting*, supra, 75. Or, as was said in *Jenney v. Laurens*, 1 Speers 356, "a use will be executed unless the purpose of creating it would be



defeated by the execution, as in cases of trusts for married women, or to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate or the manner of applying the proceeds."

The usual test applied is the latter branch of the above rule, to wit, whether the trustee has been invested with discretion to be exercised in relation to the estate, or the manner of applying the proceeds. If he is directed to receive and pay over rents and proceeds to the cestui que trust, then the legal

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estate remains \*with him so as to enable him to perform this duty. If, however, under the deed, the cestui que trust can act for himself in this matter, there being no necessity for a trustee, the use is at once executed, such being presumed to be the intention of the parties.

Now if the deed before the court is tested by this portion of the rule, there can be no reasonable doubt as to its construction. No direction whatever is given to the trustee as to the rents and profits of the land. He is not required either expressly or impliedly to collect and pay them over. He is not charged with any duty whatever in reference thereto. In fact, the implication derived from the circumstance that the land conveyed was the homestead and residence of the grantor, W. S. Howard, Sr., is that he was still to remain in possession during his life, enjoying the rents and profits as formerly.

The Circuit judge, however, bases his ruling upon the idea that the trust created were in part at least for a married woman, Mrs. Georgia V. Howard, and also that contingent remainders were created for such of her children as might survive her, for the preservation of which a trustee, invested with the legal title, was necessary. In order to prevent the statute from executing the use in such cases, it must appear, first, as to a married woman, that the estate conveyed was a separate estate intended for her sole use and benefit free from the debts and all control of her husband, and, secondly, as to preservation of contingent remainders, the terms of the deed must show that such was the purpose of interposing a trustee.

In the case of Bouknight v. Epting, supra, the deed was for the benefit of a married woman, and yet the court held the trust executed, there being nothing in the terms of the deed indicating a purpose to create a separate estate in Mrs. Epting. This was distinctly held necessary in that case to prevent the operation of the statute. Mr. Justice McIver, in discussing that question, says with great force: "It cannot be claimed that it was necessary in order to preserve the separate estate of the wife, for, as we shall presently see, no such estate is provided for in the deed, so that there is nothing in the fact that the conveyance is nominally made to a

third person for the use of the wife." Chan-

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cellor \*Dunkin, in *Wilson v. Bailer*, 3 Strob. Eq. 260 [51 Am. Dec. 678], in considering the same question, said: "The absolute terms in which the property is given to the wife, or the amplitude of her enjoyment, has never been deemed sufficient to create a separate interest in derogation of the common law right." He proceeds, further, to say: "The implication is, however, necessary when the estate is declared to be for the sole and separate use of the wife, although the words independently of her husband, or without the control of her husband, are not superadded."

Now there are no words in the deed under consideration which could possibly be construed as indicating a purpose to create a separate estate in Mrs. Howard. A life estate is first conveyed for the "use, benefit and behoof" of William S. Howard, Sr., with remainder at his death to the said Mrs. Howard, during her natural life, not even for the sole use and benefit of Mrs. Howard, but simply with remainder to her. These terms fall far short of creating a separate estate, and, under the ruling of *Bouknight v. Epting*, would have presented no obstacle to the operation of the statute of uses, even before the adoption of the constitution of 1868, with the provision therein in reference to the estates of married women.

The deed under consideration, however, was made in 1873, long after the adoption of the constitution of 1868. Section 8, Article XIV., of that instrument makes all property acquired by a married woman, after her marriage, a separate property. So that this deed could not have been intended primarily to create an estate of that sort. The constitution had this effect without any express intention to that end in the terms of the deed itself. The deed then must have been used simply as a mode of conveyance by which the legal title was vested in Mrs. Howard through the operation of the statute, protected and shielded to her by the constitution, although possessed of the legal title.

But the question at last, in this case, is not as to the character of the estate of Mrs. Howard, but that of W. S. Howard, Sr., the plaintiff. Where estates are conveyed to different parties in the same instrument, the statute may execute one and not the other. In the case of *Williman v. Holmes*, 4 Rich.

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Eq. 476, an \*estate was granted in trust "for the sole use, behoof and benefit" of a married woman, Mrs. Davidson, for and during the term of her natural life, with remainder after her death. The court held that this was a separate estate for life in Mrs. Davidson, which the statute on that account did not execute; but that the remainder was executed, and although the fee was conveyed in terms to the trustees, the apt words to that end, to wit, to "their heirs and assigns for-

ever" being used, yet the estate in the trustees was cut down to an estate per autre vie under the principle that the law will not permit the trustees to take a larger legal estate than is necessary to the performance of the executory trusts conferred upon them, it being an established rule, as was said by the court, "that trustees shall hold legal estates commensurate only with the necessities of the trusts. If the estate given to them is deficient, it will be enlarged by implication; if in excess, it will be cut down by the operation of the statute of uses, and such excess will pass to those in remainder."

So that whatever may be the proper construction of this deed in reference to the application of the statute of uses on the estates of Mrs. Howard and the children in remainder, there is no reason why it should not execute the estate of W. S. Howard, Sr., the plaintiff, vesting in him a legal estate for life, the fee possibly remaining in the trustee for the benefit of the married woman, and for the preservation of the contingent remainders to the children.

It does not follow, however, that because the remainders to the children are contingent remainders, the statute of uses could not apply. In the case of *Faber v. Police*, 10 S. C. 385, this very question was discussed, and the conclusion reached, sustained by a well-considered opinion and abundant authority, that notwithstanding the contingency of the remainders, yet the estate was executed in the life-tenant. That case was very similar to this, except that there was no married woman involved. It was a devise in trust for the use of A. during his life with contingent remainders over. The court held that under the statute of uses the legal estate vested in A.; that although the remainders provided for were evidently contingent, yet there being nothing in the terms of the will showing that

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\*the trust created to preserve these contingent remainders, such a trust could not be implied. In answer to the argument, that such an implication should arise on account of the contingency of the remainders, Mr. Justice McIver, who delivered the opinion of the court, said: "We know of no authority for such a position, and none have been cited. We are at a loss to conceive by what right a court could undertake to add to the words of a will, by which additional trusts to those which the testator has seen fit to declare, should be raised."

In our opinion, the use to W. S. Howard, Sr., was executed by the statute, through the operation of which he became the legal owner of the land in question for life. It will not be necessary to discuss the other questions raised in the appeal, as they all, more or less, hinge upon the matter herein above.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded.

18 S. C. 193

GUNTER v. GUNTER.

(April Term, 1882.)

[1. *Appeal and Error* ⇨1008.]

A finding of fact by the Probate judge, concurred in by the Circuit judge, affirmed.

[Ed. Note.—Cited in *In re Solomons' Estate*, 74 S. C. 191, 54 S. E. 207.

For other cases, see *Appeal and Error*, Cent. Dig. § 3960; Dec. Dig. ⇨1008.]

[2. *Executors and Administrators* ⇨76.]

Where discretion given to executors under a will is unlimited, it cannot be controlled by the courts unless there be a manifest and flagrant refusal to exercise it, and with the view to defeat the intent of the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 323, 336-338; Dec. Dig. ⇨76.]

[3. *Wills* ⇨618.]

A testator directed his executors to convert the residue of his estate into money "and place it in bank, or safe hands, as they may think best, the interest to be applied for the education and maintenance of my two children. \* \* \* I repeat \* \* \* the remainder of property \* \* \* to be converted into money by my executors and put in bank or safe hands for the use of my two children as they may think best." *Heid*, that the discretion given to the executors related to the investments, but that it was their positive duty to apply the interest of the invested fund to the wants of the children, which duty the court could enforce on the application of the children.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1436; Dec. Dig. ⇨618.]

[4. *Wills* ⇨450.]

In construing a will, all the parts must be considered, and effect given to each in harmony, if possible.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 966; Dec. Dig. ⇨450.]

Before Hudson, J., Aiken, February, 1882.

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\*This was an action in the Court of Probate to require Uriel X. Gunter, sole qualified executor of the will of Daniel B. Gunter, to carry out its provisions. The will was as follows:

In the name of God, amen! I, Daniel B. Gunter, being of sound mind, and knowing the uncertainty of life, and the certainty of death, do make, declare and publish, this, my last will and testament, that as soon after my death as is convenient, that my funeral and burial expenses be paid. I then give and bequeathe unto my beloved wife, Amanda C. Gunter, and my two children, use of my home place on which I now live, to cultivate only, also all my farming tools, gears, hoes, axes, wagons, carts, stock of provisions now made and on hand, my mule, oxens, cows, hogs, household and kitchen, furniture, and one hundred dollars in money.

The above mentioned articles and property, I give to my wife as before mentioned on the following conditions, that is: she is to have it so long as she remains a widow and does not marry; but if she marries any one then she forfeits her claim to all I give her. I direct that my executors on her mar-



rying, sell the property given her, and place it to the benefit of my two children above mentioned. The above property to be appraised by three persons, so that my executors may know the amount given her. The balance of my property, excluding my monies, notes, accounts on books, and otherwise, cotton, goods, and all kinds of merchandise, in store, and all that I may leave, from any source including my mothers and brothers estates, and all lands excepting my home place above mentioned, I direct my executors to convert into money, and place in bank or safe hands, as they may think best, the interests to be applied for the education and maintenance of my two children above named, and if my executors think or is satisfied that the above interest and what I have given my wife is not sufficient for education, clothing, and other needs, they are to draw on the principal sufficient for the above requirements. My two children to share and share alike, and in case one should die, before becoming of age, or has any lawful children, then the other to heir the deceased one's share, and in case of the death of both, before becoming of age, or having any lawful children, in that case I direct that all my property, both personal and real, shall go to my two brothers Ucal and U. X. Gunter, and their heirs to share and share alike. Now that this my last will and testament, may be understood, I again repeat, that I have given to my wife, household and kitchen furniture, plantation tools, mule, oxen, cows, hogs, carts, provisions, and one hundred dollars in money, as above mentioned,

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during her \*widowhood, but if she marries she forfeits her claim to it, and to be disposed as I have directed. The remainder of property both real and personal including all monies, notes, accounts, cotton on hand, goods and merchandise in store, or on hand, and all that may come to me from heirship, rents or any wise, to be converted into money, by my executors, and put in bank or safe hands, for the use of my two children as they may think best, and in case of the death of my two children, as above mentioned, then my two brothers and their heirs to have all my property, both personal and real.

And I do hereby appoint my beloved brother Uriel X. Gunter and my relatives and friends, Seaborn Jones, John E. Jones and W. A. Lybrand, executors to this my last Will and testament.

Given under my hand and seal this 22d day of January, in the year of our Lord, one thousand eight hundred and seventy-three.

(Signed,) Daniel B. Gunter. [L. S.]

Signed in the presence of U. X. Gunter, W. B. Hutto, Jacob Hydrick.

The case is otherwise fully stated in the opinion of this court.

Messrs. Croft & Dunlap, for appellant.  
Messrs. Henderson Bros., contra.

October 25th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Daniel B. Gunter, late of Aiken county, died in 1873, leaving a will. [Here follows a statement of the will.] At the death of the testator, his two children were infants of tender years, being, respectively, at the time of the filing of the petition below, nine and twelve years of age. Shortly after the death of the testator, his widow, Mrs. Gunter, seems to have been placed in possession of the home place, and the personal property bequeathed to her, the executors offering to her, from time to time, some little assistance in money for the maintenance of the children.

Things remained in this condition until 1881, some eight years after the death of the

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testator, when Mrs. Gunter, in her \*own right, and as guardian ad litem of her two children, filed a petition in the Probate Court for Aiken county, complaining that the executor had not complied with the will in several particulars, and especially that he had failed to contribute to the education and support of the children out of the interest of the funds, directed to be put at interest for their benefit, and praying that the said executor might be required to account, and that she should have such relief as justice and equity demanded. The case was heard by the Probate judge, and after full investigation it was developed that the only matters of real contest were, whether the executor should be required to pay to Mrs. Gunter any sum for deficiency in the support, maintenance and education of the children for the eight years preceding the petition, and whether anything should be allowed in the future until the further order of the court, and if so, how much, in each case, per annum.

The Probate judge, upon the testimony, decreed that the executor should pay to the petitioner the sum of \$180 for the support of the children for the six years next after the death of the testator, \$140 for their support and education for the two succeeding years, and that in the future he should pay, annually, the sum of \$75, until the further order of the court, making the amount due the petitioner for past support and education, \$320, which, added to \$295.80, about which there was no dispute, amounted to \$615.80. From this decree the defendant appealed to the Circuit Court, alleging error in the findings of the Probate judge as to the amounts allowed the petitioner, and claiming as matter of law that it was in the discretion of the executor to make such allowances as he deemed to the interest of the children, having due regard to their estate. The Circuit Court affirmed the judgment of the Probate Court in all respects, and dismissed the appeal, with costs. From this judgment of the Circuit Court, the case now comes before this court on appeal.

Two questions are presented for our consideration, first, whether the amount decreed to the petitioner for the past and future support and education of the children, is more than the evidence justified; and, second, whether the discretion of the executor, as to this matter, was subject to the control of the

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\*court. The first being a question of fact, found by the Probate judge in the first instance and concurred in by the Circuit judge, this court will not disturb it under the decisions, unless there is manifest error in the finding, or the preponderance of testimony is against it. In looking through the evidence we see no such error; on the contrary, we think the evidence was quite sufficient to support the decree in this respect.

As to the second question, if it appeared from a proper construction of the will that the testator intended to leave the application of the interest on the fund which he directed to be invested for the benefit of his two children, entirely to the discretion of the executor, then the courts would not undertake to control that discretion, unless there was a manifest and flagrant refusal to exercise it, and with the view to defeat the intent and purpose of the will. A testator who, during his lifetime, has accumulated property, has the legal right to dispose of it as he sees proper, and, when he has done so, it would be an unwarranted and arbitrary exercise of power for any court to undertake to change, alter or modify in the least, such disposition. The law authorizes the citizens to make wills, but not the courts.

The question, then, in this case is: Did the testator leave the application of the interest on the fund mentioned solely to the discretion of the executor, and are the rights of the children as to that application dependent upon his will alone? On reading the will it cannot escape attention, that the children of the testator were especially and almost exclusively the objects of his bounty. He seems to have been so solicitous about their welfare as almost to have forgotten his wife, their mother. He gave his wife nothing, except the household furniture, some little stock and \$100 in money, and the right to cultivate for herself and the children the home place—all this to be forfeited to the children in the event of her second marriage. He then directs the balance of his property, both real and personal, to be converted into money, the interest to be applied to the education and maintenance of his two children, with the power on the part of the executors, if they thought best, or became satisfied that this was not enough, to encroach upon the capital.

This direction is in the second clause of

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the will. Under it, \*if not subsequently modified, the children would have a right to appeal to the courts in case the executor neglected or declined to furnish aid to their annual support and education, and the matter would not depend upon the mere will of the executor, but upon the evidence as to the needs and wants of the children. The interest on the invested fund was to be theirs, as their wants and necessities might demand, and upon a proper showing that such necessity existed in each case, the courts could not hesitate to afford relief, because such would evidently be the intent of the testator, and the intent in all cases governs.

Was this portion of the will subsequently changed or modified so far as the rights of the children were concerned? Lower down in the will, the testator repeats his direction for the conversion of the remainder of his property into money, and that it be invested for the children, using this language, "that it be put in bank or safe hands, for the use of my two children as they may think best." Did the testator intend to apply the words "as they may think best" to the investment in the bank or safe hands, or to the use of the children? Standing alone and unaided by the previous bequest of this interest for the benefit of the children, this question would not be entirely free from doubt; perhaps the strict grammatical construction might require that the use of the children should be qualified by these words, "as they, the executors, may think best."

But in construing a will, all the parts must be considered, and effect given to each in harmony, if possible. Governed by this rule, and looking to the specific direction of the first portion, that the interest of the invested fund should be applied to the education and maintenance of the children, with direction to the executors to draw upon the principal, if that was not sufficient, we think it was the positive duty of the executors to apply the interest, and in case they declined, that the children had the right to apply to the courts, to enforce its performance, their right to relief being dependent upon the evidence submitted as to their wants and necessities. That course has been adopted in this case, and both the Probate Court and the Circuit Court having found, after full investigation, that the necessity existed to the amount decreed, this court will not disturb that judg-

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ment. \*It appears that the amount decreed for past support will not encroach on the original capital, nor will the allowance for the future support.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.



## 18 S. C. 199

## HYATT v. McBURNEY.

(April Term, 1882.)

[1. *Judgment* ¶678.]

In 1857 B. purchased land from the executors of A., and gave bonds and mortgage for the purchase-money. B. sold to C. in 1862 for confederate money, and applied it to the payment of his bonds and mortgage, which were marked satisfied. C. then mortgaged this land to H. Afterwards, in suit brought in the United States Court by the heirs of A. against B. and C., and the executors of A. (H. not being a party), the payment by B. in confederate money was held by the Supreme Court to be fraudulent and void, and foreclosure was decreed of the mortgage of B. to the executors of A., the rights of H. being expressly declared to be not affected. In subsequent action by H. for foreclosure of his mortgage, *held*, that the validity of B.'s mortgage was not res adjudicata as to H.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1196; Dec. Dig. ¶678.]

[2. *Removal of Causes* ¶81, 86.]

A petition for removal of the cause to the United States Courts properly refused, the petition not having been filed in time, and the fact upon which the application was based not being made to appear from the record as a whole.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. §§ 138, 167; Dec. Dig. ¶81, 86.]

[3. *Payment* ¶73.]

A finding of fact by the Circuit judge—that a payment made and received in confederate money was free from fraud—sustained.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 220, 222-225, 232-238; Dec. Dig. ¶73.]

[4. *Executors and Administrators* ¶124.]

A party purchasing lands from executors under a power given in the will, was discharged of his bonds and mortgage for the purchase-money by making payment of them to one of the executors, who surrendered the bonds and entered satisfaction on the mortgage, notwithstanding it appeared in the filed returns of the executors, that the bonds had been transferred to themselves, as trustees under the will, within a year of testator's death, no transfer, however, appearing upon the papers themselves.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 498; Dec. Dig. ¶124.]

[5. *Payment* ¶12.]

It is settled in this State that payment of an ante bellum debt, made to an executor in confederate money, was not ipso facto void, and in all such cases the debtor, if not guilty of fraud and collusion, was discharged from his debt by the payment.

[Ed. Note.—Cited in *Brabham v. Crosland*, 25 S. C. 535, 1 S. E. 23.

For other cases, see *Payment*, Cent. Dig. § 50; Dec. Dig. ¶12.]

6. This case distinguished from *McDuffie v. McIntyre*, 11 S. C. 551 [32 Am. Rep. 500].

[7. *Appeal and Error* ¶1022.]

[Where evidence is reported by the master upon which the circuit judge heard the case, the decision of the circuit judge will not be reversed unless it is made without evidence or opposed to the preponderance of evidence, one of which is necessary to reverse it.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4017; Dec. Dig. ¶1022.]

[8. *Powers* ¶44.]

[Where executors have full power under a will to sell land and receive payment therefor,

a purchaser of land paying them therefor is not bound to see to the application of the fund.]

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. § 164; Dec. Dig. ¶44.]

[This case is also cited in *Dunham v. Carson*, 37 S. C. 276, 15 S. E. 960, as to the facts.]

Before Pressley, J., Charleston, June, 1880.

This was an action by the executors and devisees of Edmund Hyatt, deceased, of the

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State of New York, against William \*McBurney, William Hasseltine, Alfred L. Gillespie and T. R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson. The purpose of the action and the facts generally are stated in the opinion.

The petition for removal of the cause to the Circuit Court of the United States for the District of South Carolina, was based upon the allegation that the plaintiffs were citizens of New York and Spain, and the petitioner, Mrs. Carson, a citizen of Massachusetts, and the other defendants of South Carolina, Tennessee and California. The petition was not verified, but was supported by the affidavit of her attorney, James Lowndes, duly sworn to before a notary public, of Washington, D. C., which was as follows:

Personally appeared before me, James Lowndes, and made oath that he is the attorney of Caroline Carson, and has read her petition for the removal of the said cause to the Circuit Court of the United States for the District of South Carolina, and that the facts therein stated are true, to the best of his information and belief, save that he cannot aver that Dean Hall is of greater value than \$5,500; that his information as to the domicile of Hasseltine is drawn from a statement made to him by some person, whose name he cannot recall; that his information as to the domicile of Caroline Carson is drawn from these facts, viz., that about July 1st, 1877, he received in due course of mail a letter from the said Caroline Carson, dated at Brookline, Massachusetts, in which she informed the deponent that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts; and that deponent continued to receive letters from her in the latter State during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts; and he knows that she has not, in fact for many years, resided in New York.

Upon this petition, Judge Pressley signed the following order:

The plaintiffs in this case, except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, who, in her answer, states that she is also a citizen of

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that State. She has also filed with her \*answer an exhibit of a previous case in the

United States Court relating to the same matter; in which case she was plaintiff, suing as a citizen of the State of New York. No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted showing that her answer was erroneous and the matter therein in reference to her citizenship was inserted by inadvertence or mistake.

After this case had been referred to the master, and after the filing of her said answer by the said defendant, and the master, attended by the attorneys for plaintiffs and said defendant, had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this court praying a removal of this case to the Circuit Court of the United States, and alleging that she is a citizen of the State of Massachusetts. That petition is not properly verified, and the insufficient affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit.

I, therefore, hold that the controversy in this case is between a citizen of the State of New York on the one side, and other citizens of the same State and a Spanish subject on the other side; and, further, that the petition of defendant for the removal of the case was not filed until after the trial had commenced. She is, therefore, not entitled to have the case removed from this court, and her motion to that effect is refused.

Upon the merits, Judge Pressley filed the following decree:

In this case plaintiffs seek to foreclose their mortgage on Dean Hall plantation, which secures a debt due them by McBurney & Co. Their co-defendant, Mrs. Carson, held an older mortgage on said plantation, which one of the executors to whom the mortgage was given, satisfied during the late war. That satisfaction was set aside as fraudulent and void by the Supreme Court of the United States, in a case to which McBurney & Co. were parties, but plaintiffs here were not parties to that case.

I find here, not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of the payment, and the very high character of all parties to that transaction, would rebut even strong proof of fraud, if such had been produced in the case. In the absence of all proof in that

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respect, I \*follow the decisions of the Supreme Court of this State, and hold that plaintiffs have a valid mortgage on said plantation, discharged of the said older mortgage.

But the obligors of the bond which plaintiffs' mortgage secures, being parties to the decision of the United States Court, are bound by it. It is a final adjudication of their rights, which I am bound to respect. In doing so, I must give it full effect if that

can be done without impairing the lien of the plaintiffs. They are not entitled to enforce payment of their bond out of property which the said decision gives to Mrs. Carson, if they can, without difficult or expensive litigation, enforce payment by the obligors, who are bound by the said decision. Were I to decree that, my profession of respect for that decision would be only a flimsy pretense.

It is, therefore, ordered that this case be recommitted to Master Clancy, to take testimony and report whether the plaintiffs can, without difficult or expensive litigation, procure payment from the obligors of said bond otherwise than by the foreclosure of their said mortgage.

The code, as construed by the Supreme Court of this State, requires that every case, without regard to the pleadings, be decided according to right. To that end leave must be granted to amend the pleadings, even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary, leave to amend it according to the claim set up by her at the hearing, is hereby granted.

An appeal taken by plaintiffs from this decree has been heretofore heard by this court, and will be found reported in 15 S. C. 393.

To this decree the defendant, Mrs. Carson, also excepted, but did not at that time prosecute her appeal. Her exception was as follows:

The defendant, Caroline Carson, excepts, for the purpose of an appeal to the Supreme Court, to so much of the decree of his Honor Judge Pressley as decides that the plaintiffs have a valid mortgage on the property mentioned in the pleadings, or any lien thereon, superior to the mortgage of Ball to the executors of Carson; which, in the case in the

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Supreme Court of the \*United States, to which McBurney, the mortgagor, was a party, was adjudged a subsisting mortgage when McBurney became purchaser of the property, and prior to the date of the mortgage to the plaintiff's testator.

Upon the return of the cause to the Circuit Court, Judge Kershaw passed an order for foreclosure and sale, and defendant, Mrs. Carson, excepted and appealed upon the grounds stated in the opinion. A motion by plaintiffs to dismiss this appeal was refused. 17 S. C. 145.

Messrs. A. G. Magrath, H. E. Young, for appellant.

Messrs. McCrady & Sons, contra.

October 28th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The facts of this case, not controverted, are as follows: Edmund Hyatt, late a citizen of the State of New York, together with William McBurney, William Hasseltine, Alfred S. Gillespie and Thomas R. McGahan, in December, 1862, and for some time prior, were copartners, doing business under the name and style of



Hyatt, McBurney & Co., in the city of Charleston. In December, 1862, this firm purchased from one Elias N. Ball a certain plantation, located in Charleston county, known as Dean Hall, for \$100,000, which was paid in confederate treasury notes. This land had been purchased by Ball in 1857 from the executors of William A. Carson, deceased, partly for cash and partly on a credit, the credit portion being secured by a mortgage of the premises executed to said executors, and it was the understanding between McBurney & Co. and Ball, that he would extinguish this debt, and have the mortgage delivered up and canceled. This was done by Ball, with so much of the confederate money received by him from McBurney as was necessary. This transaction took place between Ball and one of the executors, Robertson, the other of the two who had qualified having, before that time, left the State.

In May, 1863, the copartnership of Hyatt, McBurney & Co., being about to expire, Hyatt sold his interest in the concern and

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\*in the "Dean Hall" place to the other members of the firm, in consideration of \$40,000, and withdrew, this sum being secured to the said Hyatt by the bond of the new firm, with a mortgage of the "Dean Hall place."

This place had formerly belonged to William A. Carson. Carson died in 1856, testate, leaving a widow, Mrs. Caroline Carson, and two minor sons, William and James Petigru Carson. In his will he appointed Alexander Robertson and John Freer Blacklock his executors, and, after making certain specific bequests, he directed his executors to sell the residue of his estate, the proceeds to be applied, first, to the payment of his debts, and then the balance to be divided into three equal parts, one-third to be held by them in trust for his wife, Caroline, during her life, and the other two-thirds for his sons, William and James Petigru, to be paid to them, absolutely, on their attaining their majority. Under this power of sale, with which the executors were invested, Alexander Robertson and John Freer Blacklock, after qualifying, proceeded to sell the estate, selling the "Dean Hall place" to Elias N. Ball for \$50,000, the larger portion being on a credit, which was secured by mortgage of the premises, executed on March 2d, 1857.

After the late war between the States had ended, to wit, on August 11th, 1866, Mrs. Carson, who had become the owner of her sons' interests under the will of their father, and who was living in the State of New York, instituted in her own name proceedings in the Circuit Court of the United States for the District of South Carolina, to have the bonds of Ball surrendered by Robertson, the executor, declared valid and subsisting securities and the mortgage given to secure them a valid and subsisting lien on "Dean Hall" (notwithstanding it had been canceled), and praying a foreclosure thereof.

To this proceeding, all of the members of the late firm of Hyatt, McBurney & Co., were made parties, except Hyatt, who could not be impleaded, because he was a citizen of New York, of which State the plaintiff was also a citizen. The case was, however, heard as to the other parties, the Circuit Court sustaining the complaint of the plaintiff, and ordering the foreclosure, which decree, upon appeal, was ultimately affirmed by the

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\*Supreme Court of the United States, at its October term, 1878. 99 U. S. 571 [25 L. Ed. 378]. The judgment of the court was based in part on the ground of fraud, in the transaction between McBurney & Co., Ball and Robertson expressed in the following strong terms, as found in the opinion: "There was evidently a plot; McBurney & Co. were its contrivers, Ball was its instrument, Robertson was their dupe, and the Carsons the victims." Under this decree, "Dean Hall" was sold by the marshal for the District of South Carolina, on November 26th, 1879, Mrs. Carson being the purchaser.

In the meantime, to wit, on October 15th, 1879, the plaintiff, as executrix, executor, and heirs-at-law of Hyatt, then deceased, instituted the action below, for the foreclosure of the mortgage from McBurney and Gillespie to the said Hyatt, above referred to. To this action Mrs. Carson was made a party defendant, who, failing to answer within the required time, the case as to her was placed on Calendar 6, for judgment. She, however, afterwards appeared, and was granted on December 16th, 1879, further time to answer, she consenting to an order of reference. The answer was filed on January 31st, 1880, thereafter.

In this answer, Mrs. Carson, after stating the death of her husband, the fact that he left a will, the sale by his executors of the Dean Hall place to Ball, and several other unimportant facts, avers, that on and before June 4th, 1857, all the debts of the estate having been paid, the executors made distribution of the assets, and transferred to themselves, as trustees under the will, the Ball bonds and mortgage, to wit, to themselves, as trustees of herself, one bond of \$9,000, and one-third interest in one bond of \$4,000, and to themselves, as trustees of her two sons, the same amount for each in bonds, making, in the aggregate, \$31,000 in bonds, and that they then took and held, as said trustees, the mortgage of Dean Hall, securing the said debt of \$31,000. That the said mortgage was not satisfied until July 21st, A. D. 1866, when, she alleged that, Robertson alone, and at the instance of McBurney, executed a satisfaction on it. That at the time of the surrender of the Ball bonds by Robertson, they could have been exchanged in the market for more than double the amount in confederate

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treasury notes of their \*face value; and, finally, she interposed the decree of the Su-

preme Court of the United States, and claimed that the plaintiffs were estopped by that decree from denying the validity of the said bonds and mortgage, held by Robertson, as trustee as aforesaid, or their priority to that of plaintiffs, and that this plaintiff could not enforce their mortgage without first redeeming the Ball mortgage.

The case, as has been stated, was referred to the master, who proceeded to hold the reference, when, after one or two sittings, Mrs. Carson, through her attorney, gave notice to the master, that he had that day filed a petition in the clerk's office, praying, among other things, the removal of the cause into the United States Court, and that he would not continue the reference before him. Whereupon the attorney of the plaintiffs moved that the master file his report of the testimony taken.

Under this state of things the case came on for hearing before Judge Pressley, who dismissed the petition for removal, holding that the defendant, under the circumstances, was not entitled to the motion, it appearing in the answer by her own statement that she was a citizen of the same State as the plaintiffs, the State of New York, and no affidavit being submitted that this statement was erroneous or inserted by mistake; and, further, that the petition came too late, it having been presented after the filing of her answer in the cause, and after the master, attended by the attorneys on both sides, had finished taking the testimony offered by the plaintiffs; and, moreover, that the petition was not properly verified, the affidavit of the attorney not being sufficient to justify him in disregarding the positive statement in the answer of Mrs. Carson as to her citizenship.

Judge Pressley then proceeded to hear the case on its merits, finally pronouncing a decree, in which he stated, "that he found not a shadow of fraud, either in the circumstances attending the satisfaction or in the nature of the payment, \* \* \* and that, in the absence of all proof in that respect, he would follow the decisions of the Supreme Court of this State, and hold that plaintiff had a valid mortgage on said plantation, discharged of said older mortgage." Upon the findings in this decree, a judgment of foreclosure in favor of the plaintiffs was ultimately pro-

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nounced by the Circuit Court. And now from this judgment this appeal has come.

The appeal is urged upon four grounds: First, that the judgment of the Supreme Court of the United States, in *McBurney v. Carson*, 99 U. S. 571 [25 L. Ed. 378], is conclusive of the case, on the principle of res adjudicata; second, that the court below should have let go its jurisdiction upon the filing of the petition for removal by the defendant, and upon the facts therein stated; third, "that Judge Pressley erred in holding that he found not a shadow of fraud either

in the circumstances attending the satisfaction of the mortgage or in the nature of the payments," and, fourth, that he erred "in holding that the plaintiffs had a valid mortgage on said plantation, discharged of the said older mortgage." These grounds we will consider in the order in which they are stated.

We have been somewhat surprised at the earnestness with which the appellant has pressed upon the court the first ground of appeal, in the face of the language of the decree which she invokes. How could the Supreme Court of the United States have expressed more distinctly its own opinion, that the rights of Hyatt were not being adjudicated in the cases of *Carson v. Robertson* [Fed. Cas. No. 2,466] and *McBurney v. Carson*, than in the following language found in the opinion: "If he (Hyatt) shall not be made a party and the complainant shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill, and renew the litigation as to all the questions touching the prior mortgage which are involved in this controversy. The complainant has the option to make him a party, or to proceed without him, and take the hazard of the consequences." *Robertson v. Carson*, 19 Wall. 106 [22 L. Ed. 178]. Could language be stronger, or more direct to the point?

Again, the court said: "This court has held that Hyatt was not an indispensable party, as the decree would not affect his rights." *McBurney v. Carson*, 99 U. S. 569 [25 L. Ed. 378]. Mr. Justice Swayne, who delivered the opinion of the court in both of these cases, in support of the principles announced, refers to *Haines v. Beach*, 3 Johns. Ch. 459, where Chancellor Kent, speaks as follows: "The necessity of making the subsequent encum-

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\*brancers parties, or holding their rights unimpaired, appears to be much stronger, and is indispensable to justice in cases of decrees for sale according to our practice, for otherwise the mortgagor would take the surplus money, or the cash value of the equity of redemption, and defeat entirely the lien of the subsequent creditor. But their rights cannot be destroyed in this way, and the purchaser will take only a title against the parties to the suit, and he cannot set it up against the subsisting equity of those encumbrancers who are not parties." The court seems to have anticipated that the question of res adjudicata might arise in future as to Hyatt, and to prevent its interposition, and to free it from all doubt, these strong expressions appear to have been used. See also *Horn v. Lockhart*, 17 Wall. 570 [21 L. Ed. 657].

It will not do to say that these expressions were obiter, because the very question in the case of *Robertson v. Carson* was, whether Hyatt was an indispensable party, which necessarily involved the further question as to



the effect of the judgment of the court upon Hyatt's rights and interests. Instead, therefore, of the case of *McBurney v. Carson* being res adjudicata against Hyatt, and concluding him, it is rather res adjudicata for him—rather a judicial determination that he has not been concluded—and that all the questions, both of law and fact, involved in that case, though decided against the parties before the court, were especially left open for him.

But, independent of this, the authorities relied on by the appellant, failed to sustain her position. It is true, no one can doubt the propositions announced in appellants' argument, to wit, that "such effect as would belong to a judgment of the courts of this State, should be given to the judgments of the courts of the United States, rendered under similar circumstances." *Dupasseur v. Rochereau*, 21 Wall. 135 [22 L. Ed. 588]. "That judgments of the courts of the United States, when relied on in the State courts, have the same effect as judgments of the other States." *Story Conf. L.*, Sec. 609. That "Circuit and District Courts of the United States, certainly cannot be considered as foreign in any sense of the term, either in respect to the State courts in which they are, or as respects the Circuit or District Courts of another circuit or district. On the con-

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trary, they are \*domestic tribunals, whose proceedings all other courts of the country are bound to respect." [*Turnbull v. Payson*] 95 U. S. 423 [24 L. Ed. 437]. "That full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." *Art. IV., Sec. 1 Const. of U. S.*

These are all sound as general rules, and this court will never wantonly or heedlessly violate the spirit which they breathe. It fully recognizes the fact that the judiciary organized under the general government, as well as that of all the States, is engaged in the same great work for the advancement of the interests and the welfare of a common country, and not only will full faith and credit be given here to the proceedings of the courts elsewhere, but all due respect will be paid to their judgments.

In reaching our conclusions, we are willing to be aided from any quarter, and especially do we rely upon the opinions pronounced by learned and distinguished judges elsewhere. But do these principles warrant the conclusion, which the appellant seeks to draw from them, as applicable to the questions involved in her appeal? We think there is a wide gap between them as premises, and the conclusion which the appellant desires this court to enforce. She invokes, in substance, the plea of res adjudicata. The question for this court then to determine is not whether we shall pay proper respect to the judgment of the Supreme Court of the

United States, but whether, according to the principles which govern the plea of res adjudicata, it is applicable to this case.

What are those principles? They have been recently laid down by this court, as we understand them, in the case of *Mauldin v. Gossett*, 15 S. C. 565. We held, in that case, for this plea to be effective, the concurrence of four conditions was required, first, identity of the thing sued for or in controversy; second, identity of the cause of action; third, identity in the persons or parties, and, fourth, identity in the quality of the persons for or against whom the claim is made. And this court said: "If any one of these unities is wanting, and especially the unity of parties, the plea cannot be made

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out, because, while \*it is just and proper that litigation between the same parties, after they have once had their rights adjudicated by a competent tribunal without appeal, should end, yet, a thing done between others ought not to injure another. A transaction between two parties ought not to operate to the disadvantage of a third. The maxim, *res inter alios acta nocere non debet*, is as strong for the protection of those not before the Court, as that of res adjudicata for those who are present."

These four unities are all necessary to the plea of res adjudicata; but of the four, that of parties is perhaps the most important. In fact, it is absolutely essential, because the court has no jurisdiction over one not before it. Here, it was a recognized fact that Hyatt was not before the court. The necessity of his presence was one of the questions in the case, the court holding, as has already been stated, that this was not indispensable as to the rights of those who were present, but expressly declaring that Hyatt could not and should not be prejudiced. In several of the cases cited by appellant, the parties were the same in both courts. Such was the fact in *Christmas v. Russell*, 5 Wall. 290 [18 L. Ed. 475]; *Mills v. Duryee*, 7 Cr. 483 [3 L. Ed. 411]; and *McElmoyle v. Cohen*, 13 Pet. 324 [10 L. Ed. 177]. And the question was, what effect should be given to the proceedings of the first court in such cases. The principles announced in these cases are not controverted, but they have no application here.

In *Dupasseur v. Rochereau*, 21 Wall. 135 [22 L. Ed. 588], the facts were somewhat similar to the facts here. "Judgment had been rendered by the Circuit Court of the United States for a party, declaring that his mortgage was the first lien on the land, and the marshal sold the property clear of all prior liens, the mortgagee being the purchaser. This judgment and sale was set up by way of defense to a suit brought in the State court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit. The

State court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to the Supreme Court of the United States by writ of error, and that court held that the State court did not refuse to accord due force and effect to

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the judgment; that such a judgment in the State courts would not be conclusive on the point in question, and the judgment of the Circuit Court could not have any greater force and effect than judgments in the State courts." Extract from syllabus of *Dupasseur v. Rochereau*, 21 Wall. 130 [22 L. Ed. 588].

In *Green v. Van Buskirk*, 5 Wall. 307 [18 L. Ed. 599], Van Buskirk was held bound by a proceeding to which he was not a party, and this, at first view, would seem in conflict with the position taken above, but upon an examination of the case, this, we think, will be found to be a mistake. Bates owned certain safes at Chicago. These he mortgaged to Van Buskirk, in the State of New York, but the mortgage was not duly recorded in Illinois, and possession was not delivered to Van Buskirk. Green attached the safes in Chicago, after the date of the mortgage to Van Buskirk, and sold them and received the proceeds. Van Buskirk sued Green, in New York, for these proceeds. Green pleaded the proceedings in Illinois. The court in New York disregarded the Illinois judgment, and decreed for Van Buskirk. The Supreme Court of the United States held that this was error, and that the judgment in Illinois was binding upon Van Buskirk, although he was not a party to that proceeding. This decision, however, was based upon the fact that in the proceedings in Illinois the court there had given construction to the law of Illinois as to recording mortgages and the necessity of delivery of property to pass the title, which construction, upon a familiar principle, was binding upon other courts, and, therefore, should not have been disregarded by the court in New York. But the court also held, that, notwithstanding the proceeding in Illinois adjudicating the safes to Green, Van Buskirk would still have the right to set up title to the property if he had such as was superior to that conferred by the attachment proceedings in Illinois, and, further, that he had the right to show that the property was not liable to attachment, from all of which he would have been barred had he been a party to that suit. In other words, he was bound by the construction of the Illinois statute by the Illinois court, but not by the facts of a case to which he was no party. This case, thus understood, fails to support the appellant.

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\*We feel constrained to overrule the first ground of appeal, both upon principle and authority.

Second. Did Judge Pressley err in refusing the removal of this cause to the Circuit Court of the United States for the district of South Carolina? Judge Pressley, in his order refusing the motion to remove, gives the reasons for his action. They seem to us to be quite sufficient, and to be sustained by authority. It did not appear from the record of the case, to the satisfaction of Judge Pressley, that the parties were citizens of different States. Nor was the petition filed within proper time, as required by the act of congress. Chief Justice Waite, in the *Railway Co. v. Ramsey*, 22 Wall. 328 [22 L. Ed. 823], said: "To obtain a transfer of a suit, the party claiming it must file in the State court a petition therefor, and tender the requisite security. Such petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If, upon the hearing of the petition, it is sustained by proof, the State court can proceed no further."

The facts stated in this petition were, perhaps, sufficient to entitle the petitioner to the order, had the petition been filed within proper time and had the facts stated been sustained by the record as a whole, but the petition broke down at both of these points. It was not filed as required by the act of congress (1875) at or before the term at which the suit could have been tried, nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True, this fact was stated in the petition, but her answer distinctly states that she was a citizen of New York. Thus, the record on its face fails to show the important fact required for removal. *Meyer v. Construction Co.*, 100 U. S. 457 [25 L. Ed. 593]. Hence, Judge Pressley had no other alternative but to dismiss the petition upon both of the grounds mentioned.

Third. Appellant insists that Judge Pressley erred in holding as follows: "I find here not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of the payments." We have care-

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fully examined the evidence \*reported by the master, and upon which Judge Pressley heard the case, and we not only fail to see that his finding of fact in this respect is either without evidence, or opposed to its preponderance, one of which is necessary under our decisions to reverse it; but, on the contrary, we concur with him, that there is not a shadow of evidence in the case tainting the transaction with moral fraud and corruption, either as he stated in the satisfaction of the mortgage, or in the nature of the payments. No one knowing the parties and having the testimony before him, which Judge Pressley had, especially that the late



lamented James L. Pettigru, the father of Mrs. Carson, and grandfather of the other two beneficiaries, under W. A. Carson's will, not only had full knowledge of the whole transaction, but desired and approved its consummation, could, for a moment, believe that it was conceived and perpetrated in fraud.

It is true that the settlement was based on confederate treasury notes, which soon thereafter turned to ashes; but at that time, there was no other medium of exchange in this Southern country. The fortunes of war had driven every other from our midst. It had become, from necessity, the currency of the courts, judicial sales, banks and bankers, professional men, merchants, and all classes of business. It was received for labor and all kind of service, and property of every species, real and personal, constantly changed hands upon it. It paid notes, bonds and judgments, and was for years the very life-blood of the people in all their business relations. If simply the use of this money by them is enough to fix fraud upon McBurney, Ball and Robertson, in a legitimate transaction, thus completed in open day-light, and in the very presence of the nearest relative of the parties, who at that time was the acknowledged head, not only of the bar of South Carolina, but of the entire south, and with few equals anywhere, and equally as distinguished for his high personal integrity and abhorrence of fraud, then the people of the Southern States, as a whole, were steeped in fraud during the war, because everybody, without exception, used it then. We see no error in this finding of the Circuit judge, upon the evidence before him.

Fourth. Did the Circuit judge err in hold-

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ing that the plaintiff had a valid mortgage on Dean Hall, discharged of the Ball mortgage? This part of Judge Pressley's decree is assailed upon three grounds, first, that the Ball bonds and mortgage had been transferred by the executors from themselves, as such to themselves as trustees, under Carson's will in 1857, and, therefore, Robertson, one of the executors, had no legal right to receive payment of these bonds, or to cancel the mortgage in 1862; second, that Robertson, as one of the executors, had no right to act alone, even if the bonds and mortgage were still in their possession as legal owners, because, being in that event joint owners, neither could act alone; third, that in no event could the debt of Ball be legally discharged by the executors in such currency, without the consent of the cestuis que trust. In other words, the appellant contends that the executors were trustees, and that, therefore, they could not, even as executors, receive payment of the Ball debt in anything but legal currency.

To entitle the first ground to consideration, the fact upon which it is based should ap-

pear as an established fact in the case, to wit, that the bonds and mortgage of Ball had actually been assigned by the executors to themselves, as trustees, before the payment by Ball. This was a question of fact involving at the same time the question of law, whether at the time of the alleged transfer it was legally competent for the executors to make such a transfer. The will directed that the proceeds of the sale of the property should first be applied to the payment of the testator's debts, and then the residue to be divided and held in trust by his executors for his wife and children. Under our law, executors and administrators are allowed one year to ascertain the indebtedness of the estate, and the courts will not take judicial cognizance of proceedings instituted for the purpose of making distribution of the estate of the deceased, until after the expiration of one year from his death. So said Chancellor Dunkin, in *Adger v. Adger*, MS. Dec., Charleston, 1850, p. 252. In this case, Carson died on August 17th, 1856. It is claimed that the transfer was made June 22d, 1857. This was within the year, and was premature.

But independent of this legal question, has the fact of the assignment been legally estab-

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lished in such way that Judge Pressley could not have disregarded it as a fact? Judge Pressley does not state his finding upon that question, but we think the testimony was hardly sufficient to establish this fact. The only evidence upon the subject was the returns of the executors filed in the Probate Court. There was nothing upon the original papers, which were the subject of transfer, showing the assignment. The executors had not been discharged by any official act of the Probate judge, nor any notice given that the duties of trustees had been assumed by them. The papers had been originally executed to Robertson and Blacklock, as executors, and they still appeared upon their face to belong to these parties in the same capacity.

Under this state of facts, in our opinion, the testimony was not sufficient to establish the transfer claimed, and, on that account, the ruling of Judge Pressley is not obnoxious to the first objection. But even if the transfer had been regularly made, would it defeat the payment made by Ball if that payment was free from fraud and collusion and otherwise legal? This would be a fraud upon Ball. Finding his bonds in the hands of those to whom he had executed them, with no mark of transfer and nothing whatever to excite suspicion, he was fully justified in acting upon the representation that they were still the legal owners. He knew no one in the transaction but the executors. They were his creditors. He found his bonds and mortgage in the possession of one of them, the other having left the State, and he paid

off the debt and canceled the mortgage. If this payment was otherwise legal no court could disturb it. This was not a case where the debtor was bound to see to the application of the fund at his peril. The executors had full power under the will to sell the estate and receive payment, and it was no business of the purchasers to follow the funds to their directed destination. *Laurrens v. Lucas*, 6 Rich. Eq. 226.

It is not necessary to discuss the second ground above. It is familiar law, that executors are not bound to act jointly in receiving payment of debts due them as such, or the estate. In most respects, the act of one is the act of all. Either can release or pay a debt. 2 Wms. Ex. 946; *Anderson v. Earle*, 9 S. C. 460; *Tompkins v. Tompkins*,

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ante 1. This is not denied by the appellant. In fact it is admitted in the argument, and it has only been referred to herein, because, in the answer, the ground is taken that Robertson alone executed the satisfaction on the mortgage.

This brings us to the consideration of the last ground urged against this last holding of the presiding judge. Could the executors legally receive confederate currency in payment of the Ball bonds, and thereupon execute satisfaction of the mortgage? This is independent of the question of actual fraud, and raises the point whether it is competent for executors, or any other trustees having charge of the estates of others, to settle with the debtors of such estates, upon any other basis than legal currency. Not whether such settlement is a breach of trust on the part of the trustees, but whether the debtor can be discharged, except upon the payment of legal currency.

Many vexed and anomalous questions have grown out of the use of confederate currency during the war by the people of the Southern States, and numerous decisions are found in our own reports upon this subject, both before the adoption of the constitution of 1868, and since. While among these cases, several are found where trustees have been held liable (under certain circumstances) for a breach of trust in receiving this currency, not a single case appears where the debtor to the trustee has been made to repay his debt, once paid in such currency in the absence of all fraud and collusion between the parties. The old court, as organized before reconstruction, as well as the court as organized since, has invariably held that executors and administrators, being the legal owners of estates under their charge, have all the rights of such owners, so far as their relations to third parties are concerned; and while they may be held responsible to their cestuis que trust for failing to observe proper care and legal prudence in the discharge of their fiduciary duties, either in the collection or investment of the bonds under

their control, or otherwise; yet, where the transaction is free from fraud, the cestui que trust, if he feels aggrieved, must look alone to the trustees for redress. He cannot push the trustees aside, and assail his debtor.

This seems to have been well settled in

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this State, so far as a \*series of decisions of the court of last resort can settle a principle. Out of the many cases found in the reports in which the subject of confederate currency and confederate transactions has been discussed, the following are referred to as especially bearing on the question now before the court: *McPherson v. Gray*, 14 Rich. Eq. 128; *Wiseman and Finley v. Hunter*, Ib. 175; *Mayer v. Mordecai*, 1 S. C. 399 [7 Am. Rep. 26]; *Sanders v. Rogers*, 1 S. C. 452; *Creighton v. Pringle*, 3 S. C. 97; *Cureton v. Watson*, 3 S. C. 458; *Chalk v. Patterson*, 5 S. C. 290; *Singleton v. Lowndes*, 9 S. C. 465; and *State v. Moseley*, 10 S. C. 1—the two former of which were decided by the old court before the constitution of 1868, the others, since.

In most of the cases, the main question was whether the trustee had committed a breach of trust in receiving confederate money, and thereby discharging their debtors. The question being determined upon the principles applicable to the duties of the special trust, such as good faith, reasonable diligence, a proper observance of the terms of the trust, and of the law prescribing the duties of trustees; but in several the precise question under discussion was considered and adjudged; and, we think, that those of the first class, in which the trustee has been held liable, negatively sustains the discharge of the debtor, as fully as the second class does affirmatively, because the only ground upon which the trustee could be held responsible as for a breach of trust, is the fact that he has discharged the debtor. If the debtor has not been discharged, then no injury has been done, and no breach of trust committed. Thus all of these cases may be regarded as authority for Judge Pressley's holding, now under consideration.

In *McPherson v. Gray*, 14 Rich. Eq. 128, a decree on creditors bill, made in 1859, directed the master to sell testator's estate for one-third cash, and the residue on a credit, secured by mortgage, the debts to be paid out of the proceeds, and the residue, subject to the trust of the testator's will, to abide the future order of the court. The master made the sales, and took from the purchaser of a plantation his bond for a large sum of money, with mortgage. In January and March, 1864, the purchaser paid the bond to the master in confederate treas-

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ury notes—a \*currency which at that time had greatly depreciated, but which was the only currency in the country. The court, concluding that the payment was made in good faith, held that neither the purchaser



nor the master was liable to the beneficial owners of the bond, Wardlaw, A. J., delivering the opinion of the court.

There is a striking similarity between this case and the case now before the court. In both cases, land was sold before the war, partly for cash and partly on a credit, and a mortgage taken to secure the credit portion of the sale, the proceeds of the sale first to be applied to the debts, the residue to be held subject to the trusts of testator's will. In both, the purchaser paid the purchase money in depreciated currency—confederate notes—the first being paid in 1864, the latter in 1862. In both, there was an entire loss to the cestuis que trust. In both, the payments were made in good faith. In the first, the court, consisting of Dunkin, Wardlaw and Glover, the latter sitting in the place of Inglis, concurred in holding that neither the purchaser nor the master were liable to the beneficial owners of the bond, and why should not such be the holding in the present case? There is no difference whatever between the two cases, except that, in the present case, Robertson was an executor, deriving his authority to sell from a will; and, in *McPherson v. Gray*, Gray was the master in equity, deriving his authority to sell from an order of the court. The trusts to be discharged were the same, and both were trustees. Executors, we suppose, are trustees, and Mr. Justice Wardlaw said in terms that "Mr. Gray, the master, was a trustee." *McPherson v. Gray*, p. 130, *supra*.

In *Wiseman and Finley v. Hunter*, 14 Rich. Eq. 167, under an order made in June, 1861, to collect a certain bond, dated in January, 1860, with as little delay as possible, the commissioner, in August, 1862, received payment in confederate treasury notes. In May, 1863, the commissioner reported that he had collected the bond, and, on motion of the solicitor of the parties entitled to the fund, an order for distribution was made. Two of the parties resided in Tennessee, and did not receive their shares, and they sought to have the payments opened and to compel the obligor to pay their shares. The court held that the obligor was discharged by the

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payment, and that the transaction could not be opened. This was in 1868, when Dunkin, D. L. Wardlaw and Inglis composed the court. "Debtors have rights as well as creditors," said the president of the court (Dunkin) in delivering the opinion, and, further, "where a transaction has been consummated and rights vested, the repose of society demands that it should not be opened." True, in this case the commissioner had been ordered to collect with as little delay as possible, and, at the instance of the solicitor of the parties, by a subsequent order distribution had been directed, but there was nothing said in either of these orders about confederate treasury notes.

*Mayer v. Mordecai*, 1 S. C. 383 [7 Am. Rep.

26]. By deed made in May, 1860, three bonds secured by mortgages of real estate were assigned to B. in trust, to invest the proceeds as soon as received in such manner as the said B. may think proper, on consultation with the cestui que trust. The cestui que trust removed shortly afterwards from South Carolina, where the trust was created, to New York, and remained there during the war with the Confederate States. In 1862 and 1863, B. collected the bonds in confederate treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate States, without consultation with the cestui que trust. Held, that B. committed a breach of trust in receiving payment of the bonds in confederate treasury notes and in investing the proceeds in bonds of the Confederate States, and that he was liable to account to the cestui que trust for the sums received. Held, further, that the obligors on the bonds were not liable to account to the cestui que trust, for they were discharged by their payments to B.

Here, unlike the cases above, the trustee was held liable, on the ground that he had acted without consultation with the cestui que trust, which the deed expressly required, but the obligors, as in the other cases, were protected. This case was heard in 1869, when Moses, Williard and Hoge composed the court. Chief Justice Moses delivered the opinion, saying: "That although the trustee is not discharged from liability to account for the three bonds, yet the mortgage as against the original debtors cannot be set up as of force. The legal title to the bonds was in him, and with the investment of the

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proceeds they had no concern." And again: "If, according to the ruling in this State, a vendee is not bound to see to the application of the purchase money (*Laurens v. Lucas*, 1 Rich. Eq. 226; *Lining v. Peyton*, 2 DeS. 375), or a mortgagee, under the order of the court, that the money is appropriated to the purpose for which the mortgage was taken (*Spencer v. Bank of State*, Bail. Eq. 468), much less can a debtor who makes satisfaction to the creditor in a manner acceptable and agreed to by him, in the form of actual payment, be held to such requisition"—quoting what Mr. Justice Inglis said in the case of *Austin v. Kinsman*, 13 Rich. Eq. 265, to wit: "That a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and by voluntary acceptance of such substitute as payment makes it so." *Mayer v. Mordecai*, p. 398, *supra* [7 Am. Rep. 26].

In *Sanders v. Rogers*, 1 S. C. 452, the trustee was held liable for collecting, in 1863, well secured bonds, and failing to invest as the instrument creating the trusts directed, but there was no intimation that the payment by the obligor was invalid, or that the bonds had not been extinguished thereby. The case of *Creighton v. Pringle*, 3 S. C. 77, is to the

same effect. In *Chalk v. Patterson*, 5 S. C. 290, it was held that the commissioner in equity was not liable, and, in *State v. Moseley*, 10 S. C. 6, that the sheriff was exempt from responsibility in receiving confederate money in satisfaction of an execution in his office.

These cases (and many others might be cited) establish the principle that executors and administrators and quasi-trustees, such as commissioners, masters and sheriffs, had authority during the war to receive the only currency which was then in existence, in satisfaction of bonds, notes and mortgages under their control, where the payment was made by the debtors free from fraud and collusion. Clearly, that the payment was not ipso facto void on the ground that the trustee could receive payment only in legal currency. This principle discharges the debtor in all such cases. But whether the trustee shall be exempt from responsibility is another question, which will depend in each case on its own special facts, such as good faith,

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reasonable and \*proper diligence and care, and the terms of the trust under which he acts.

In view of these authorities coming from the court of last resort in this State, it is needless to inquire elsewhere. In any event, these must control us, running as they do, in the same direction in an unbroken current, on the exact point involved here, from the close of the war, when these perplexing questions first arose, up to the present time. The case of *McDuffie v. McIntyre*, 11 S. C. 551 [32 Am. Rep. 500], is not in conflict. That case decided that a guardian had no power to sell a bond and mortgage belonging to the estate of the ward. That such property occupied the same position that any other property of the ward would, such as a horse, a watch, goods and chattels of any kind, or real estate. Of such property belonging to the estate of his ward, the guardian has no such legal title as would authorize him to dispose of it, without the order of the court. But there is a clear distinction between such a case and that of an executor or administrator who is authorized to sell the property of the estate and take notes therefor to themselves.

The cases from the Supreme Court of the United States, relied on by appellant, had other features, different from the above cases, which prevent conflict. In *Fretz v. Stover*, 22 Wall. 198 [22 L. Ed. 769] the bonds in no sense belonged to the party who collected them. He was simply an attorney in possession for collection, and the case turned

upon the question, whether he had exceeded his powers in the manner of the collection. Not being the legal owner, he had no right to exceed his agency, and the court held the parties, who paid him in other currency than such as his agency authorized him to receive, responsible over to the principal who repudiated the unauthorized settlement. That principle does not touch the one here. Here, the executor was the legal owner, had full power at his peril to deal with the bonds in question as he chose, to exchange, release, or compromise, which being done without fraud and free from imposition, surprise, or undue advantage, would be final, and could not be opened to the prejudice of the debtor.

In *Horn v. Lockhart*, 17 Wall. 571 [21 L. Ed. 657] an executor in the State of Alabama was held responsible for funds of the estate

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invested \*by him in bonds of the confederate government. This was upon the ground, that inasmuch as these bonds were issued for the avowed purpose of raising funds to prosecute the war, the investment was an act giving aid and comfort to the enemies of the United States, and, therefore, void. The question of the liability of the debtors to the estate, who had paid off their indebtedness, was not involved, and not passed upon.

We see nothing in *Williams v. Bruffy*, 96 U. S. 177 [24 L. Ed. 716], or in *Ketchum v. Buckley*, 99 U. S. 188 [25 L. Ed. 473] which touches the question raised here. It is said in *Williams v. Bruffy*, by Mr. Justice Field, that "debts can only be satisfied when paid to creditors to whom they are due, or to others by direction of lawful authority." This is not controverted, on the contrary is recognized as familiar law, but it is equally good and familiar law that when creditors to whom a debt is due extinguish the debt by the receipt of that which they have consented to receive as payment—whether it be money or any other commodity—there is no authority in the courts, or any other power, to revitalize it. It becomes an executed contract and passes out of existence. We think that Robertson occupied the position of a creditor. Ball was his debtor, and Ball having paid to Robertson the amount due him in such currency as Robertson was willing to receive, the payment being bona fide and free from fraud and collusion, the matter then reached a finality beyond resuscitation by this court or any other legal authority.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

[Reversed, *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167.]



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## CHAPMAN v. LIPSCOMB.

(April Term, 1882.)

[1. *Appeal and Error* ⚭273.]

Exceptions to a decree are required by the fifth rule of this court to state specifically the errors alleged; an allegation of error by mere reference to exceptions sustained or overruled by the Circuit judge, is insufficient.

[Ed. Note.—Cited in *Levi v. Blackwell*, 35 S. C. 514, 15 S. E. 243; *State of South Carolina v. Seabrook*, 42 S. C. 78, 20 S. E. 58.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 1626, 1627; Dec. Dig. ⚭273.]

[2. *Reference* ⚭100.]

Where a master's report fails to state its conclusions of law and fact separately, the proper remedy is a motion to recommit; it furnishes no ground for an exception.

[Ed. Note.—Cited in *Aultman v. Utsey*, 41 S. C. 310, 19 S. E. 617.

For other cases, see *Reference*, Cent. Dig. §§ 157-168; Dec. Dig. ⚭100.]

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[3. *Appeal and Error* ⚭1022.]

\*Where an action at law, as e. g., for the recovery of personal property and damages for its detention, is referred by consent to a master to determine all the issues, whose findings of fact are adopted by the Circuit judge, this court has no power to review such findings.

[Ed. Note.—Cited in *Straub v. Screven*, 19 S. C. 446, 451; *Aultman v. Utsey*, 41 S. C. 310, 19 S. E. 617.

For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⚭1022.]

[4. *Appeal and Error* ⚭1022.]

Nor it is otherwise where the answer sets up an equitable defense, for the complaint determines the character of the action. In such case the legal and equitable issues must be tried, each by their appropriate tribunal; but here the exceptions as to findings of fact relate only to the legal issues, and cannot therefore be considered.

[Ed. Note.—Cited in *McGee v. Hall*, 23 S. C. 392; *Du Pont v. Du Bos*, 33 S. C. 397, 11 S. E. 1073; *Jenkins v. Jenkins*, 83 S. C. 544, 65 S. E. 736; *Southern Ry.-Carolina Div. v. Howell*, 89 S. C. 393, 71 S. E. 972, Ann. Cas. 1913A, 1070.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⚭1022.]

[5. *Action* ⚭36.]

The code of procedure has abolished the difference in forms of action as they heretofore existed in the two jurisdictions, but has made no change as to causes of action, or in the marked distinction which formerly existed between law and equity.

[Ed. Note.—Cited in *Sale v. Meggett*, 25 S. C. 81; *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 142, 70 S. E. 396.

For other cases, see *Action*, Cent. Dig. § 297; Dec. Dig. ⚭36.]

[6. *Partnership* ⚭12.]

The true test of a partnership is the existence of a communion of profits and losses.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 27; Dec. Dig. ⚭12.]

[7. *Partnership* ⚭29.]

A contract whereby one party is to furnish a certain number of laborers to work in a brickyard, and to receive therefor one-half of the bricks made and to have the option of purchasing a fixed number at a stated price, the other

party to make the brick and defray all other expenses, does not constitute a partnership.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 30-33; Dec. Dig. ⚭29.]

[8. *Partnership* ⚭29.]

And the party making the brick could sell to a stranger his half of the brick on hand, and the purchaser would be entitled to the possession of the property purchased, without regard to his vendor's indebtedness under the contract.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 30-33; Dec. Dig. ⚭29.]

[9. *Appeal and Error* ⚭266.]

Exceptions taken at the reference to the admission of incompetent testimony by the master, not considered, it not appearing that the Circuit judge made any ruling upon them, and no exceptions upon these points having been taken to the Circuit decree.†

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1569; Dec. Dig. ⚭266.]

Before Cothran, J., Richland, November, 1881.

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\*This was an action by W. W. Chapman against T. J. Lipscomb, superintendent of the South Carolina penitentiary, commenced in August, 1879. The nature of the action and the pleadings are stated in the opinion of this court.

By consent of counsel, the cause was "referred to N. B. Barnwell, Esq., master for Richland county, to take testimony and determine all issues of fact and law in the above stated cause, and that he report his actings and doings in said cause with all convenient speed to this court." The master reported as follows:

This cause arises upon the following facts: On August 4th, 1879, one J. A. Bondurant sold and delivered to the plaintiff, for a valuable consideration (to wit, the right to manufacture and sell in certain counties in Georgia a certain article, known as a "cotton planter," the patent right to which was owned by the said plaintiff), the articles mentioned in the complaint, the said articles being then in the custody and control of the said J. A. Bondurant, who was, at that time,

†The brief does show that this testimony was objected to by defendant when offered, and that exceptions were duly taken to the master's ruling admitting it. We do not, however, understand this court to have overlooked those exceptions, or to hold that any further exception was necessary to bring this matter before the Circuit Court; but that an exception to the ruling or decree of the Circuit judge, upon this testimony, was necessary to bring before this court any error committed by him in overruling the exceptions noted by the master in his transcript of the testimony. It will be observed that the chief justice is confining himself to the exceptions taken to the Circuit decree, the first of which refers back to the exceptions taken to the master's report, and as the exceptions to the admission of this testimony are not to be found in the exceptions taken to the master's report, nor alluded to in the other exceptions to the Circuit decree, the question, although properly before the Circuit Court for determination, if there urged, was not raised by any of the exceptions upon which the appeal to this court was based.—REPORTER.

engaged in the manufacture of brick, upon a brickyard held by the defendant, under a lease from the Columbia Water Power Company, the said defendant having entered into a contract with the said J. A. Bondurant and one J. P. Bondurant, the father of the said J. A. Bondurant, the terms of which are set out in the answer in this case.

Being satisfied that this was a bona fide sale for value by the said J. A. Bondurant, acting for himself and the said J. P. Bondurant, to the said plaintiff, and there being no satisfactory proof before me of any fraud and collusion between the parties, it only remains to inquire whether, under the terms of the contract, the said J. A. & J. P. Bondurant had such right and title in the property sold as to enable them to give a good title to the plaintiff, without the knowledge and consent of the defendant thereto, it being admitted that the defendant knew nothing of the transaction between the plaintiff and the said J. A. Bondurant.

It is claimed by the defendant, that under the terms of the contract between himself and J. A. & J. P. Bondurant, that he, the defendant, became a partner with the said J. A. & J. P. Bondurant in the manufacture of the said brick, and that, until a division of the brick, the same remained partnership

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assets \*and that the plaintiff, being fully informed, as it is admitted he was, of the terms of the contract, could acquire no right to the property until there had been an accounting between the defendant and the said J. A. & J. P. Bondurant. Under this view of the case on the part of the defendant, the defendant at first refused to give up any part of the property purchased by the plaintiff; subsequently, and after suit brought, the defendant permitted the plaintiff to take all of the articles except the 171,000 brick, being the one-half of a kiln of brick of 342,000 brick then upon the premises, the said brick having been made under the contract hereinbefore referred to. All the brick the defendant has taken possession of, and made such use of them as he thought proper, to wit, has used the whole kiln for the purposes of the South Carolina penitentiary.

Even if, under the terms of the contract, it could be held that a partnership existed, I am satisfied that the said J. A. & J. P. Bondurant had full authority and power to sell the one-half of the said kiln, without the knowledge or consent of the said defendant, to such person and for such price as seemed best to themselves. I am the more confirmed that this is the correct interpretation to be given to this contract, from the fact that this seems to have been the view held by the parties themselves in executing this contract, to be inferred from the fact that the said J. A. Bondurant did sell in such manner as he saw fit, without consultation with the said defendant, a large quantity of brick, to

wit, more than 100,000, to such persons and at such prices as seemed proper to the said J. A. Bondurant, all of which was well known to the defendant, who only seemed to have taken notice of these sales to the extent of cautioning the said J. A. Bondurant against failing to be able to furnish the penitentiary with the amount of brick expected. But I am satisfied that the terms of this contract constituted no partnership between the parties, and that the remedy of the defendant is not against the property in dispute in any way whatever, but must be upon the contract against the parties thereto. Under this view, the right of the plaintiff to this property, without let or hindrance, accrued absolutely on August 4th, 1879, and it was the duty of

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\*the defendant to have peaceably permitted him to take possession thereof.

The value of the brick I find to be \$6 per thousand. The damages sustained by the plaintiff I assess at \$250.

I find, as a conclusion of law, that the plaintiff is entitled to the possession of the property sued for, and if the same be not delivered, for the value thereof, to wit, the sum of \$1,026, and for the sum of \$250, his damages, and for the costs of this action.

All of which is respectfully submitted.

(Signed,) Nathaniel B. Barnwell,

March 31st, 1880.

Master.

The following was the contract between the defendant and the Bondurants:

The State of South Carolina, County of Richland—This indenture in duplicate, had, made and agreed upon, this 13th day of February, 1879, by and between T. J. Lipscomb, superintendent of the South Carolina penitentiary, of the first part, and J. A. & J. P. Bondurant, of Augusta, Ga., of the second part, witnesseth:

First. That the party of the first part, in consideration of the payment to him of a certain proportional share of bricks herein-after stipulated to be paid, and of the covenants hereinafter entered into by the party of the second part, doth hereby agree to furnish to said party of the second part fifty able-bodied convicts, for the term of seven months, daily, (Sundays excepted,) or their labor for 9,100 days in the aggregate in each year. The labor of said convicts to be used for the purpose of brick making on the Kinsler (or Green) brickyard tract, in Richland county.

Second. Said convicts, and a sufficient guard to guard them, to be furnished free of cost to said party of the second part. The feeding and clothing of said convicts, and the whole cost of maintaining the guard, to be defrayed by the party of the first part.

Third. The said party of the first part also agrees to assume the payment to the owner of the yard of the royalty of 100 bricks for every thousand bricks made.

Fourth. That the party of the second part agree to make three million (3,000,000) of



bricks in each and every year during the terms of this contract, using only 9,100 days' labor of convicts in each year, and to turn over to the party of the first part at the brickyard, one-half of all the bricks made. Said bricks to be of average quality of the bricks burned in each kiln.

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\*Fifth. That the said party of the second part agrees to sell to said party of the first part 1,000,000 of bricks in the year 1879, if he needs them for the use of the South Carolina penitentiary, at the rate of five dollars (\$5) per thousand on the yard, or six dollars (\$6) per thousand delivered at the penitentiary.

Sixth. That the said party of the second part agrees to assume all other expenses consequent upon the manufacture of the brick, except the convict labor, guard, and royalty to the owner of the yard.

Witness our hands and seals, this 13th day of February, 1879. This contract to exist for two (2) years, with the privilege of five (5) years.

T. J. Lipscomb, [L. S.]

John P. Bondurant, [L. S.]

James A. Bondurant, [L. S.]

To the master's report, defendant excepted as follows:

1. That the master has not reported the testimony in the cause. 2. That his report does not contain a statement of the facts found and the conclusions of law separately. 3. To statement in pages 2 and 3 of copy furnished. 4. To findings. That this was a bona fide sale for value. 5. That there was no satisfactory proof of fraud and collusion between Bondurants and plaintiff. 6. That the Bondurants had full power and authority to sell one-half of the brick kiln mentioned, without knowledge or consent of the defendant. 7. To the reasons given for the preceding finding. 8. That the terms of the contract between the Bondurants and defendant constituted no partnership. 9. That defendant's only remedy is against the Bondurants only. 10. That plaintiff's right to this property, without let or hindrance, accrued absolutely on August 4th, 1879, and it was the duty of defendant to have peaceably permitted him to take possession thereof. 11. To the value of the brick found. 12. To the damages sustained by plaintiff found. 13. To the final conclusions.

The Circuit decree was as follows:

This was an action heard by the court at the fall term of the Court of Common Pleas for Richland county, November, 1881, upon exceptions to the master's report, the cause

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\*having been referred to him "to take the testimony and determine all issues of fact and law" therein. It appeared upon the trial before me that an appeal had been taken from the refusal of a former Circuit judge, to hear the cause upon the ground of want of jurisdiction of the master, to hear the matter

upon reference, the defendant insisting that the provisions of the code, embraced in sections 294, 295, 296, 297 and 436, apply only to referees, and not to masters in those counties of the State where such had been appointed, and the office of referees abolished. The Supreme Court, by McIver, A. J., say in this case: "We are, therefore, unable to concur in the conclusion reached by the Circuit judge, that the master has no jurisdiction to hear this case; and, on the contrary, think that the parties were entitled to have the case heard upon the master's report and exceptions." And the judgment of the court was made in accordance therewith. 15 S. C. 470.

The master's report, which embraces a vast amount of testimony taken by him, as well as other testimony taken by commission, has been carefully considered; and, although there is much conflict between the parties and the witnesses for plaintiff and defendant, and some circumstances connected with the conduct of the plaintiff and J. A. Bondurant, especially of a character somewhat suspicious, I fail to find in these such proof of fraud as to overcome the presumption of integrity, which the law throws over and around the transactions of men in the ordinary affairs of business.

Concurring, as I do, in the conclusions reached and announced by the intelligent master who heard this cause, I can the more freely criticise the inartificial manner in which he has blended in the report his conclusions of fact and law. It would have been better to have separated these more distinctly than he has done. He finds, however, as matter of fact (1) that the transaction impeached by the defendant was bona fide; (2) that there was no partnership between the Bondurants and the defendant, as the representative of the penitentiary authorities (this latter I take to be a mixed question of law and fact); and, as further matter of fact, the value of the bricks sued for, and the damages sustained by the plaintiff; and, as

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a sole conclusion of law, the \*plaintiff's right to recover the possession of the property sued for, to wit, \$1,026, and his damages, the sum of \$250, and the costs of this action. In all of these I concur.

Wherefore it is ordered, adjudged and decreed, that the exceptions to the master's report be, and the same are hereby, overruled, and that said report be confirmed and made the judgment of this court.

From this decree defendant appealed on the following exceptions:

1. On all the grounds which were exceptions to the master's report. 2. Because his Honor ordered those exceptions to be overruled, and confirmed said report, and made it the judgment of the Circuit Court. 3. On all the grounds on which the Circuit judge bases his conclusion, which are incorporated

with those exceptions. 4. Because the proof shows, conclusively, fraud on the part of plaintiff and his associates.

Messrs. Bachman & Youmans, for appellant.

Messrs. Rion, Lyles & Barron, contra.

October 28th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case was heard below upon a report of the master, with the testimony upon which the report was founded. The action was an ordinary action for the recovery of personal property, or for the sum of \$1,000, the alleged value thereof, in case a delivery could not be had, and for damages.

The property consisted of 179,000 bricks, more or less, alleged by the plaintiff to have been in his possession and wrongfully taken by the defendant. The defendant relied mainly upon a contract between himself and certain parties who had made the bricks, to wit, J. A. & J. P. Bondurant, under which the bricks had been made, alleging that these parties had failed to carry out this contract, and that by their consent he had taken possession of the bricks as of right under said agreement, and that no sale or assignment of said bricks, by these parties to the plaintiff, could bind him, except so far as there might be a surplus after a full accounting between

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the said J. A. & J. P. \*Bondurant and himself; and he demanded an accounting. There was no averment of fraud in the answer as to the sale. The contract referred to will be found in the report of the case. [Here follows a statement of the master's report, the Circuit decree and the exceptions.]

This appeal was taken before the recent rule of this court, on the subject of exceptions presented in the general form of the first exception, to wit, simply by reference to exceptions taken elsewhere than to the decree or judgment itself. It is our duty, therefore, to look back to the master's report, and to take up the exceptions thereto and consider them seriatim. The first was disposed of by a subsequent order of the Circuit judge requiring a report of the testimony to be made, which was done, and the report filed. If that report was not satisfactory, there should have been a motion to recommit. This fact shows the confusion which may result from exceptions taken in this general and informal way, and vindicates the rule recently adopted, which rule the court hopes will not escape the notice of the profession in their preparation of appeals in the future.

The second exception is met by the cases of *Bollmann v. Bollmann*, 6 S. C. 44, and *State, ex rel. Cathcart, v. Columbia*, 12 S. C. 393. In the first case, it was said on this subject: "It may be enough to say that the language of the code is to be considered as directory and not mandatory." Again, "In

addition to what has been said, if the separation was necessary to a better understanding of her rights, her course was not to except because of the omission, but to move for a recommitment of the report, that it might be re-produced in the desired form." In the second case, the principle was announced as follows: "The first exception has been previously disposed of by this court, holding that the neglect of the referee or Circuit judge to present distinct findings of fact and conclusions of law is not error." The court say further: "It is to be regretted that so little regard is paid to this salutary requirement; but the remedy is not by appeal to this court on the ground of error of judgment; what might be the effect of a motion refused to correct such irregularity as a foundation of an appeal, we are not called upon to say, as that is not the present case."

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\*The third exception questions "statements in pages 2 and 3 of copy furnished." We have no means of ascertaining the precise questions raised by this exception, and, therefore, pass it over.

The remaining exceptions question certain findings of the master, and which were adopted by the Circuit judge. These findings consist both of fact and of law. The findings of fact being, first, that a bona fide sale for value had been made of the bricks by the Bondurants to the plaintiff; second, that there was no fraud and collusion between Bondurants and the plaintiff; third, as to the value of the bricks, and, fourth, as to the damages found. The findings of law were, first, that the terms of the contract constituted no partnership between the Bondurants and the defendant; second, that the Bondurants had full power and authority to sell one-half of the brick kiln mentioned, without the knowledge or consent of the defendant; third, that defendant's remedy is against the Bondurants only.

As to the findings of fact, these cannot be reviewed by this court, however erroneous they might be. This court, as we have often had occasion to say, is for the correction of errors of law in cases at law, with appellate power only in cases of Chancery. In a law case, the facts are beyond our reach. The constitution gives them to the jury exclusively, except that the errors of the jury in this respect may be reviewed and overruled by the Circuit judge on motion for a new trial, and may, in an extreme case, reach this court on appeal from the action of the Circuit judge on such motion, where it involves an error of law. It is only in Chancery cases that we can review the facts, which must be brought here in such cases either by a "Case" made up for that purpose, or on a case with exceptions, which latter brings up both errors of fact and of law.

Now, to apply these principles, the question arises, is this a law case, or a case in Chancery? Whether it is the one or the other



does not depend upon the form or mode of trial which the parties may have adopted. A law case, it is true, is usually tried by a jury, but the right to a jury may be waived, and the facts submitted to a master or referee, or to the court if the parties so consent, but the case is nevertheless a law case, and

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must \*be governed by the principles applicable to cases at law. A case in Chancery is not different, under the code, from cases of that character before the code. The code has made no change as to causes of action, or as to the marked distinction which formerly existed between equity and law. These still exist, and the code leaving these untouched has dealt simply with the forms of action, having abolished all previous forms and prescribed one and the same for all classes of injuries or causes of action.

The cause of action in the present case was the withholding by the defendant of the personal property of the plaintiff, and the plaintiff desired to recover his property with damages for its detention. His form of action before the code would have been trover, which is an action at law. His action is still of the same kind and on the law side of the court involving no principles of equity whatever. Such being the character of the case, the facts involved, whether found by a master, referee or the court, are beyond the jurisdiction of this court, and, in considering the legal questions involved, these facts must be taken as they have been found below.

It may be said, however, that the answer set up an equitable defense, and converted the case into a case in Chancery. A defendant cannot change the character of the plaintiff's action by simply interposing an equitable defense. If this could be done, it would give power to the defendant to deprive the plaintiff of the right of trial by jury at his pleasure, which would be placing that important constitutional right upon a very uncertain tenure. The former practice in such cases was for the defendant to go into the Court of Equity and enjoin the action at law, until the equitable defense could be heard. Now, the Court of Equity having been abolished, and the jurisdiction of that court having been conferred upon the Court of Common Pleas, equitable defenses, it is true, may be set up in that court, and be heard there with the legal action to which it is interposed as a defense, but the action and the defense are not consolidated into one and tried necessarily by the same tribunal; on the contrary, they still preserve their original and distinctive features, the one being still entitled to be tried by a jury and the other by the court under the forms of an equity proceeding.

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\*In *Adickes v. Lowry*, 12 S. C. 108, the court, in discussing the nature of equitable

defenses interposed in an action at law, said: "Such defense is equitable in its nature, and belongs to that side of the court which exercises the Chancery jurisdiction. Under the former practice, such defense could not have been set up in the action at law to try the title and recover possession. The defendant would have been obliged to file his bill in equity to restrain proceedings at law, and to seek such other relief as in equity he might have a right to demand. Under the Code of Procedure, all this may be affected by the pleadings in a single action, and new parties, if necessary, brought in; but at the trial, the legal and equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by a jury, while those which would formerly have been properly triable in equity must be determined by the judge in the exercise of his Chancery power."

The case before the court was referred to the master by consent, "to take the testimony, and determine all issues, both of fact and law, and to report his actings and doings to the court." The master was thus charged with the whole case, complaint and defense, law and equity; and discharging his duty under this consent order, he was invested with the functions, both of the jury and a chancellor—of a jury as to the facts upon which the plaintiff rested his case, and of a chancellor as to equities of the defense. The facts on the law side were those to which the defendant has excepted. As to these, as we have already said above, they are not before us.

We come, then, to the questions of law. The first and most important arises upon the construction of the contract. Did that constitute the defendant a partner with the Bondurants? We think not. The true test of a copartnership is that there must be a communion of profits and losses. Story, in section 19 of his work on Partnership, says: "It is often laid down in elementary works, as well as in common authorities, that to constitute a partnership there must be a communion of profits and losses between the part-

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ners; and this, in a qualified sense, is \*perfectly true, when it is understood with proper limitations belonging to the statement." And in section 21: "That each partner must, at all events, share in the losses, so far, at least, as they constitute a charge upon, and diminution or deduction from, the profits, and in this sense it is regularly true."

We see nothing in the contract which could subject the defendant to any losses which might overtake the business. Nor was he to have a certain portion of the products as profits. The benefit which he expected to derive was not dependent upon the successful operation of the business by the Bondurants,

nor was it to await the payment of the expenses to be incurred. On the contrary, he was to have delivered to him by the Bondurants a fixed proportion of all the brick made on the yard, to wit, one-half—not one-half after the payment of debts and expenses incurred, but one-half of all made, the Bondurants agreeing also to sell to him 1,000,000 in the year 1879, at a certain rate. These stipulations were based upon the consideration that the defendant was to furnish a certain number of convicts as laborers in the yard. They are inconsistent with the idea of a copartnership, and we can see no error in the ruling of the court upon that subject.

Such being our conclusion upon the question of the partnership, it follows necessarily (the court below having found as matter of fact, that a bona fide sale had been made of the bricks in question by the Bondurants to the plaintiffs, and the sale free from fraud and collusion), that plaintiff's right to the property had been established, and he was entitled to a recovery. And the defendant's cause of action being for the breach of the contract on the part of the Bondurants, his remedy was against them only. The moment the court below construed the contract as constituting no partnership, the equitable feature in the defense vanished, and nothing was left but a plain and ordinary action at law for the recovery of personal property which depended solely upon the facts as developed in the testimony.

Some question is made in the argument of appellant as to incompetent testimony, but we find no exception among the thirteen taken to the report of the master, referring to this matter. Nor do we see that the judge

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made any ruling on this \*subject, or that any exception to the decree raises such a question.

As to the damages, we see nothing erroneous in the ruling of the Circuit judge on that subject. The complaint was for the recovery of the property and damages for its detention. What amount of damages the plaintiff sustained was a question of fact exclusively for the jury, or other tribunal acting as a jury, subject to be corrected, if erroneous, by other proceeding than by appeal.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

18 S. C. 235

OLIVER v. WHITE.  
(April Term, 1882.)

[1. *Exemptions* ⚡3.]

The act of 1870 (14 Stat. 380), allowing an exemption of personal property to the head of a family, whether he owns a homestead or not, was not in conflict with the constitution of 1868.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 3; Dec. Dig. ⚡3.]

[2. *Homestead* ⚡72.]

Quere. Are type, press and printing material, tools within the meaning of that word as used in the homestead clause of the constitution?

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 105; Dec. Dig. ⚡72.]

[3. *Taxation* ⚡576, 577.]

An exemption cannot be claimed as against an execution for city taxes, even though no certificate that it was issued for such an obligation be endorsed on the process.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1162, 1164; Dec. Dig. ⚡576, 577.]

[4. *Exemptions* ⚡116.]

A sheriff is not liable in damages for levying on property exempted under the provisions of the constitution and the homestead acts. The claimant must demand the right given him by the constitution.

[Ed. Note.—Cited in *Burr v. Brantley*, 40 S. C. 539, 19 S. E. 199.

For other cases, see *Exemptions*, Cent. Dig. § 137; Dec. Dig. ⚡116.]

Before Kershaw, J., Charleston, July, 1881.

This action was commenced April 28th, 1880, for damages for a levy on defendant's property under an execution issued by the city court of Charleston, in February, 1879. The complaint alleges that the execution was "issued out of the city court for a license, in 1878," and that the "said material had been laid off and assigned to plaintiff as a homestead, in 1877, in the suit, of McCoull, Sullivan & Co. against W. J. Oliver." At the trial, according to the brief, "the plaintiff introduced the assignment of homestead in the last-mentioned case," and proved, by the

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\*deputy sheriff of Charleston county, that it was taken from the record of that case in his office. The terms of this assignment are not given. Other matters are stated in the opinion.

In granting the non-suit, the Circuit judge said:

This execution, exceedingly irregular on its face, is produced here by the plaintiff, who complains that certain property was levied on by the defendant, who was then the sheriff of the city of Charleston, and was charged by the terms of this execution with carrying it into effect by the seizure of the defendant's property. This property was seized by the defendant, and the plaintiff claims that it was exempt from the seizure by the terms of the homestead act and the laws passed in pursuance thereof by the legislature of the State.

It was generally conceded, until quite recently, that these acts of the legislature, although different from the constitution, were valid, and they were universally practised upon up to the time of the recent decision, which has been cited here. But those decisions have declared that the powers of the legislature did not extend so far as to deal with the matter of exempting property from levy and sale by execution, because the legis-



lature had attempted to legislate upon that subject and had lost all legislative powers. They had no power to legislate beyond the declarations of the constitution. It is generally considered unfortunate that these views of constitutional law should prevail, denying to the legislature an exercise of power, from time to time, when not prohibited by the constitution from such legislative action.

It used to be considered that all the rights and privileges of legislation proper to legislative bodies, and not denied by the constitution, could be exercised by the legislature. But that is not the character of the instrument under which we are now living, and the Supreme Court has so construed the constitution, especially in regard to this matter, much against the will of the legislature of the State. However much it is to be regretted, I am bound by those decisions, and I suppose that the Supreme Court, which pronounced the decisions, regretted it as much as I do, that those who framed the constitution did not protect the man who owned a little personal property and no real estate. But they did not so provide. The last legis-

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lature passed an amendment to the constitution, which makes these humane provisions of law applicable to the poor landless man, as well as to those having large landed estates. But this has no reference to this case. It cannot be retroactive in its effects. The claim, therefore, that this property was exempt by the homestead is concluded by the decisions cited before the court.

It is hardly necessary for me to say anything about the construction of the word "tool," and if it rested on the Massachusetts case, I would, by no means, be governed by it.

Something has been said that this is a claim for taxes, and though it has assumed the form of an execution, yet I think that upon that ground the property would not be exempt from liability. I don't know that the homestead is exempt from taxation. The municipal power is only delegated power. Its taxation is State taxation, delegated by the State to the city administration. No abuse of the process has been shown. No action of the deceased sheriff, beyond that which the execution required him as a matter of duty to perform, is shown. The plaintiff is, therefore, without status in court. The non-suit is granted.

Mr. W. M. Thomas, for appellant.

Mr. G. D. Bryan, contra.

November 14th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Alonzo J. White was sheriff of Charleston, and as such officer was instructed to collect an execution of the city council of Charleston against W. J. Oliver, for \$119.75. In the discharge of this duty he levied upon certain printing material, type, &c., and closed up the printing office,

known as the Democrat in the city, belonging to W. J. Oliver, the defendant in the execution. The office seems to have been closed for several weeks, and then the execution being paid by Mrs. Oliver, the levy was released and the property returned. This action was brought by the plaintiff, W. J. Oliver, against Alonzo J. White, the sheriff, for damages alleged to have been sustained by the suspension of his business as editor, caused by the levy aforesaid.

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\*The complaint alleged that the levy was illegal for the reason that, being the head of a family, he was entitled to homestead in the type and printing material, which, as "tools," were exempt by the constitution from levy and sale. The sheriff answered that he made the levy in the discharge of his official duty; that the property was restored as soon as the execution was paid, and that Oliver, the defendant, was not entitled to claim the type and printing press, as homestead. After he answered, but before trial, Alonzo J. White died, and Blake L. White administered upon his estate, and in some way the case was revived against him as administrator.

After the plaintiff closed his evidence, the defendant's attorney moved for a non-suit, which was granted by Judge Kershaw, who held that W. J. Oliver was not entitled to claim homestead in the printing material, for the reason that the constitution, as recently construed, did not allow homestead in personal property, except as an incident to homestead in land, and for the further reason that it appeared the execution was for taxes due the city of Charleston. He held that the deceased sheriff did nothing beyond what the execution required him to do as a matter of official duty. The plaintiff appeals to this court upon the grounds. 1. "Because the plaintiff was entitled to a homestead in the personalty levied upon, as being the head of a family. 2. Because the press and types were 'tools' of trade, in accordance with the constitutional exemption."

We do not clearly see how the original action against Alonzo J. White for a tort, alleged to have been committed by him, was revived against his administrator, Blake L. White, in view of the maxim "*quod actio personalis moritur cum persona*." The code only provides for such continuance upon the death of the defendant "if the cause of action survive or continue;" but as there probably was some good reason for it, we will consider the case, which must be controlled by the law as it stood before the amendment of the constitution in 1880 in regard to homestead.

We do not understand that this court has ever declared unconstitutional the act of 1870, "to further determine and perpetuate the homestead." 14 Stat. 380. That act provided that "whenever the personal property

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of the head of any family is taken \*or attached by virtue of any mesne or final process issued from any court, and said person shall claim the said property, or any part thereof, as exempt from attachment by the provisions of section 32, Article II. of the constitution, whether the said person owns a homestead of real estate or not, it shall be the duty of the officer executing the said process to cause to be laid off and appraised, such property as the said person may select, consisting of such articles as are enumerated in the constitution, &c.

The precise question of the constitutionality of this act has never before arisen in this court; but other questions have been decided here connected with that act; indeed, based upon it, which, therefore, incidentally, at least, affirmed the validity of the act. The following cases have recognized the act. *Prince v. Nance*, 7 S. C. 351. In this case the plaintiff sued the defendant for rent in arrear, and attached part of his crop, cotton in the seed, &c. He moved to set aside the attachment on the ground that he was entitled to an exemption of one-third of his crop under the act of 1873, 15 Stat. 373. It did not appear that the defendant owned any land. The court held that, being the head of a family, he was not entitled to the exemption under the act, but was remitted to his right under the homestead provision of the constitution, which excluded the right as to rent, "an obligation contracted in the production of the crop." The court said: "The express object of section 9 of the act above mentioned is to secure exemption in the nature of a homestead of one-third of the yearly 'products or earnings' to every person not the head of a family, and not to persons who are heads of families, as they have the right to homestead exemption, in a proper case, by laying claim thereto as provided by law."

*Duncan v. Barnett*, 11 S. C. 333 [32 Am. Rep. 476]. This was a rule upon the sheriff because he had not sold under an execution certain personal property, viz., two bales of cotton, seed cotton and corn. The only question was whether the subsequent attempt to add to the list of articles exempted, "one-third of the annual product of agricultural laborers, by the act of 1873, was consistent with the provisions of the constitutional enactment. It was not whether

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the head of a family \*without land was entitled to an exemption of personal property, but whether the particular articles fell within the category of those enumerated in the constitution. It did not appear that the defendant in the execution had or claimed any homestead in land, and yet it was assumed that if the articles levied had been such as are named in the constitution, there would have been no question about it.

*Pender v. Lancaster*, 14 S. C. 28 [37 Am. Rep. 720]. The question in this case was whether a person who married and became the head of a family after an execution against him had been levied on a horse, was entitled to claim the horse as exempted under the constitution, notwithstanding the previous levy. It did not appear that the defendant owned any land, and yet it was taken for granted that he was entitled to the exemption, unless he had lost the right by the levy before his marriage. In delivering the judgment of the court, Chief Justice Willard distinctly recognized the exemption of personal property as a matter entirely independent of homestead in land, for he said: "The right to the homestead, and that to the exemption of personal property of the prescribed kinds, must be regarded as of the same nature and attended by the same general incidents, as they are both created by the same instrument for the accomplishment of the same purpose, and only differ in the respect that one relates to real and the other to personal property."

We must, therefore, conclude that the Supreme Court has never declared unconstitutional the act of 1870, before referred to, but, on the contrary, at different times and in various ways has recognized it, and incidentally, at least, affirmed its legality and validity. It follows that when the levy was made upon the property of the defendant, Oliver, he was not excluded from claiming the exemption of his personal property, although he owned no land and had no homestead therein, provided the articles of property were such as are enumerated in the constitution.

Assuming that Oliver had the right to claim the constitutional exemption in personal property, although he owned no land, were the type, press and other printing material such personal property as fall within those enumerated in the constitution? The articles enumerated in the constitution are, "house-

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hold fur\*niture, beds and bedding, family library, arms, carts and wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value, in the aggregate, the sum of \$500." The press and type cannot possibly fall under any class named, except it may be that of "tools." Does that word naturally and properly embrace press, type and printing material? The word "tool" is defined to be "An instrument of manual operation, particularly such as are used by farmers and mechanics."

It seems to have been held, in Iowa, that it embraces printing press, type and other material, but that the contrary has been held in Massachusetts. *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. 426 [20 Am. Dec. 531]. It is not perfectly clear, but we are inclined to agree



with Judge Wilde, who, in delivering the judgment in the last case cited, said: "The word 'tool' is not understood, either in its strict meaning or popular use, as designating complicated machinery, which, in order to produce any useful effect, must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation, all which is required in a printing apparatus. Nor can the several parts be denominated 'tools,' as they cannot be used separately, but, like the ax and its handle, must be united to accomplish any work. The press and forms may, with as much propriety, be denominated 'tools' as the types. All are the necessary component parts of the machinery for printing. Besides, types cannot be used as tools of trade by a printer, after he is stripped of the other parts of his printing apparatus, so that the exemption from attachment of the types alone would not enable him to pursue his trade and thereby gain his subsistence, which was the object of the statute."

But without regard to this question, the fact that the execution was for taxes was certainly enough to protect the sheriff. It is true, the certificate required by the act of 1868 was not endorsed on the process, but that requirement was for the purpose of simplifying the proof of the fact, and upon a question whether the execution was issued

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upon a claim for taxes, that \*omission would be evidence against the plaintiff in the execution, as in the case of *Adams v. Agnew*, 15 S. C. 36, cited in argument, but when once the fact appeared that the judgment was rendered upon a claim for taxes, we suppose that the plaintiff's omission to have the certificate endorsed by the court could not exclude the sheriff from the protection of the constitutional provision, which in itself has no such requirement.

Besides, the act itself seems to contemplate that the claim for homestead shall be made after levy. The words are, "when-ever the personal property of the head of any family is taken or attached," &c. The sheriff is a ministerial officer, and has no right to consider and determine the question of homestead. The process in his hands is a mandate to make the money. If he sells or removes property, subject to homestead, he is liable to be indicted under the act "to punish sheriffs and other officers for violating the homestead" (14 Stat. 172); but it would seem that there is no prohibition against simply making a levy, which the sheriff being commanded to make, is the usual preliminary step to the claim of homestead upon the part of the defendant in execution. The constitution only gives the right to demand homestead, and it is necessary for the claimant to set it up and establish it

as in regard to any other right. *Pender v. Lancaster*, supra.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 242

ABRAMS v. CARLISLE.

(April Term, 1882.)

In an action for claim and delivery of a mule, the trial justice rendered judgment for plaintiff and notified counsel, and on same day issued his execution under which the constable at once seized the mule and delivered it to plaintiff; defendant on same day demanded of the trial justice a return of the property, and within five days afterwards moved for a new trial, which was granted. Afterwards this defendant sued the trial justice for damages. *Held*—

[1. *Replevin* ⚡113.]

That the process having been executed and a new trial granted, the trial justice had no authority to undo what the constable had done.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 445; Dec. Dig. ⚡113.]

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[2. *Replevin* ⚡113.]

\*Has a trial justice the right to have his execution executed within the five days allowed for appeal or motion for new trial?

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 445; Dec. Dig. ⚡113.]

[3. *Justices of the Peace* ⚡25.]

In issuing his execution the trial justice acted judicially, and is not, therefore, liable in damages, unless it was done willfully or corruptly. *McCall v. Cohen*, 16 S. C. 445 [42 Am. Rep. 641].

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 32; Dec. Dig. ⚡25.]

Before Hudson, J., Newberry, February, 1881.

The opinion states the case.

Messrs. Moorman & Simkins, for appellant.  
Messrs. Jones & Jones, contra.

November 14th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. Milton A. Carlisle is a trial justice of Newberry county, and this was an action against him for damages for acting contrary to law, and for official misconduct under the following circumstances: One David Boozer, in February, 1879, brought an action against Wilson G. Abrams for claim and delivery of a mule of the value of \$75. This action was brought before Milton A. Carlisle, as trial justice. Boozer gave bond, had the mule delivered to him, but on the same day Abrams, the defendant, gave the bond required in such case, and the mule was returned to him. On March 6th, 1879, the trial justice heard the case and delivered a judgment in writing for Boozer, that the mule be delivered to him, or in case a delivery could not be made, then for \$75 damages. March 8th this judgment was read to the counsel on both sides, and no motion was made for a new trial or

notice given of appeal. On the same day an execution was issued to enforce the judgment, which was executed, and the mule delivered to Boozer. Soon after the delivery of the mule, and on the same day the attorney of Abrams demanded from the trial justice possession of the mule, and he refused to deliver the mule, saying the judgment had been executed. On March 12th Abrams moved for a new trial, which the trial justice granted, and the case was tried again on July 4th, and judgment again given for Boozer.

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July 11th \*Abrams appealed to the Circuit Court of the Common Pleas, where the case is still pending. On August 7th Abrams again demanded that the trial justice should deliver the mule to him, upon the ground that he had given bond for the delivery of the mule if the final decision should be against him, but that pending the litigation he was entitled to retain possession. The trial justice refused to comply with the demand, and this action was brought against him for damages in acting contrary to law, and for official misconduct.

The presiding judge charged the jury "that if the trial justice acted within the scope of his jurisdiction and authority, and had issued no illegal execution, or did any illegal act, he was not liable; that in the absence of instructions from the plaintiff he was not bound to wait until five days elapsed before issuing execution at once; the judgment was announced to the attorneys on March 8th, and no intimation of an intention to appeal being given, he issued the execution and the same was enforced; no proceedings by the defendant Abrams, subsequent to this can operate as a supersedeas of the judgment and enforced execution; that no trespass was therefore committed by the trial justice in issuing the execution or in refusing to undo what the constable had done in enforcing the same; consequently the question of damages cannot go to the jury, and you must find for the defendant Carlisle."

The jury found for the defendant, and the plaintiff appeals to this court upon the following grounds: "Because the judge erred in charging the jury—1. That in the absence of instructions from the plaintiff in the judgment, it was the right and duty of Trial Justice Carlisle to execute the judgment he had rendered against the defendant, the plaintiff in this case, immediately upon its publication, and was not bound to wait until the time for appeal or motion for a new trial had expired. 2. That the proceedings in that case, subsequent to said judgment, did not operate as a supersedeas of the judgment and execution. 3. That the defendant, as trial justice, committed no trespass in issuing the execution and in refusing to undo what the constable had done in enforcing the same, and that the jury must find for the defendant."

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"It is clear that the trial justice could not have legally delivered the mule to the plaintiff, Boozer, after the new trial was granted, for, in that case, the judgment would have been set aside, and the issue would have stood untried, precisely as it did when Abrams got possession of the mule under his bond. We take it to be also clear that, having had the mule delivered under his judgment before the motion for a new trial was made, the trial justice had no legal authority under a judgment which was then *functus officio*, to undo what the constable had done; so that upon this part of the case, the matter is reduced to the question, whether the trial justice was authorized by law to issue his execution on the very day his judgment was promulgated, and have it executed by taking the property from one and giving it to the other litigant, before the five days had expired, which are allowed for appeal or motion for a new trial.

We have no doubt that the trial justice, during that time, had the right to enter his judgment and lodge his execution, as it is sometimes said, "to bind property;" but this case does not make it necessary to decide whether he had the right, in an action for personal property, to have his judgment executed by seizing and delivering the property before the time allowed for appeal or motion for a new trial had expired. Under ordinary circumstances, we think it the better course for him to regard the case as still pending until the time allowed for a new trial or appeal has expired.

But Milton A. Carlisle was a judicial officer, and the subject-matter was clearly within his jurisdiction. He had just decided the case, and when he entered his judgment and execution to enforce it, he was acting judicially, as much so as when he rendered the judgment itself, and even if he did make a mistake in having the mule delivered at once, without reference to the right of the defendant to move for a new trial or appeal within five days, he was not liable in damages for the consequences, unless he acted willfully and corruptly. A judicial officer is not liable in damages for an honest mistake committed in the course of his duty. This court has lately had occasion to consider this question in the case of *McCall v. Cohen*, 16 S. C. 448 [42 Am. Rep. 641], and it cannot be necessary to do more than refer to that case, in which

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\*the court say: "It is as well settled as any legal proposition can be, that a judicial officer is not liable in damages for an injury which may come to a party by reason of an error of judgment committed in the discharge of his duty, when the subject-matter is within his jurisdiction. Without going into the long line of authorities in support of this proposition, extending back, at least, to the time of Lord Coke, it cannot be necessary to do more than refer to the case of *Bradley v.*



Fisher, 13 Wall. 335 [20 L. Ed. 646], decided in the Supreme Court of the United States as late as 1871, in which the subject received exhaustive consideration. \* \* \* This is undoubtedly the law in reference to courts having general authority, and it is equally true in reference to judges of inferior courts, except, possibly, as to the right to call in question the motives with which they act, whether ignorantly or willfully and corruptly." *Reid v. Hood and Burdine*, 2 N. & McC. 168 [10 Am. Dec. 582]; see also *Young v. Herbert*, 2 N. & McC. 172 (in note to this case), and authorities.

There is no allegation here that the trial justice, Carlisle, acted willfully and corruptly. "Neither in the pleadings nor in the argument is he charged with collusion, fraud, malice or corruption. On the contrary, this is disavowed by plaintiff's counsel, who speaks in terms of praise of the ability and integrity of that officer."

The judgment of this court is that the judgment of the Circuit Court be affirmed, and the appeal dismissed.

#### 18 S. C. 246

STATE, ex rel. CONANT v. FULLER.

(April Term, 1882.)

##### [1. *Mandamus* ⇨1.]

A writ of mandamus can only issue where there is a specific legal right to be enforced or a positive duty to be performed, and where there is no other specific remedy; and this legal right embraces not only the character of the claim, but also the form in which it is presented.

[Ed. Note.—Cited in *State ex rel. Kendall v. County Commissioners*, 28 S. C. 260, 5 S. E. 622.

For other cases, see *Mandamus*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

##### [2. *Mandamus* ⇨109.]

This highest of judicial writs will not issue to compel a county treasurer to pay an auditor's checks for assessment expenses, where the accounts for which the checks were issued have not been examined and approved by the county commissioners, as required by the act of 1875, § 23, (15 Stat. 993), and subsequent legislation.

[Ed. Note.—Cited in *Re Conant's Claims*, 21 S. C. 362.

For other cases, see *Mandamus*, Cent. Dig. § 235; Dec. Dig. ⇨109.]

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\*Before Kershaw, J., Beaufort, November, 1881.

This is an appeal from the following order of the Circuit judge. Other facts are stated in the opinion.

The claim of the relator is founded upon services rendered by assistant assessors in making the assessment for taxes in the year 1876, for which the relator holds the checks of the auditor on the treasurer of Beaufort county, as provided for in section 84 of the act of 1874, p. 762.

By that act, \$1,000 were set apart to pay the expenses of the assessment, which was re-

quired to be paid out of the first money collected for the year for which such assessment was made. In this instance the funds collected were paid out without providing for these claims. Here, lately, other funds have come into the hands of the treasurer on account of the taxes of that fiscal year. And the object of this proceeding is to procure a writ of mandamus to compel the application of this fund to the claims of the relator, which were not paid as they should have been out of the money formerly collected. If they had been so paid there would have been a different set of claims displaced, which would have remained unpaid, but which have been satisfied out of money applicable first to the claims of the relator. There therefore does not appear any reason to doubt the equity of the present claims, and they ought to be paid unless there be objections of a legal character preventing the relief demanded.

If the funds now in the hands of the treasurer had been paid out at the time when the other taxes for that year were collected and before any payments had been made from the entire fund so collected, there can be no question that the fund would have been charged with the payment of claims like this. And it would have made no difference whether they were paid out of the money first collected or the last. In other words, there was no specific appropriation of the identical \$1,000 first collected, so as to give the assessor the right to those specific dollars, and only to those, so that when these had been improperly paid out to the other parties the assessor had no right to be paid out of other funds left in the treasury. I do not think that the lateness of the time at which this

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fund has come into the treasury \*can affect the rights of the relator. The taxes collected on account of that year, (1876,) whenever received, constitutes a fund applicable to those claims, which, under the act, constitute a class of claims preferred to the extent of \$1,000, payable out of that fund.

This special preference was necessary in order to procure an assessment to be made, without which there could have been no taxes collected. They are necessary expenses of administration, without which, the laws would be inoperative upon which the maintenance of the government depends. I do not think, therefore, that they come under the general class of liabilities of the county, to be thrown into the category of past indebtedness. The legislature very distinctly indicated this by the peculiar provisions of the act of 1874, placing them upon an entirely different and peculiar footing. I have given consideration to the various objections urged at the bar and in the return of the respondent, and find nothing to justify a refusal of the relief desired by the relator. The act providing for a division of the coun-

ties of Beaufort and Hampton, and a division of the debt between them cannot affect this question, nor can any confusion result in consequence, since reference was required to be had in such division to the unpaid taxes due Beaufort county.

It is ordered and adjudged that a writ of mandamus do issue to command the treasurer of Beaufort county to pay the claims of the relator as demanded, but without costs.

Messrs. Elliott & Fowles, for appellant.

Messrs. W. J. Verdier, J. D. Pope, contra.

November 15th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. On November 15th, 1881, John Conant, the relator, applied to Judge Kershaw for a writ of mandamus to compel R. B. Fuller, treasurer of Beaufort county, to pay him the amount of twelve warrants, aggregating \$995. The affidavit of the relator set forth that at certain stated times in the years 1876 and 1877, L. S. Langley,

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then the auditor of Beaufort county, "drew his warrants or checks as such auditor, and directed them to the treasurer of said county according to law, and required him to pay to the persons named in said warrants or checks the amounts therein named, being in payment of the expenses of the assessment of said county for taxation for the fiscal year 1876, and to charge the sum to the assessment fund;" that thereafter said warrants or checks came to the hands of the relator, who is the lawful owner and holder thereof; that they were not paid by the then county treasurer, George Holmes, because there were then no funds in his hands applicable thereto; that respondent has funds in his hands applicable to the payment thereof and refuses to pay the same, although requested so to do, and that the whole expense of making the assessment for said year (1876) is still due and unpaid. The checks, twelve in number, were drawn for various sums from \$25 to \$200, and, with one exception, were in favor of "bearer" or "J. W. Brown or bearer." Eleven were dated on various days in June, July and August, 1876, and the twelfth on January 16th, 1877.

The respondent made return, in which he admits that he has in his hands county funds for the fiscal year commencing November 1st, 1876, collected lately, in May and July, 1881, amounting to the sum of \$882.86, but submits that the same is not applicable to the payment of relator's claims for various reasons therein set forth.

Judge Kershaw heard the case upon petition and answer, and granted the writ, we suppose, to the extent of the money in hand for the year commencing November 1st, 1876. The respondent appeals to this court upon the following grounds:

1. "Because his Honor granted the order upon equitable grounds, whereas it is submitted it should have been granted only to

compel the performance of a clear duty, made obligatory by law upon the respondent.

2. "Because his Honor ruled that relator's claims had not become past indebtedness, and that the taxes collected for the year 1876, whenever received constituted a fund for the payment of such claims.

3. "Because his Honor ruled that the act creating the county of Hampton, and pro-

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viding for a division of the debt of the old county of Beaufort, between the present county of Beaufort and the county of Hampton, and the action of the commissioners appointed thereunder do not affect this question.

4. "Because the relator did not present said claims for payment at the time when the first collection of taxes, for said fiscal year were made by the then county treasurer, which said collection as claimed by him was applicable to the payment thereof.

5. "Because said claims, if valid, were payable from the proceeds of a tax levied by an act of the general assembly, approved March 22d, 1878, to be applied to the indebtedness of the county of Beaufort, for the fiscal year commencing November 1st, 1876.

6. "Because, under existing laws, respondent cannot legally pay said claims, except upon the checks of the county commissioners.

7. "Because said checks were not drawn in the manner then required by law, especially in this, that the alleged services for which they were drawn were not specified, nor were they ever audited or approved by the county commissioners.

8. "Because it is alleged in the return of the respondent, and not controverted, that said services were never rendered.

9. "Because no legal demand was made upon respondent for payment of said claim.

10. "Because respondent is not treasurer of the old county of Beaufort, but of the new county of Beaufort, and cannot therefore legally pay said claims."

The view which the court takes of this case renders it unnecessary to consider all the exceptions seriatim. It is well settled that the writ of mandamus can only issue to compel the performance of some act obligatory by law on the officer to whom it goes. He must have the ability to comply, and must be also under a clear duty in respect thereof. A writ of mandamus is the highest judicial writ known to the constitution and laws, and only issues when there is a specific legal right to be enforced, or where there is a positive duty to be performed, and where there is no other specific remedy. When the legal right is doubtful, or when the perform-

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ance of the duty rests in discretion, or where there is other adequate remedy, the writ cannot rightfully issue. *Hayne v. Hood*, 1 S. C. 23; *Ex parte Mackey*, 15 S. C. 223.



Did the relator have a legal right, clear and beyond doubt, so that it was the plain ministerial duty of the treasurer to pay these checks? As we understand it, the legal right referred to embraces, not only the character of the claim, but also the form in which it is presented, and this must be determined by the state of the law and facts existing at the time the proceeding was taken. The county treasurer is a public officer, and he cannot be compelled by mandamus to pay any claim unless it is presented in the form required by law. The demands presented to him for payment in this case were simply checks of the auditor of Beaufort county for the time being, without having been investigated by the county commissioners, or having any statement attached showing the services alleged to have been performed by the parties, in whose favor they were drawn, and the question is whether it was the plain ministerial duty of the treasurer to pay them in that form.

It is alleged that the checks were given for services rendered in assessing the property of Beaufort county, in the months of June, July and August, 1876, preparatory to the levy of taxes for the fiscal year commencing November 1st, 1876, and are chargeable upon, and should be paid out of any money in hands from that levy. The respondent denies that the services were ever rendered at all, and refers to circumstances connected with the checks to sustain the allegation, and insists that he could not lawfully pay them without audit, and that the mere check of the auditor was not such audit. The Circuit judge did not think it necessary to order an issue to ascertain the fact, and for the purposes of the case, we will assume that some such services were rendered.

In several respects this case is like that of *The State, ex rel. Wise v. Ransom*, 9 S. C. 200, certainly in reference to the time when the alleged services were rendered, and, therefore, if there is no good reason why these services should not be paid for, they would be chargeable to the levy for which they were rendered, commencing November 1st, 1876; but the question lies back of

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\*that, whether the treasurer was bound to pay them at all, merely in the form of checks of the auditor under the act of 1874, which provided as follows: "That the treasurer of each of those above named counties shall pay to his county auditor, or his order, the sum specified in the auditor's warrant from the first collection of county funds of that fiscal year."

After the passage of this act, it was soon perceived that so far as it directed the treasurer to pay such county claims simply on the check of the auditor, it was not in harmony with other provisions of the law, but anomalous and dangerous, if not unconstitu-

tional. The policy of the law, undoubtedly, is to subject every county claim to the examination of the board of county commissioners, the tribunal provided for that purpose by the constitution. In this view, doubtless, the legislature passed the act of March 25th, 1876, 16 Stat. 194, which provided as to these claims for making assessments, as follows: "And the county commissioners of the several counties shall, upon the application of the county auditors, draw their checks on the county treasurers for the several amounts to which the auditors may be entitled under the provisions of this section, and the county treasurers shall pay the said checks from the first collection of county funds of the fiscal year in which the work shall be performed. But no such check or order shall be paid by the county treasurer until the auditor shall have filed with the county commissioners an itemized statement of the services rendered by his assistants," &c.

It is true that, although passed before, this act did not take effect until after the time these services were rendered, viz., November 1st, 1876; and on that account it was held, in the case of *Wise v. Ransom*, supra, that it did not apply to services rendered in June, July and August of 1876. But there was another act on the statute book at that time that seems to have been overlooked, which was in active operation, and, we think, repealed so much of the act of 1874 as directed the treasurer to pay such claims as these upon the naked check of the auditor. That was the act of April 13th, 1875. "To reduce all acts and parts of acts in relation to county commissioners, their powers and duties into one act, and to amend

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the same." 15 Stat. 993. \*Section 23 of that act, after making some regulations as to numbering audited claims, provided as follows: "And after the passage of this act no claims of any class or description, drawn against any county in this State, shall be paid by the county treasurer of any county until such claims have first been examined, approved and allowed by the board of county commissioners of such county. And the said commissioners, after examining, approving and allowing such claims, shall, if there be funds in the hands of the county treasurer subject to the payment of said claims, draw their checks for the payment of said claims upon the treasurer of their respective counties, specifying the fiscal year for which the claims were contracted or incurred, and immediately cancel the said claims, and file the same in their office as a voucher for their draft. And it shall not be lawful for any county treasurer to pay any claim against the county, except upon the checks of the county commissioners of the said county, which shall bear upon their face not only the number, amount and name

of the party in whose favor they are drawn, but the nature of the claims for which they are drawn, and the fiscal year in which they were contracted or incurred," &c.

This act, as stated, was passed in April, 1875, taking effect from its passage, which was before these services were rendered or checks were drawn. It expressly "repealed all acts and parts of acts inconsistent with it," and we think it repealed so much of the act of 1874 as made it the duty of the county treasurer to pay naked checks of the auditor without the approval of the county commissioners. This act was not referred to in the case of *State, ex rel. Wise v. Ransom*, supra, for the very good reason that it did not apply to that case, in which the question was made upon the order of the board of county commissioners, who had examined and approved the claim. It is important to preserve the symmetry of the law, which requires that a county treasurer shall not pay any claim against the county, except upon the check of the county commissioners, who are charged with the duty of raising the money for that purpose and giving checks for all proper county claims.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the petition for mandamus dismissed.

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\*CHARLESTON RICE MILLING CO. v.  
BENNETT & CO.  
(April Term, 1882.)

[1. *Estoppel* ⚡22.]

In action by A., involving his right of way through an alleged canal over a lot of B. covered with water, both parties, deriving title through one J., who held under certain partition proceedings, the presiding judge committed no error in charging the jury that the absence of any trace of the canal on a plat made at the time of the partition was "only one circumstance to be considered and was not conclusive," it appearing that J., during his ownership, marked out the canal on an old plat, and that it was referred to as a boundary and open way in the title deeds under which B. held.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 31; Dec. Dig. ⚡22.]

[2. *Easements* ⚡26.]

A.'s right to the use of such a canal cannot be defeated by showing that it is crossed by a proposed street dedicated to the public, but never filled up, used, nor prepared for use.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 72<sup>1</sup>–74; Dec. Dig. ⚡26.]

[3. *Dedication* ⚡53; *Highways* ⚡80.]

[Laying out a road or dedicating a street to the use of the public does not divest the title of the adjacent proprietors to the land on which it is projected; but their rights remain the same, subject to the easement created.]

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 96; Dec. Dig. ⚡53; *Highways*, Cent. Dig. § 288; Dec. Dig. ⚡80.]

Before Kershaw, J., Charleston, July, 1881.

This was an action by Wm. P. Russell and

Nathan Frye, copartners, under the name and style of the Charleston Rice Milling Co. against Charles S. Bennett and others, copartners, doing business under the firm name of C. S. Bennett & Co. The summons bears date January 10th, 1881. The opinion makes a full statement of the case.

Mr. A. G. Magrath, for appellant.

Messrs. L. DeB. McCrady, E. McCrady, Jr., contra.

November 27th, 1882. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action for damages caused by the alleged obstruction of a canal running into Cooper river, the use of which was claimed to belong to the plaintiffs in common with other persons, including the defendants. Without the plat, which we cannot make a part of this opinion, it is difficult to give a clear view of the locus in quo, which is necessary to a proper understanding of the case, but we will endeavor to make it intelligible.

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The plaintiffs and defendants own rice mills in Charleston, situated near each other, and both within the low grounds lying between the low-water mark and the edge of the marsh of Cooper river. The mill of defendants was established first, and lies between that of the plaintiffs and the channel of the Cooper river.

The plaintiffs, having lately changed their building material factory into a rice mill, claim that there is an old canal running along the north side of their lot and through that of the defendants to the river, which they have a right to use, and which, if kept open, would enable parties in boats with rough rice to reach their mill, and that defendants, to their great damage, have obstructed that canal. The defendants, on the other hand, deny that there is any such canal through their lot which the plaintiffs are entitled to use, either by prescriptive right or by grant as an appurtenant to their lot. And these are the questions in the case.

The evidence does not disclose when or by whom, or for what precise purpose the alleged canal was cut; but there is little doubt that there was once such a canal through the marsh opening into the river. The part furthest from the river, along the plaintiffs' lot, is admitted to be there now; but the defendants allege that the lower end, connecting with the river, no longer exists, or if it does, that the plaintiffs have no right to use it.

Many years ago, one William Johnson owned all these marsh lands down to Cooper river, including the lots of both plaintiffs and defendants, and it is admitted that both parties hold under him. After William Johnson died, proceedings were instituted to

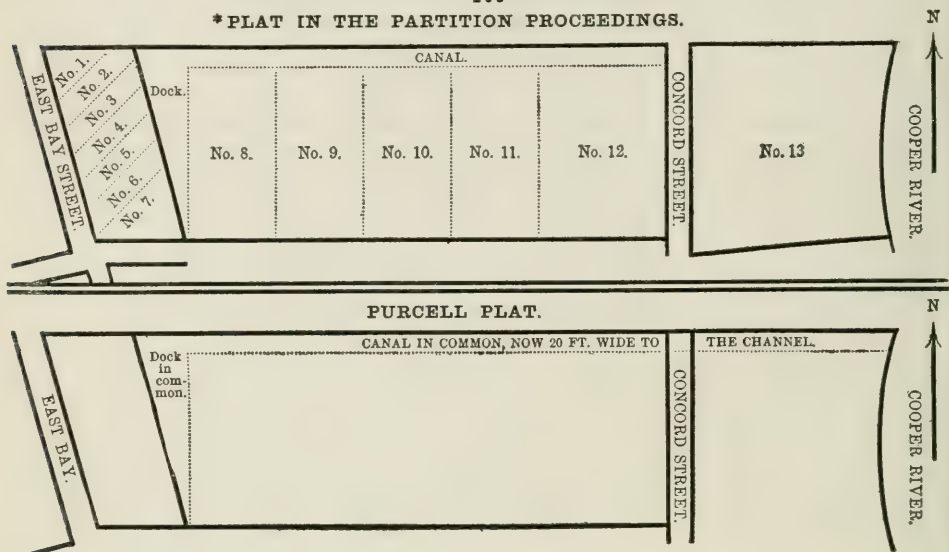


partition these lands. The commissioners in partition recommended that the lands should be divided into different parcels, and sold or assigned to the parties in interest, and along with their return exhibited a rude plat dividing the land into lots numbered from one to thirteen.

It seems that sometime before these proceedings, the city had ordered a street to be opened through these lands, to be called "Concord street." The site indicated for it, however, had never at this place been filled up and made an actual street, but remained in its original state as mud or water. See Ben-

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\*PLAT IN THE PARTITION PROCEEDINGS.



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nett v. \*Bell, 10 Rich. Eq. 466. On the plat of the commissioners in partition before referred to, the site of Concord street fell between lots No. 12 and No. 13, and a dotted line marked "canal" traced its course as running along the northern border of all the new made lots from No. 1 to No. 12 inclusive, but there it struck the site of Concord street, which, as stated, was covered by water, and did not go beyond through lot No. 13, lying between Concord street and the river.

Under these partition proceedings, lots No. 12, on the west side, and No. 13, on the east side of the site of Concord street, were assigned to John Johnson, Jr., as one of the heirs of William Johnson. About the year 1831, John Johnson, Jr., died, leaving a will whereby he devised all of his property to his executor, first to pay debts and then to his wife, Mary, during her life, with remainder over to his brother, Dr. Joseph Johnson. Sometime after, when Dr. Joseph Johnson and Mary Johnson owned all the lands through which, as alleged, the canal runs, it appears that upon an old plat of the premises, made by one Joseph Purcell, in 1821, the said Joseph Johnson drew two lines indicating the canal, which, corresponding with that marked on the partition plat, as far as that went down to Concord street, extended beyond that point to the river, and wrote between the lines the following words: "Canal in common, now twenty feet wide to the channel."

In 1834, after this declaration, Dr. Joseph Johnson and Mary Johnson conveyed lot No. 13 to Richard Fordham, with the following description: "All that tide lot \* \* \* bounded to the north on land laid out as a canal for the use of certain heirs of William Johnson, deceased, \* \* \* and to the west on Concord street, together with the right to use and enjoy the said canal on the north," &c. This is the lot to the east of Concord street, now owned by the defendants under this title to Fordham, to whom it was first conveyed. In 1849, Joseph Johnson and Mary Johnson conveyed lot No. 12 to William Bell, with this description: "All that water lot \* \* \* butting and bounding to the north, on a canal twenty feet wide, laid out for use in common of sundry heirs and

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assigns of William Johnson, \*father of the above-named Johnson; to the east on land of W. J. Bennett & Co." This is the lot now owned by the plaintiffs, under this title, to the west of Concord street.

The defendants claim that if the canal ever had an existence through their lot to the channel, as indicated by Joseph Johnson on the Purcell plat, it was discontinued, and the plaintiffs, as owners of lot No. 12, have no right now to the use of it for two reasons—first, that there was not, on the partition plat under which they held, any trace of the canal east of the site of Concord street, and, second, that the said Concord street, dedicated by the city, cuts the line of the supposed

canal at nearly a right angle, and, although now merely a street in theory, would certainly, if ever filled up, cut off and render useless as a canal all that part of it lying between that point and the river.

The case came on for trial before Judge Kershaw. Much testimony was offered, especially upon the claim as to the use of the canal relied upon to give the plaintiffs a right by prescription. But upon this subject the judge charged that, as the alleged canal through the lot of the defendants was under an open sheet of water and not appearing on the surface, the evidence did not establish such a use of the water on the precise line of the unseen canal, as to give a prescriptive right to its use, and there being no exception to this charge, we need not pursue this branch of the subject farther.

Upon the other points involved, the judge charged as follows: "The plaintiffs having derived their title under this partition, are entitled to enjoy the attendant right to the use of the canal as established by the decree in partition. The question therefore is, what was that canal as established by the decree?"

\* \* \* You will not understand me as indicating any opinion on this subject, but merely calling your attention to all the evidence and instructing you that the plat accompanying the partition is not conclusive, but may be considered by you, in connection with other circumstances, and the action of the parties under it may be determined by all the evidence before you, including the admission of the parties as contained in their deeds and all their conduct in relation to it, as indicating the understanding which followed the land into the hands of the persons

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who were afterwards the owners of it. My impression of that plat made by the commissioners is, that it is so ambiguous that it throws you upon the evidence in the case wherever the fact that the canal does not extend beyond Concord street, is a material point. This Concord street seems to have been dedicated at some time to the use of the public, and you are to determine from that circumstance, whether that is or is not a reasonable fact which would tend you to the belief that the canal was to stop at that street because there was to be a street there. But in regard to the effect of a street laid out and not dedicated, although the city may have opened and filled up that street at any time, that circumstance would not be conclusive of the right of the plaintiff to use the canal beyond the street, if, in point of fact, they had the right to do so attendant upon their title. The street when established might possibly abridge their use of the privilege, but until actually occupied as a street, the land is open to the use of the adjacent proprietors," &c.

The jury found for the plaintiffs damages in the sum of \$315, and the defendants appeal

to this court upon the following exceptions:

1. Because there was not any proof of a dedication of the alleged canal, nor proof of acceptance or user.

2. Because an act of dedication involves a designation of the object dedicated, the purposes of the dedication, and the persons to whom and for whom such dedication is made. And in all of these respects the evidence was wanting, particularly in the two last named, concerning which there was no evidence.

3. Because there was not any evidence of user to give right by prescription, and the non-user in any way had continued so long as to bar a right claimed under deed.

4. Because the plaintiff must recover, if at all, on his own title, and that to be proved as set forth in their complaint. And the right set forth in their complaint and in their title, was contradicted by the proof produced at the trial.

5. Because a dedication, public in its nature, requires more than the proof of a mere intention; it must be accompanied by certain positive acts. And if private, because

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limited to a certain person or persons, the right claimed by such person or persons must be clearly established by such person or persons.

6. Because the legal effect of a deed or of deeds must be decided by the terms of such deed or deeds, and these terms cannot be varied by circumstances or matters outside of such deed or deeds.

7. Because a right to claim damages results only from a wrong done in the violation of some right, and there was not any proof of a right to be violated, consequently no wrong done for which damages could be given.

8. Because his Honor, the presiding judge, should have instructed the jury as is set forth in the preceding propositions.

As we understand it, the right claimed on the part of the plaintiffs to have the use of the canal, is not a public right belonging to all persons, but a private right as an incident of the ownership of their lot, which came to them as assigns of the Johnsons, with the right to use the canal over all other lands derived from the Johnsons; that they have to that effect a covenant running with the land. If the right exist, it is a private right resting in grant, and there is no question of dedication to the use of the public or acceptance involved.

The case seems to have turned entirely upon two questions, whether the canal, which the plaintiffs were entitled to, ever extended east of Concord street to Cooper river; and if so, whether the defendants have obstructed it. These were both questions of fact, and being an action at law, this court has no right to review the evidence or do more than correct any error of law, which may have been committed.



There were no requests to charge, and we do not see that any specific error of law is charged in the exceptions, unless it may be involved in the instructions of the judge that neither the absence of a trace of the canal on the partition plat, beyond the proposed site of Concord street, nor the mere dedication of that street without its being filled up, was conclusive against the rights of the plaintiffs. We do not think it was error in the judge to tell the jury that the absence of a trace of the canal on the partition plat, beyond Concord street, was only one circumstance to be considered with others, and was

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not conclusive \*as to its non-existence beyond that point. The canal was not traced on the partition plat, but there was no negation as to its existence beyond. That was not a case for the application of the principle of *expressio unius est exclusio alterius*. As said by the judge, it may be that it was not thought necessary to mark the canal "further than where it entered upon open water." It was admitted that down to the site of Concord street there was a canal as marked on the plat, and from the nature of a canal it would seem probable that it had an outlet or vent to the river.

But be that as it may, after partition, both lots belonged to Dr. Joseph Johnson and Mary Johnson; and whilst they were the owners, it was acknowledged and marked on an old plat that the canal did go to the channel. The parties, in one sense, do hold under the partition proceedings, but through Dr. Joseph Johnson and Mary Johnson, and any explanation which they made of those proceedings bound them and went along with the lands into the hands of their alienees. *Elliott v. Rhett*, 5 Rich. 406 [57 Am. Dec. 750].

It is true that the plaintiffs must recover upon the strength of their own case; but when the action is for obstructing a right of way, we see no reason why the plaintiffs' right to recover might not be shown by the admissions of the defendants. They had no higher right than was conveyed by Joseph Johnson and Mary Johnson to Fordham in 1834, and thence down to them. They purchased, subject to the easement as declared by the successive deeds in their chain of title. As late as 1871, in the deed from W. J. Bennett to C. G. Memminger, executor of Thomas Bennett, their lot is described as "all that tide lot, \* \* \* butting and bounding north on a canal, laid out for the use of certain heirs of William Johnson; east, on the channel of Cooper river; south, on dock twenty feet wide, owned and used in common between Robert Eason and the devisees of John Johnson, deceased, and west on Concord street, together with a right to use and enjoy the said canal on the north, and dock on the south, in common with such other persons as

are now or may hereafter become entitled to use and enjoy the same in common," &c. The

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defendants are estopped \*from denying that the canal crossed Concord street and ran along the northern boundary of their lot held from the Johnsons.

As to the effect of the simple dedication of Concord street, without its being filled and actually made a street, we concur with the judge. Laying out a road or dedicating a street to the use of the public does not divest the title of the adjacent proprietors to the land on which it is projected; but their rights remain the same, subject to the easement created. Whether Concord street shall be filled up and prepared for use as a street, and if so, what effect that would have upon the canal called for by the title deeds of the parties, are matters between the plaintiffs and the authorities of the city, which are not before us, and as to which we make no ruling. All we mean to say is, that in the present condition of things, the defendants cannot defeat any right to the use of the canal which may otherwise exist, by showing that the proposed street, if actually made, would cross that canal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 18 S. C. 262

GUNTER v. GRANITEVILLE MANUFACTURING COMPANY.

(April Term, 1882.)

[Reported and Annotated in 44 Am. Rep. 573.]

[1. *Trial* ⇨268.]

Where the presiding judge said to the jury concerning requests to charge "that most, if not all, of them were in accordance with the law as understood by me, and already laid down in my charge," but "were declined so far as they contained matter inconsistent with the instructions already given," a request to charge cannot be said to have been refused unless shown to be inconsistent with the general charge.

[Ed. Note.—Cited in *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 273, 15 S. E. 562.]

For other cases, see *Trial*, Cent. Dig. §§ 662, 673; Dec. Dig. ⇨268.]

[2. *Master and Servant* ⇨185.]

A workman, employed by a cotton manufacturing company to keep the machinery of the mill in repair and good working order, is not a fellow-servant with a weaver in the factory in such a sense as to exempt the employer from liability for an injury to the weaver caused by the negligence of such workman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 408; Dec. Dig. ⇨185.]

[3. *Master and Servant* ⇨190.]

A master is liable for any injury to his servant caused by his own negligence, or by the negligence of any person representing him; and a person employed to do anything which it is the master's duty to do—as e. g., in a cotton factory, to employ the operatives and discharge

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them when incompetent or careless, to provide suitable machinery, and to keep it in proper re-

pair and safe working order—is the master's representative.

[Ed. Note.—Cited in *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 276, 282; *Sanders v. Etivan Phosphate Co.*, 19 S. C. 513; *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 544; *Calvo v. Charlotte, C. & A. R. Co.*, 23 S. C. 528, 55 Am. Rep. 28; *Boatwright v. Northeastern R. Co.*, 25 S. C. 133; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 387, 7 S. E. 614, 1 L. R. A. 682; *Donahue v. Railroad Co.*, 32 S. C. 301, 11 S. E. 95, 17 Am. St. Rep. 854; *Carter v. Oliver Oil Co.*, 34 S. C. 214, 13 S. E. 419, 27 Am. St. Rep. 815; *Branch v. Port Royal & W. C. Ry. Co.*, 35 S. C. 407, 14 S. E. 808; *Carter v. Oliver Oil Co.*, 37 S. C. 604, 15 S. E. 928; *Jenkins v. Richmond & D. R. Co.*, 39 S. C. 511, 18 S. E. 182, 39 Am. St. Rep. 750; *Whaley v. Bartlett*, 42 S. C. 472, 20 S. E. 745; *Carson v. Southern Ry.*, 68 S. C. 83, 46 S. E. 525; *Richey v. Southern Ry.*, 69 S. C. 393, 48 S. E. 285; *Brabham v. American Telephone & Telegraph Co.*, 71 S. C. 56, 50 S. E. 716; *Shirley v. Abbeville Furniture Co.*, 76 S. C. 455, 57 S. E. 178, 121 Am. St. Rep. 952; *Hicks v. Southern Ry. Co.*, 38 S. E. 731.

For other cases, see *Master and Servant*, Cent. Dig. § 465; Dec. Dig. ☞ 190.]

#### [4. *Jury* ☞ 131.]

In action against a corporation for damages, an employé of the company was called as a juror and examined on his voir dire; after answering in the negative the statutory questions, he was asked by the court if he was an employé of the defendant, and the juror said he was, whereupon he was excluded. *Held*, that the question was proper, and that the propriety of this juror's exclusion was a matter wholly within the discretion of the presiding judge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 569; Dec. Dig. ☞ 131.]

[This case is also cited in *Ex parte Johnson*, 19 S. C. 493, and *Price v. Richmond, etc., R. Co.*, 38 S. C. 213, 17 S. E. 732, as to the degree of care required of the master in the selection of machinery.]

Before Kershaw, J., Aiken, September, 1881.

This was an action by Marina S. Gunter against the Graniteville Manufacturing Company, commenced October 4th, 1879, for \$10,000 damages for the loss of an eye, caused by a shuttle flying from its place while a loom was being repaired, in work hours, by one Harling, the loom repairer. The case was tried in September, 1880, and a verdict was rendered for plaintiff for \$2,000. On defendant's appeal, a new trial was granted; and at this second trial the verdict was for plaintiff, \$5,400.

The judge's charge was as follows:

In order that the plaintiff may recover, it must appear to you that the facts alleged in the complaint are true as alleged therein. That the plaintiff was employed by the defendant company at the time of the alleged injury. That the defendant was negligent in providing and using unsafe, defective and insecure machinery, or in causing the machinery to be repaired during working hours, and when the plaintiff was compelled, in the performance of her duty, to be so near the same as greatly to endanger her person. That the plaintiff suffered the injury complained

of. That the injury was caused by the alleged negligence of the defendant.

The whole law of this case is laid down in the opinion of the Supreme Court read in your hearing, and you will take that as a part of this charge. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances

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would not have done, the \*essence of the fault being either in the omission or commission of the duty.

To apply this definition to the conduct of the defendant, it was their duty to provide and use such machinery only as a reasonable and prudent person would ordinarily have done, under the circumstances of the situation in which they were. It was their duty to keep the same in repair as a reasonable and prudent person would ordinarily have done under the same circumstances. It was their duty to repair, or cause to be repaired, the machinery at such hours and in such manner as a reasonable and prudent person would have done under the same circumstances.

If the defendant company has failed in these duties, or any of them, they have been negligent in a legal sense, and if the plaintiff has been injured as the direct result of such negligence, the defendant is liable, unless it appeared that there are other circumstances in the case which will excuse the company from liability. For if the injury complained of was not entirely occasioned by the negligence or improper conduct of the defendant, but would, notwithstanding such faults of the defendant, have been avoided, but for the negligence or want of ordinary care on the part of the plaintiff, the defendant is entitled to the verdict. So, also, if the injury was not entirely occasioned by the negligence or improper conduct of the defendant, but would have been avoided but for the negligence or want of ordinary care on the part of a co-laborer of the plaintiff, the defendant is entitled to a verdict, unless it appear that the defendant had not used ordinary care and reasonable prudence in the selection of such a co-laborer, it being a principle of law, that the employé assumes the risks incident to his employment, one of which is the negligence of a co-laborer. The company is liable for the negligence of its officers and agents to whom it delegates the control of its business and operatives, and the performance of their duties, but not for that of a co-laborer of the plaintiff.

The term co-laborer embraces all those employed in performing any portion of the work of the cotton mill, in which the plaintiff was employed, in any of its departments, but not a workman employed to keep the machinery in repair, though in some respects a fellow-servant or co-laborer. As to what



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constitutes a middleman, or such an officer or agent as to represent the company as to make it liable for his negligent acts or omissions, I will read a passage from the case of *Buckner v. The New York Central Railroad Company*, cited in 31 Am. Rep. 515, 516.

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If then you find that the plaintiff has suffered the injury complained of as a direct result of the negligence of the defendant or its representatives, you will proceed to enquire whether it could have been avoided by the exercise of ordinary care or prudence of the plaintiff, or of any co-laborer whose want of care contributed directly to the injury, for if such want of care on the part of the plaintiff or her co-laborers in any way contributed to the cause of the injury, the defendant would not be liable, for when the injury in part was caused by the negligence of the plaintiff, and in part by negligence of the defendant, or of a co-laborer, the court will not distinguish between these contributing causes, but will refuse to interfere.

The questions are, was the injury complained of caused by the use of defective machinery as alleged? Were such defects known to the defendants, or might they have known of such defects by the use of ordinary care and prudence? Or was it caused in any part by the repairing of the machinery during the work hours? If so, was that a want of reasonable care and prudence on the part of the defendants, or was it caused by a want of reasonable care and prudence on the part of the workmen appointed to repair the machinery? If so, then the defendants would be liable, unless you find that the negligence or want of reasonable care and prudence on the part of the plaintiff, or on the part of a co-laborer, contributed to the cause of the injury, as I have before stated.

What act is there on the part of the plaintiff which she ought not to have done, as a reasonable and prudent person, which contributed as a cause to her injury? If you find any such, she cannot recover. What ought she to have done, as a reasonable and prudent person, to avoid such injury which she did not do? If you find any such neglect on her part that contributed as a cause of the injury, she cannot recover. If you find no such negligence on the part of the plain-

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tiff, then apply the same test to the conduct of any co-laborer of the plaintiff having any connection with the accident. If you find any such contributory negligence on the part of any co-laborer of the plaintiff, she cannot recover.

But if you find that the injury was caused entirely by the negligence of the defendant company or their agents, middlemen or representatives, your verdict should be for the plaintiff. If you find for the plaintiff, you must find such a sum of money as you may

think should reasonably compensate her for the injury she has sustained, the loss of time, mental and bodily suffering, loss of eyesight, and other permanent injuries and disabilities. [Here the learned judge read the fifth syllabus in *Hough v. Railway Company*, 10 Otto 214 (25 L. Ed. 612), as a part of his charge.]

The defendants moved for a new trial, which being refused, they appealed to this court on the exceptions suffered in the opinion.

Messrs. D. S. Henderson and Youmans, Attorney-General, for appellants.

I. On the request to charge, first considered by this court, the following authorities were cited: 24 N. Y. 442; Prof. Jury Tr., § 337; Shearm. & R. Negl., §§ 87, 88, 92; Wood M. & S. §§ 331, 332, 333, 452; 32 Md. 411; Cooley M. & S. 7-13; 2 Thomp. Negl. 971; 1 Add. Torts 904. II. Counsel cited Wood M. & S., § 326; Cooley M. & S. 6-11; 50 Geo. 465; 55 Id. 133; 58 Id. 490; 25 N. Y. 565. III. Counsel cited Wood M. & S., § 327; Shearm. & R. Negl. 94. IV. Upon the next request to charge, and the alleged error in the charge, considered together by the court, counsel cited Cooley M. & S. 3-18; Wood M. & S., §§ 393-396; 39 N. Y. 468; 53 Id. 549; 12 Otto 213; 9 Cush. 113; Shearm. & R. Negl., §§ 100-110; Prof. Jury Tr., § 344. V. On last request to charge, Wood M. & S., § 419; Cooley M. & S. 18; Shearm. & R. Negl., § 99.

Messrs. W. W. Williams, O. C. Jordan, G. W. Croft, contra.

November 27th, 1882. The opinion of the court was delivered by

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\*Mr. Justice McIVER. This being the second appeal in this case, it will not be necessary to make any further statement of the case than such as may be sufficient for a proper understanding of the points raised by this appeal, inasmuch as a full statement may be found by reference to the case as reported in 15 S. C. 443. The points now raised arise upon the alleged refusal of the Circuit judge to charge certain propositions of law as requested by the defendant, and upon exceptions to the charge, and to the organization of the jury.

The first request, which appellant insists was erroneously refused, is as follows: "That manufacturing companies, as between them and their employes, are not bound to use such appliances as are of the best or most approved description. If they supply such as are reasonably safe, and have been sanctioned by use, they do all that the law requires. There is, in short, no implied warranty that the materials furnished by the master shall be sound and fit for the purpose, nor that the servant shall not be exposed to extraordinary risks." It will be observed that the Circuit judge did not

refuse to charge all of the propositions requested, but, on the contrary, in his settlement of the case, he says:

"At the conclusion of the charge, the jury were told that various requests to charge had been preferred by the counsel on either side, which they had heard read; 'that most, if not all, of them were in accordance with the law as understood by me, and already laid down in my charge; that I declined the requests to charge, on both sides, so far as they contained matter inconsistent with the instructions already given them,' so that unless it appears that there was something in this request inconsistent with the instructions already given to the jury, it cannot be properly said that this request was refused.

The judge's charge was reduced to writing and is set out in the "Case," and need not be repeated here. Upon a careful examination of the charge, we are unable to discover anything in it which is inconsistent with the proposition contained in the first request. On the contrary, the jury were instructed that it was the duty of the defendant "to provide and use such machinery only as a reasonable and prudent person

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would ordinarily \*have done under the circumstances of the situation in which they were." This necessarily implied that the defendant was "not bound to use such appliances as are of the best or most approved description," but only such as a reasonable and prudent person would ordinarily have used under similar circumstances. There was, therefore, not only no inconsistency, but the proposition asked for was, in effect, charged.

The next request, which it is alleged was erroneously refused, was in the following language: "That the plaintiff having been injured by the flying out of a shuttle from a loom, upon which she was a weaver, if the jury find that she knew, when she undertook her employment, and during her continuance thereon, that the flying out of shuttles were matters of ordinary occurrence in the factory, and incident to the employment which she undertook, then she cannot recover, and the verdict must be for the defendants." This request also contained nothing inconsistent with the charge, but on the other hand was embraced in it. It involved the proposition that when one voluntarily engages in a service to which it is known that certain risks are incident, he assumes such risks, except where they result from the negligence of the employer or of any person who represents him. This proposition is distinctly announced in the opinion of this court at the hearing of the former appeal, which the Circuit judge had read to the jury as part of his charge, and in addition to this said, in so many words, to the jury, "that the employé assumes the risks incident to his

employment." There is, therefore, no foundation for the charge of error in this respect.

The next request, which appellant claims was improperly refused, was as follows: "That if the jury find that there was once a shuttle-guard upon the loom in question, their next inquiry should be, how long that shuttle-guard had been removed before the accident, and if they find that the shuttle-guard had been absent any reasonable length of time before the accident, and without any complaints of its absence by the plaintiff, but that she worked upon the loom with it off, then the defendants are not to blame for its absence, and the verdict must be for the defendants." This request is based upon the doctrine of contributory negligence, and we think the law upon that sub-

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ject \*was fully and correctly expounded to the jury. There was nothing in this request inconsistent with the charge, and it was, in effect, adopted by the Circuit judge and laid before the jury.

The next request was in these words: "That if the jury find that the company exercised ordinary skill and caution in the purchasing of machinery, and the employment of competent and reliable persons to keep the same in order and superintend its working, then they have performed all their duty as employers to their employé, the plaintiff, and she cannot recover." This involves the proposition that the employer's duty is fully complied with when he has exercised ordinary care in furnishing suitable machinery, and in the employment of competent and careful persons to keep the same in repair, and that his duty does not require him to go further and see that all needful repairs are made. A similar proposition is involved in the exception to the charge, which was "that his Honor erred in instructing the jury that the term co-laborer embraces all those employed in performing any portion of the work of the cotton mill, in which the plaintiff was employed, in any of its departments, but not a workman employed to keep the machinery in repair, though, in some respects, a fellow-servant or co-laborer," because it is submitted that in order to constitute a 'workman employed to keep the machinery in repair,' a middleman or representative of the company, said workman must have the power to employ and discharge hands, and purchase and change machinery, and said charge being intended to apply to the position of the witness, Harling, without such qualification, was calculated to mislead the jury, and was erroneous." This request, and the exception to the charge will, therefore, be considered together.

Who is embraced within the terms co-laborer or fellow-servant is a question which has been the subject of no little discussion, and the authorities are somewhat conflicting.



The question has been presented to different courts in various aspects, but we propose to confine our attention to the form in which it is here presented. Is a workman, employed to keep the machinery of a cotton mill in repair and in good working order, a co-laborer or fellow-servant with an operative employ-

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ed to attend one or more \*looms as a weaver, in such a sense as to exempt the employer from liability for an injury caused by the negligence of the person employed to keep the looms in repair and proper working order? The rule seems to be well settled that the master is liable to his servant for any injury caused by his own negligence, or by the negligence of any person representing him. It would seem to be clear that any person employed by the master to do anything which it is the duty of the master to do, is his representative. It undoubtedly is the duty of the master to employ the laborers who are to operate the machinery, and discharge them if incompetent or careless; and, therefore, any person to whom this duty is delegated by the master is undoubtedly his representative, and the master would be responsible to his servant for any injury caused by the negligence of the person to whom this duty has been delegated.

So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been entrusted. It is, likewise, the duty of the master to keep the machinery in proper repair and safe working order; and if he entrusts the performance of this duty to another, we see no reason why he should not be held liable for injury to one of his servants, caused by the negligence of the person employed to perform this duty which it is incumbent upon the master to perform.

The test as to whether an employé is the representative of the master is, not whether such employé has the power to employ or discharge hands, or to purchase or change machinery, for, while these are some of the duties of the master, they are not all of his duties, and hence, an employé who is not entrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the

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performance of the duty of the master thus delegated to him must be regarded as the negligence of the master.

These views are fully supported by authority from other States, though, so far as we

are informed, there is no case in this State directly upon the point now under consideration. *Murray v. The South Carolina Railroad Company*, 1 McM. 385 [36 Am. Dec. 268], was a case in which a fireman on a locomotive was injured by the negligence of the engineer, and simply decided the general proposition that a master is not liable to one of his servants for an injury caused by the negligence of a fellow-servant, and does not purport to decide who is embraced within the term, fellow-servant. The case of *Conlin v. The City Council of Charleston*, 15 Rich. 201, turned upon the question whether the person whose negligence caused the injury was a servant of the city council or of an independent contractor.

There are decisions, however, in our sister States, in which the question has been distinctly raised and decided in conformity with the views hereinbefore advanced, and these cases appear to be fully sustained, both by reason and authority. In *Ford v. Fitchburg Railroad Company*, 110 Mass. 240 (14 Am. Rep. 598), a fireman was injured by reason of a defect in the engine, which was due to the neglect of the employés of the company charged with the duty of keeping the engine in repair, although the company had no reason to suspect negligence or incompetency on the part of such employés, and it was held that the company was liable. In that case the court used the following language: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of

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supplying safe machinery, are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant."

*Corcoran v. Holbrook*, 59 N. Y. 517 (17 Am. Rep. 369), was a case in which an operative in a cotton mill was injured by the fall of an elevator, which was not kept in proper repair, and it was held that the master was liable. It is true that, in that case, the injury was attributable to the negligence of the general agent, to whom the defendant had entrusted the management of the mill, but the principle upon which the decision rests, shows that the liability of the master was

fixed, not because the injury resulted from the negligence of a general agent, but because it was the duty of the master to supply and maintain suitable machinery, and if this duty was neglected, it did not matter to whom such duty was entrusted, the master would be liable. The court used this language: "It was the duty of the defendants towards their employés to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employés, who were lawfully and properly, in the performance of their functions, in the habit of using it. That duty they delegated to their general agent. As to the acts which a master or principal is bound as such to perform towards his employés, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and held liable for the manner in which they are performed."

In *Brann v. Chicago, R. I. and P. R. R. Co.*, 53 Iowa 595 (36 Am. Rep. 243), a brakeman on a railway train was injured by reason of the failure of an inspector to perform his duty, and the company was held liable. After laying down the proposition, that it was the duty of the corporation, not only to provide, in the first place, suitable and safe machinery and appliances, but also to see that they are kept in repair, the court said: "As the corporation must act through agents and employés, the negligence of the employés, upon whom the duty of inspection is devolved, is the negligence of the corporation," and cite a number of authorities to sustain the proposition.

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\*In *Fuller v. Jewett*, 80 N. Y. 46 (36 Am. Rep. 575), an engineer on a railway was killed by the explosion of the boiler, resulting from a failure to keep it in proper repair, and it was held that the defendant was liable, although he had employed a competent superintendent of repairs and master mechanic, and made proper regulations, and the negligence was that of the mechanics directed to make the repairs. The defense was, that the negligence of the mechanics employed to make the repairs was the negligence of a fellow-servant, and, therefore, under the admitted rule, the employé was not liable for the injury sustained by one of his other servants; but the court said, "that acts which the master, as such, is bound to perform for the safety and protection of his employés, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent or servant [or] of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master,

and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant, whose negligence caused the injury, or of the fact whether it was, or was not, practicable for the master to act personally, or whether he did, or did not, do all that he personally could do, by selecting competent servants, or otherwise to secure the safety of his employés." And again, the court said, "the duty of maintaining machinery in repair for the protection and safety of employés is the same in kind as that of furnishing a safe and proper machine in the first instance." See, also, *Hough v. Railway Company*, 100 U. S. 213 [25 L. Ed. 612].

We are aware that there are cases, some of which have been cited by appellant, that seem to be in conflict with those above cited; but an attentive examination of those cases will show that they either ignore, or do not

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give full weight to what we regard as the only true test as to whether the person in question occupies the position of a fellow-servant to the servant who is injured or is a representative of the master, and that is, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and, we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and safe working order, and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have entrusted the performance of such duties to subordinates, by whatever name they may be called, and even though the master may have exercised due care in the selection of such subordinates. We think, therefore, that the request to charge, which we have been considering, was properly refused, and that the exception to the charge cannot be sustained.

Finally, the defendant requested the Circuit judge to charge, "that the burden of proof is upon the plaintiff, to show that those who are employed by the defendants to superintend their work are incompetent, and they are presumed to be competent until shown to be otherwise by competent testimony." We see nothing in this request inconsistent with the charge of the Circuit judge, and, therefore, it cannot be said that it was refused. Indeed, we do not perceive its applicability to the case as made, inasmuch as there does not seem to be any pretense that the injury complained of resulted from any negligence on the part of "those who were employed by the defendants to superintend their work." But even conceding its applicability, its correctness was recog-



nized by the former decision in this case, which was read to the jury as part of the judge's charge.

The only remaining question is as to the organization of the jury. It seems that one of the jurors presented was, on the motion of the plaintiff, examined on his voir dire, and to the question indicated by the statute (Gen. Stat. of 1872, 523, § 25), he answered in the negative. He was then asked by the court whether he was in the employment of

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the defendant, to which \*he replied that he was. In his settlement of the "Case," the Circuit judge says: "It appeared to me his relation to the defendant might (unconsciously to himself, perhaps,) prevent him from being wholly indifferent between the parties, and for that reason he was excluded." To this exception was duly taken. The statute above referred to reads as follows: "The court shall, on motion of either party in suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called."

The provision of the act, that "any other competent evidence in support of the objection" may be introduced, shows that negative answers to the questions indicated are not conclusive. This additional evidence may be obtained from answers of the juror to such additional questions as may be propounded to him by the court, as well as from any other competent source. The language of the act "if it appears to the court that the juror is not indifferent," shows that it is the mind of the judge before whom the case is tried, which is to be satisfied as to whether the person presented as a juror is a suitable person to serve as such, and, therefore, when, as in this case, the judge was not satisfied upon this point, we certainly cannot undertake to say that he should have been satisfied. This exception cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

# 18 S. C. 275

LASURE v. GRANITEVILLE MANUFACTURING COMPANY.

(April Term, 1882.)

[1. *Appeal and Error* ⇨1068.]

After verdict in favor of plaintiff, alleged errors of the Circuit judge, in his charge to the jury, either of omission or commission, relating solely to the right of recovery and not affecting the measure of damages, are immaterial to

plaintiff, and will not be considered on his appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ⇨1068.]

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[2. *Master and Servant* ⇨289.]

\*In action against a corporation for damages sustained by plaintiff while in their employment, the Circuit judge did not err in refusing to charge the jury "that even if the jury find there was a defect in the tramway known to the company, yet, if they find that the plaintiff also knew of said defect, or by the exercise of ordinary care and diligence could have known of it, and still voluntarily continued in the employment of the company, he cannot recover," for these are questions of fact to be determined by the jury under all the circumstances of each particular case.

[Ed. Note.—Cited in *Parker v. South Carolina & G. R. R.*, 48 S. C. 384, 26 S. E. 669; *Farley v. Charleston Basket & Veneer Co.*, 51 S. C. 222, 233, 28 S. E. 193, 401; *Powers v. Standard Oil Co.*, 53 S. C. 362, 31 S. E. 276; *Barksdale v. Charleston & W. C. Ry. Co.*, 66 S. C. 208, 44 S. E. 743; *Wofford v. Clinton Cotton Mills*, 72 S. C. 348, 51 S. E. 918.

For other cases, see *Master and Servant*, Cent. Dig. § 1096; Dec. Dig. ⇨289.]

[3. *Master and Servant* ⇨235.]

The exercise of due care and diligence in ascertaining whether machinery or other appliances furnished an employé to work with, are kept in proper repair, is the duty of the master and not of the servant.

[Ed. Note.—Cited in *Donahue v. Railroad Co.*, 32 S. C. 302, 11 S. E. 95, 17 Am. St. Rep. 854; *Carter v. Oliver Oil Co.*, 34 S. C. 216, 217, 13 S. E. 419, 27 Am. St. Rep. 815; *Branch v. Port Royal & W. C. Ry. Co.*, 35 S. C. 407, 14 S. E. 808; *Carter v. Oliver Oil Co.*, 37 S. C. 604, 15 S. E. 928; *Evans v. Chamberlain*, 40 S. C. 109, 18 S. E. 213; *Carson v. Southern Ry.*, 68 S. C. 83, 46 S. E. 525; *Green v. Southern Ry.*, 72 S. C. 402, 52 S. E. 45; *Thomason v. Victor Mfg. Co.*, 95 S. C. 244, 78 S. E. 895.

For other cases, see *Master and Servant*, Cent. Dig. § 714; Dec. Dig. ⇨235.]

[4. *Master and Servant* ⇨190.]

A master must provide his servants with safe and suitable machinery and appliances necessary for their work, and must also keep them in repair, and is liable to those servants for injuries resulting to them from his negligence in these matters, or for the negligence of mechanics or other subordinates employed by him to perform these, his duties.

[Ed. Note.—Cited in *Calvo v. Charlotte, C. & A. R. Co.*, 23 S. C. 528, 55 Am. Rep. 28; *Price v. Richmond & D. R. Co.*, 38 S. C. 213, 17 S. E. 732; *Richey v. Southern Ry.*, 69 S. C. 393, 48 S. E. 285.

For other cases, see *Master and Servant*, Cent. Dig. § 465; Dec. Dig. ⇨190.]

5. *Gunter v. Graniteville Manufacturing Company*, ante p. 262 [44 Am. Rep. 573], approved.

[This case is also cited in *Hooper v. Columbia & Greenville R. Co.*, 21 S. C. 541, 548, 53 Am. Rep. 691, and distinguished therefrom.]

Before Aldrich, J., Aiken, April, 1880.

This was an action by Thomas J. Lasure against the Graniteville Manufacturing Company, commenced November 21st, 1877. The complaint demanded \$10,000 damages for injuries sustained in a fall; and the proof was that plaintiff's arm was broken, wrist dislocated, hip injured and slightly dislocated, and his face cut from forehead to chin.

The charge of the judge to the jury was as follows:

You will bear in mind that this case is not to be determined by the rule which applies to common carriers. When a railroad or steamboat company, or a stage coach, or any other conveyance for public travel, undertakes to carry passengers for hire, their contract is they will carry them safely, and they are liable in damages for any injury that may be received, except the same may be from the act of God or the public enemy. Hence, if a corporation undertakes to carry you or your goods from one place to another, for hire, it is liable for any injury to the person or loss of goods, whether it be from unavoidable accident or carelessness. But such is not the rule, as applied to employes in a factory or a railroad, or in any other industrial occupation. In such case, when a man engages to work for wages, he takes a

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\*certain amount of risks himself, and if an injury is received in the business in which he engages, the employer, be it railroad, factory or steamboat company, is not liable in damages unless it be made to appear clearly to you that the injury so received is the result of carelessness or negligence on the part of the employer.

There can be no doubt that this plaintiff has been injured, and seriously injured. His face was cut open, his arm broken, and his hip injured. He has suffered great bodily pain and anxiety; been confined to his bed for weeks, prevented from the labor by which he made a sustenance, and a burden to his family and friends. Nay, more, he is still suffering from the injuries received at the time of the accident. If all this be the consequence of negligence or wanton carelessness on the part of the defendant, the Graniteville Company, they are liable in damages, and should be made to pay the penalty for their neglect. On the other hand, however, if this be one of the risks which every operative takes when he engages in the business of a factory, however great may be his injury, however painful his suffering, however permanent his hurt, the company is not liable, because it is one of the accidents which may or may not occur, and of which he takes the risk for hire.

So that the first question presented to you is: Was the defendant guilty of carelessness or negligence which occasioned the injury, the pain, the anxiety and the loss of time of which the plaintiff complains? The law makes you the sole judges of that question. I cannot assist you. In considering it, you will ask: Was this structure safe, or was it carelessly constructed? Was it kept in good repairs by ordinary diligence? Did the defendant show that solicitude and concern for the safety of the persons in their employment which men of ordinary prudence exhibit in the conduct of their affairs? Was it one of those accidents that might have hap-

pened under the exercise of ordinary prudence, or was it the result of carelessness and neglect? If the former, the company is not liable, because that was one of the risks the plaintiff took when he contracted to receive wages for his labors. If the latter, the company is liable, because the undertaking of the plaintiff was to work for wages, pro-

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ected \*by the ordinary diligence which prudent men exercise in the conduct of their affairs. These are questions for you, and as you resolve them, so will be your verdict.

Another question for your serious consideration is: Did the plaintiff contribute to this accident by his own negligence, or by his violation of the rules of the company? And in this connection you will consider what was the rule of the company whose servant he was. Was it a rule when a bale fell off the truck the employe was to send for the officer who had the road in charge? Did he throw that bale of cotton with a sudden jerk, or did he lower it easily on his truck? Would the road have broken if the plaintiff had not thrown down the bale? Now, if he violated the rules of the company or recklessly threw his bale from the edge to the side on the truck or the platform, so as to occasion a sudden jar, which broke the support of the shoulder resting on the sill of the factory, did he not contribute to the accident? If so, the company is not liable, because he was deficient in that prudence which men ordinarily display in the exercise of their business.

These are questions for your solution. As you solve them, so will be your verdict. While these great enterprises are to be held to the strictest responsibility, and made to pay for any damage resulting from their carelessness or negligence, yet they are not to be bled and stripped of their earnings because they are rich. By united capital they do that which individual capital cannot accomplish. They increase the general wealth of the State, which permeates society and adds to the industrial labor of the county. They employ, at liberal wages, hundreds of our people, men, women, and children; furnish them with comfortable houses, good schools for the education of the rising generation, and help support the government by taxation. Hence you are to decide the case on the law and the evidence, not considering the poverty of the plaintiff or the wealth of the defendant. But while these corporations are dispensing these blessings, adding to the wealth of the State and increasing the comfort and happiness of the people, they must protect those whom they employ, and when-

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ever one of their employes is \*injured because of their carelessness or negligence, they are liable.

You are not to find a verdict because the plaintiff is a poor man and the defendant a rich corporation, but according to truth and



justice. Remember this court is no respecter of persons—each case must be tried by the law and evidence applicable thereto. In all such cases there is a great deal of vociferation and earnest declamation about rich corporations and poor men, hard working laborers. You have nothing to do with this. Render your verdict as between man and man. A corporation is simply the aggregation of individuals. In that union you will find capitalists, men of moderate means and widows and orphans. These aggregated make the corporation, and all of these—the capitalist, the man of moderate means and the widow and orphan—are as much entitled to your consideration and sympathy as the plaintiff. So, gentlemen, you will dismiss from your minds, “bloated corporations, wealth, large dividends, poor laborers,” and decide this case as between man and man, by the law and the evidence.

Messrs. W. T. Gary, G. W. Croft, for plaintiff.

Messrs. Henderson Bros., contra.

November 27th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. This action was brought by the plaintiff, who was a laborer in the employment of the defendant, a company carrying on a cotton factory, to recover damages for injuries sustained by reason of the alleged negligence of the company. It appears that the plaintiff was engaged in removing cotton bales from the warehouse to the mill of the company, by rolling them on a truck over an elevated tramway between the two buildings, and, while so doing, the tramway gave way by reason of the splitting or breaking of some of the timbers, which supported the track, and the plaintiff fell and sustained the injuries for which the action was brought. Both parties presented to the Circuit judge sundry requests to charge,

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which \*were neither specifically refused or granted, and the case was submitted to the jury under a charge to which no exception was taken by either party. The jury found a verdict in favor of the plaintiff for \$500, and judgment being entered thereon, both parties have appealed, alleging, as error, the refusal or neglect of the Circuit judge to charge the several propositions as requested by them respectively.

It will not be necessary to consider the merits of the several propositions contained in the numerous requests submitted by the plaintiff, for every one of them relate solely to the plaintiff's right to recover, and none of them relate to the question of the amount which he was entitled to recover, or could in any way affect the question of the measure of his damages. Now, as the plaintiff has recovered, his only possible ground of complaint is as to the amount of his recovery,

and we cannot conceive how he could be prejudiced by the refusal or omission to charge any proposition of law, however correct it might be, affecting only his right to recover, and not affecting the question of the measure of his damages. In cases of this kind there are always two questions, first, whether the plaintiff has made a case entitling him to recover any damages, and if so, second, what is the proper measure of his damages. The two questions are entirely distinct and different, and depend upon different principles. The plaintiff having established his right to recover, as is conclusively demonstrated by the verdict in his favor, any error on the part of the Circuit judge, either of commission or omission, in submitting the first question to the jury, becomes wholly immaterial, and need not, therefore, be considered. The appeal on the part of the plaintiff cannot, therefore, be sustained.

The defendant also appeals upon five grounds. The first and fifth were very properly abandoned, as it is manifest that they could not be sustained.

The second ground of appeal alleges that the Circuit judge erred in not charging the fourth request submitted by the defendant, which is in these words: “That even if the jury find there was a defect in the tramway known to the company, yet if they find that the plaintiff also knew of said defect, or by the exercise of ordinary care and diligence

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could have known of it, and \*still, voluntarily, continued in the employment of the company, he cannot recover, and the verdict must be for the defendant.” We think it very clear that the proposition, or rather propositions (for there are two of them), contained in this request, are not well founded. It does not follow necessarily that a servant is guilty of contributory negligence because he remains in the service of his master after he has knowledge of defect in the machinery or appliances with which he is furnished to perform his work, but it is a question of fact for the jury to determine under all the circumstances of each particular case. Wood on Master and Servant, § 357, citing Snow v. Housatonic Railroad Company, 8 Allen, 441.

It was, therefore, no error to refuse to charge, as matter of law, that if the plaintiff knew of the defect in the tramway, and still continued in the employment of the company, he could not recover. The other proposition involved in the request—that if the plaintiff could, by the exercise of ordinary care and diligence, have known of the defect, and still, voluntarily, continued in the service of defendant, he could not recover—cannot be sustained, not only for the reason above stated, which applies with equal force to both propositions, but also because it presupposes a duty upon the part of the serv-

ant to exercise due care and diligence, to ascertain whether the machinery or appliances furnished him to work with are kept in proper repair, whereas this is the duty of the master and not of the servant.

The third and fourth grounds of appeal, involving practically the same principles of law, will be considered together. They are based upon a refusal or neglect to charge the propositions contained in the fifth and sixth requests submitted by the defendant, which are in these words: 5. "That if the jury find that the company constructed the tramway with due skill and caution, and employed competent and reliable persons to superintend their work, then they have performed all their duty as employers to their employé, the plaintiff, and he cannot recover." 6. "That even if the jury find there was a defect in the tramway, caused by the negligence of those employés who had charge of it, yet the plaintiff cannot recover,

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because the negligence which \*caused the misfortune is not that of the company, but of fellow employés, working under the same common head."

The principles involved in these requests have been considered and passed upon in the decision just filed in the case of Gunter v. The Graniteville Manufacturing Company, ante p. 262 [44 Am. Rep. 573], and, therefore, we need not repeat here what was said in that case upon these points. It was there determined that it is not only the duty of the master to provide, in the first instance, safe and suitable machinery and other appliances necessary to enable his operatives to do the work for which they are employed, but that it is equally his duty to see that such machinery and appliances are kept in proper repair, and that for any negligence in the performance of either of these duties, from which an injury results to one of the operatives, the master is liable, even though these duties may have been entrusted by the master to a subordinate officer or agent, by whatever name he may be called, and without regard to the rank of such subordinate. Hence, if an injury is sustained by a servant by reason of the negligence of a mechanic, employed to keep the machinery or other appliances in proper repair, the master is liable, notwithstanding the fact that the master may have exercised due care in the selection of the agent to whom such duty is entrusted, because such duty is a duty of the master, and whether performed in person or by an agent, any negligence in the performance of it is the negligence of the master. It follows, therefore, that there was no error in refusing to charge the propositions contained in either of these requests.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 282

NATIONAL BANK v. GARY.

(April Term, 1882.)

[1. *Bills and Notes* ⇨166.]

A note duly dated and signed by its maker, without seal, in words following: "On the first of November, 1877, I promise to pay to M. W. Gary, or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the

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rate of one \*per cent. per month, having deposited with said M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia railroad second mortgage coupons, past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale of the said security. If the net proceeds of the said security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest at the rate of one per cent. per month," is a promissory note, and negotiable.

[Ed. Note.—Cited in *Dowie & Moise v. Joyner*, 25 S. C. 123, 128.

For other cases, see *Bills and Notes*, Cent. Dig. § 418; Dec. Dig. ⇨166.]

[2. *Bills and Notes* ⇨288; *Evidence* ⇨403.]

Seemle. An endorsement, in blank, of a negotiable note renders the endorser liable to every subsequent holder; and in the absence of fraud or mistake, such liability cannot be affected by parol evidence.

[Ed. Note.—Cited in *Smith Bros. v. Brabham*, 48 S. C. 341, 26 S. E. 651.

For other cases, see *Bills and Notes*, Cent. Dig. §§ 654-657; Dec. Dig. ⇨288; *Evidence*, Cent. Dig. §§ 1807-1812; Dec. Dig. ⇨403.]

[3. *Bills and Notes* ⇨160.]

[Cited in *Carroll County Savings Bank v. Strother*, 28 S. C. 517, 6 S. E. 313, to the point that an agreement to pay counsel fees for the collection of promissory notes deprives it of its negotiability.]

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 403; Dec. Dig. ⇨160.]

Before Fraser, J., Edgefield, October, 1880.

Action by the First National Bank of Charleston, endorsee, against M. W. Gary, endorser, commenced in April, 1879. The charge of the judge to the jury is not stated in the brief—only the plaintiff's requests to charge. Of these, five in number, only the two following are material to the points considered by this court:

1. "That the instrument sued upon in this action is a negotiable instrument, and if the defendant, for value, wrote his name upon the back of said instrument, then said defendant became liable as endorser, unless said endorsement was obtained by the fraud or deceit of the plaintiff.

2. "That the instrument sued upon is a promise to pay a sum, fixed in said instrument, without regard to the sale of the securities mentioned in said instrument; that



the instrument imposed no obligation upon the holder of the same to sell said securities before demanding and requiring payment of said instrument from the maker or indorser."

These requests were both refused, and after verdict for defendant and judgment thereon, plaintiff appealed to this court, alleging error, *inter alia*, in refusing the above-stated requests.

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\*A motion by defendant to dismiss this appeal was refused. *Bank v. Gary*, 14 S. C. 571.

Messrs. C. L. Woodward, Buist & Buist, for appellants.

Mr. W. T. Gary, contra.

This instrument is not a promissory note according to the definitions. 2 Blacks. Com. 467; Chit. Bills 132; 84 Pa. St. 407; 1 N. & McC. 102, 255; 2 Id. 585; Cheves 92; 1 Spears 127; 1 Strobb. 44; 9 Rich. 299; 12 Id. 445. It is not "simple, certain, unconditional and not subject to any contingency." 19 Wall. 560; 4 Moore 471; 1 Dan. Neg. Inst., § 50; 47 N. Y. 661; 24 Ga. 287; 5 T. R. 482; 2 Miles 442. The contract must be only for the payment of money, or it is not negotiable. 1 Dan. Neg. Inst., § 59, and authorities cited; 77 Pa. St. 131; 84 Id. 407; 1 Bay 173. It is too heavily burdened for a promissory note. The rule laid down in 1 Dan. Neg. Inst., § 59, that a superadded agreement, which only facilitates the means of collection, does not destroy the negotiability of the instrument, is not sustained by the South Carolina decisions, *supra*.

November 27th, 1882. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action brought by the plaintiff, as endorsee, against M. W. Gary, as endorser, of a paper, of which the following is a copy:

"\$886. Charleston, S. C., July 31st, 1877.

"On the first of November, 1877, I promise to pay to M. W. Gary, or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the rate of one per cent. per month, having deposited with M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia railroad second mortgage coupons past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the

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\*maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of this note, as may be necessary to pay the same, with all interest due thereon, and also the payment of all

expenses attending the sale of the said security. If the net proceeds of the said security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest, at the rate of one per cent. per month.

(Signed) "W. J. Magrath,

"Pres't Greenville and Columbia R. R. Co."  
(Endorsed) "M. W. Gary."

The fundamental and controlling question made by this appeal is, whether the paper sued on is a negotiable instrument? The Circuit judge held that it was not, and the appellant alleges that there was error in so holding. The first part of the paper, down to the first period, is nothing more nor less than a note, with a recital of the fact that certain railroad coupons had been deposited with the payee as collateral security for the payment of the amount which the maker promised to pay. It is an absolute promise to pay a certain sum of money, at a certain time, to a certain person therein named, or his order. There is nothing conditional or uncertain about it, and it therefore comes up, fully, to the definition of a promissory note, (Story Prom. N., § 1, and 1 Dan. Neg. Inst., § 28, et seq.) and being payable to the payee or order, and being open—that is, unsealed, it is negotiable.

The only remaining inquiry, so far as this part of the paper is concerned, is whether the additional words, containing a mere recital of the fact that the payment of the sum promised has been secured by certain specified security, deprives it of its character as a negotiable instrument. It will be observed that these additional words constitute no additional agreement, nor do they in any way qualify, or render doubtful or uncertain, the preceding absolute promise to pay. They do not incorporate into the paper any terms which can, by any possibility, destroy or render uncertain any of the essential elements

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which are necessary to \*make up a negotiable note. They are a mere recital of a fact which can have no influence upon the promise to pay, and we are unable to see any reason why the addition of such words should affect the negotiability of the instrument. Such, too, seems to be the result of the authorities. *Wise v. Charlton*, 4 Ad. & E. 786; *Fancourt v. Thorn*, 9 Ad. & E. (N. S.) 312; *Towne v. Rice*, 122 Mass. 67.

The next inquiry is whether the remainder of the paper, by which the maker gives to the payee authority to sell the collaterals in case the sum promised is not paid at maturity, and apply the proceeds of such sale to the payment of the amount due as well as to the expenses of such sale, and an obligation to pay whatever balance may be due, after the net proceeds of the sale are so applied, deprives the paper of its negotiability. Here, too, it will be observed that these additional words cannot in any way affect the terms of

the original promise, so as to import into it any element of uncertainty, either as to the amount to be paid, the time of payment, the person to whom payment is to be made, or the medium of payment. In fact, these words import nothing more than an agreement which the law would imply from the fact that collaterals had been deposited with the payee to secure the amount promised, and may be regarded as surplusage, except, perhaps, the authority to sell the collaterals "without advertising," and this, so far from clogging, or in any way impeding, the payee in the enforcement of his rights, would have an exactly contrary effect, and would tend to render more certain the payment of the note at maturity, which is one of the things which impart to a negotiable paper its peculiar value. We do not perceive, therefore, how these additional words can deprive the paper in question of its negotiable character.

This view is supported by the weight of authority. In *Story Prom. N.*, § 17 (8th Ed.), it is said: "An instrument in terms and form a negotiable promissory note does not lose that character, because it recites that the maker has deposited collateral security for its payment, which he agrees may be sold in a certain manner specified, and that he would pay the balance." In 1 *Dan. Neg. Inst.*, § 59, that eminent author, while admitting the general rule to be that a nego-

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tiabile note must be for the payment of money only, and "if any other agreement of a different character be engrafted upon it, it becomes a special contract clogged and involved with other matters, and has been deemed to lose thereby its character as a commercial instrument," adds: "But at the present time, we think, that this general rule is subject to the qualification, that if the superadded agreement do not impair the certainty of the promise to pay the certain amount named, but only facilitates the means of its collection, it does not, in any degree, destroy the negotiability of the instrument." And in the succeeding sections he cites the cases in which such superadded agreements, as for example, authority to confess judgment, waiver of stay and exemption laws, or stipulations to pay collection fees, have been held not to impair the negotiability of the paper.

It seems to us, however, that, while agreements authorizing a confession of judgment, or a waiver of stay and exemption laws, do come strictly within the qualification stated, inasmuch as such agreements cannot in any way affect the certainty of the promise to pay, and only facilitate the collection of the amount promised, the same cannot be said of a stipulation to pay collection fees, for that does import into the contract an element of uncertainty as to the amount which the maker promises to pay, and ought, therefore, to deprive the paper of its character as a negotiable instrument. Upon the same prin-

ciple a power of attorney to sell collaterals may be incorporated in a note without impairing its negotiability, even though it may contain a waiver of the necessity for advertising such sale (as in the case now before the court), because such superadded agreement does not in any way impair the certainty of the amount to be paid, and only facilitates its collection.

In *Zimmerman v. Anderson*, 67 Pa. St. 424, a paper containing a promise to pay a certain sum of money, at a specified time, to a person therein named or order, to which was added these words: "Waiving the right of appeal and of all valuation, appraisement, stay and exemption laws," was held to be negotiable. Read, J., in answer to the argument that these additional words rendered the paper unnegotiable, said: "They do not contain any condition or contingency, but

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after the note \*falls due, and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability, it adds to it, and gives additional value to the note." These remarks apply with equal force to the waiver of the necessity for advertising the sale of the collaterals, in the case now before the court.

To the same effect are the remarks of *Sharswood, J.*, in *Woods v. North*, 84 Pa. St. 407 (24 Am. Rep. 201), where, while holding that the insertion of an agreement to pay collection fees, if not paid when due, rendered the note unnegotiable because it imported into the contract an element of uncertainty as to the amount to be paid, said: "Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper." See also *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer 207; *Osborn v. Hawley*, 19 Ohio 130.

The cases of *Wallace v. Dyson*, 1 Speers 127, in which the paper sued on was an obligation for the hire of slaves, and contained, also, a stipulation "to furnish clothing, pay taxes, not to pay physicians' bills," &c.; *Barnes v. Gorman*, 9 Rich. 297, in which the paper was of like character; and *Read v. McNulty*, 12 Rich. 445 [78 Am. Dec. 467], in which the promise to pay so much money "with exchange on New York," are clearly distinguishable from the case now under consideration; for in each of those cases the superadded agreement imported an element of uncertainty into the contract as to the amount to be paid, while here, as we have seen, the additional words relied upon do not, in any way, affect any of the certainties required in a negotiable note. We are of



opinion, therefore, that the Circuit judge erred in charging the jury that the paper sued on was not a negotiable note.

Under this view of the case the other questions presented by the grounds of appeal cannot fairly arise, and need not, therefore, be considered. The question as to the legal effect of an endorsement in blank by the payee of a negotiable note, and whether it is competent by parol evidence to vary the contract which the law implies from such endorse-

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ment, though discussed \*in the argument here, does not seem to be raised by any of the grounds of appeal, and, therefore, is not properly before us. The Circuit judge having held that the paper in question was not negotiable, such a question was never reached in the Circuit Court, and, consequently, there was no ruling upon it from which there could be an appeal. But even if it had been raised, we suppose the law upon that subject is too well settled to require any extended notice at our hands; that an endorsement, in blank, of a negotiable note renders the endorser liable to every subsequent holder, and, in the absence of allegation and proof of fraud or mistake, such liability cannot be discharged or limited by parol evidence.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

### 18 S. C. 289

Ex parte CAROLINA NATIONAL BANK.  
GIBBES v. GREENVILLE AND COLUMBIA R. R. CO. STATE, ex relatione ATTORNEY GENERAL v. SAME.

(April Term, 1882.)

[1. *Appeal and Error* ⇨1012.]

A finding of fact by the Circuit judge reversed because opposed to the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3990-3992; Dec. Dig. ⇨1012.]

[2. *Receivers* ⇨155.]

Money, necessary for the proper and successful management of a railroad, borrowed by the officers of the road while acting as receivers under an order of court, giving them power "to continue in the possession and management of the property," should be repaid out of the fund in court, realized from the income of the road while in the receiver's hands.

[Ed. Note.—Cited in *State v. Port Royal & A. R. Co.*, 45 S. C. 469, 23 S. E. 380.

For other cases, see *Receivers*, Cent. Dig. §§ 283-292; Dec. Dig. ⇨155.]

[3. *Receivers* ⇨155; *Set-Off and Counterclaim* ⇨34, 41.]

Such loan having been secured by a deposit of bonds belonging to the railroad company, which bonds were afterwards sold to the credit of the loan, and the payee, under a call for creditors, having presented his petition for the payment of the balance out of the receiver's

fund, other creditors could not assert, by way of counter-claim to this petition, the right to have the hypothecated bonds surrendered to the court or their value accounted for.

[Ed. Note.—Cited in *Ex parte Williams*, 18 S. C. 304.

For other cases, see *Receivers*, Cent. Dig. § 287; Dec. Dig. ⇨155; *Set-Off and Counterclaim*, Cent. Dig. §§ 56, 76; Dec. Dig. ⇨34, 41.]

4. *Fifty-four Bond Case*, 15 S. C. 304, and *Ex parte Brown and Wife*, Id. 531, recognized and followed.

Before Fraser, J., Richland, December, 1881.

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\*The facts necessary to a proper understanding of this case will be found stated in the opinion. The orders appointing receivers need not be given, as they will be found in the *Fifty-four Bond Case*, 15 S. C. 304, in *Ex parte Benson & Co.*, ante 38 [44 Am. Rep. 564], and in other cases.

The Circuit decree, omitting its statement, was as follows:

The first question is as to the validity of petitioner's claim. It is not necessary for me to state again my reasons for holding that there is nothing in the language of Judge Melton's order, or of any ruling of the Supreme Court, to warrant the inference which has been pressed upon me, that the president and board of directors of the Greenville and Columbia Railroad Company had, under that order, the power to conduct and carry on the business of the company "in like manner as they have heretofore done." The words in the order are "under the order and subject to this court." These are words of large signification, but they convey the powers and prescribe the duties of a railway receiver, and no more. The business of the company was that of a common carrier of freight and passengers. It was only a privilege to make contracts for the loan of money. Whatever was necessary for the business of the company was within the range of their powers and duties. "All outlays made by the receivers in good faith in the ordinary course, with a view to advance and promote the business of the road and to render it profitable and successful, are fairly within the line of discretion, which is necessarily allowed to a receiver entrusted with the management of a railroad in his hands." *Cowdrey v. The R. R. Co.*, 1 Woods 331 [Fed. Cas. No. 3,293].

If it were clearly shown that money was borrowed to carry on the operations of the road as a common carrier, I would not say that it ought not to be repaid out of the fund. Before this is done, however, the court ought to have proper evidence that it was necessary for this purpose, and if not, parties must look to the personal responsibility of the receiver. If money-lenders are not satisfied with this personal responsibility, it is an easy matter to wait

until an order of the court can be obtained. All other trustees borrow money for the use of the trust-estate in the absence of express power, only on their own personal respon-

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\*sibility, and can be re-imbursed after it has been shown to have been properly expended. I see no reason to apply a different rule to receivers.

I cannot be controlled in this matter by the testimony of a very intelligent and experienced witness who says that all the money borrowed was "necessary." The facts do not bear him out. We find these receivers, in disregard to orders of the court, for four years paying interest on the whole bonded debt—buying and selling bonds of this company—of the Laurens Railroad Company, of the Blue Ridge Railroad Company, making an extension to connect with the Air Line railway, paying to a debt of T. Bush, for which they were in no way responsible, about \$15,000, and on the debt of H. H. Kimpton, an unsecured debt contracted before the receivership, over \$27,000.

The order of Judge Melton gave to the receivers no power to borrow money, so that it must be repaid as a mere matter of contract, and I do not think it was necessary or proper to do so in this case. If the petitioner dealt with the receivers with a view to their character as receivers and not as officers of the company, then petitioner must have known that he was dealing with the funds, which were under the control of this court, and which ought not to have been purchased or sold without its sanction. I doubt if petitioner ever looked to the receiver's fund for payment, much less to a claim to be superior to bondholders who held liens. I do not think, therefore, that there is any hardship to petitioner in this view, and the claim ought not to be allowed.

With regard to the counter-claim, I have nothing to add to the views expressed in a judgment to be filed at the same time with this in *Ex parte* George W. Williams, Treasurer [see next case, post]. If it were necessary to decide the question, I would be inclined to the opinion that such a counter-claim could not be set up in this form of proceeding. I do not see how a counter-claim, to be enforced against the person of the petitioner, can be set up against a mere application to be paid out of a fund in court. In the view of this case, which I have presented in *Ex parte* Williams, I do not think that there is any ground for this counter-claim in any form of action, and it ought

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not to be \*allowed. There is no theory of which I am aware on which it could be allowed which would not re-open all the issues between the bondholders in this case, and, perhaps, lead to new and unexpected litigation.

It is, therefore, ordered and adjudged, that

the petition and counter-claim be dismissed.

From this decree both parties appealed. Petitioner's exceptions were as follows:

1. Because his Honor erred in holding that the order of Judge Melton conveyed the powers and prescribed the duties of a railway receiver, and no more; whereas his Honor should have held that the powers conveyed by said order were more extended, and the duties imposed thereby more general than those usually conferred and imposed upon railway receivers.

2. Because his Honor erred in holding that the loan set forth in the said petition was unnecessary, and in this connection disregarded the uncontradicted testimony of the witness Manson, who proved that all loans made were necessary to the proper conduct and management of the business of the road.

3. Because his Honor erred in deciding that the order of Judge Melton conferred upon the president and directors, acting as receivers, no power to borrow money.

4. Because his Honor erred in not allowing the claim, and in ordering and adjudging that the petition be dismissed.

The exceptions of Clyde et al. were as follows:

1. That his Honor having decided that the receiver had no right or authority to borrow money, it followed, necessarily, that the receiver had no right or authority to pledge the assets of the road for money so borrowed, and his Honor should have held that the assets so pledged were illegally pledged.

2. That his Honor, having held that if the petitioner dealt with the receiver, "he must have known that he was dealing with the funds which were under the control of this court, and which ought not to have been purchased and sold without its sanction," should have further held that the funds or assets acquired by the petitioner, without the sanc-

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tion of the court, \*were illegally acquired, and that petitioner thereby became liable to restore them, or to account to the court for their value.

3. That it was proved that the president of the Carolina Bank was a director of the Greenville and Columbia Railroad Company, and one of the receivers appointed by the order of Judge Melton, and was annually re-elected director until his death, in 1880, and that his Honor should have held that the bank had full notice that it was dealing with the receiver, and obtaining assets which were under the control of the court.

4. That his Honor erred in holding that the doctrine of *lis pendens* applied to this case. That the question is not whether these particular bonds pledged carried notice with them, but is whether one dealing with a trustee, a receiver, and acquiring from him trust property, which he had no right to part with, except by order of court, can hold such property as against the *cestui que trust*.



5. That his Honor having held that the receiver had no authority to borrow the money, and that the petitioner, dealing with the receiver, was dealing with funds which were under the control of the court, and could not be purchased or sold without its sanction, by the dismissal of the counter-claim, leaves the petitioner in possession of assets illegally acquired from a trustee; and to the extent of the amount realized by the sale of the bonds, the petitioner profits by his illegal action, and the *cestui que trust* loses.

6. That the first part of the decree declares the transaction illegal, while the latter part gives to petitioner good title to the property illegally acquired; whereas it is respectfully submitted that petitioner should have been decreed to account for the assets or their value.

Messrs. Melton, Clark & Muller, for petitioner.

Mr. James Conner, contra.

November 27th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. For the proper understanding of the questions in-

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volved in this case, it will only be \*necessary to state the facts connected with the claim of the petitioner, the Carolina National Bank. In July, 1872, by an order of the court in the above causes, the property of the Greenville and Columbia Railroad Company was placed in the possession and under the management of the president and directors of said company, who were thereby directed to conduct and carry on the business of said company, subject to the orders of the court. It has since been decided by this court that this order constituted the president and directors receivers. Under this order, the road was operated from its date in July, 1872, to November, 1878. During this time the president and directors borrowed certain moneys from the petitioner which were used in the conduct and management of the business of the company.

The amount thus borrowed, after several renewals and payments, was finally reduced, on April 13th, 1877, to \$20,000, evidenced by one note for that sum, which was renewed from that date to July 13th, 1878, the date of the last renewal. To secure the payment of this money, the president and directors deposited with the petitioner two hundred and sixty-eight bonds of the said Greenville and Columbia Railroad Company for \$500 each. These bonds were sold by the petitioner on March 13th, 1880, for \$13,400, the proceeds being applied to the note. The balance the petitioner seeks in this proceeding to establish against the fund in court, arising from the annual income of the road while in the hands of the receiver, or from the proceeds of the sale thereof.

Clyde, Logan and Bryan, who were hold-

ers of a large amount of the second mortgage bonds of the company, and upon whom the petition was served, answered, resisting the petition upon the ground that the receivers had no right to borrow money, nor the president to make the note in question. They also asserted the right by way of counter-claim, to have the bonds hypothecated to the petitioner surrendered to the court, or their value accounted for by the petitioner for the benefit of the second mortgage bondholders.

To this counter-claim the petitioner replied, and the case came to a hearing before Judge Fraser, who dismissed both the petition and the counter-claim. From this de-

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creed, both the petitioner \*and the defendants, Clyde, Logan and Bryan, have appealed. The appeal of the petitioner involves, mainly, a question of fact, to wit, whether the loan contracted by the president and directors, and which was the basis of petitioner's claim, was necessary to the proper conduct of the road under their charge as receivers.

Without attempting to define the exact powers with which the receivers in the case were invested by the order of June, 1872, it is sufficient to say, in the language of *Cowdrey v. The Railroad Company*, 1 Wood 336 [Fed. Cas. No. 3,293], and quoted in the decree of Judge Fraser, "that all outlays made by the receivers in good faith in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are purely within the line of discretion which is necessarily allowed a receiver entrusted with the management of a railroad in his hands." This, no doubt, is the general rule, and no one who is at all familiar with the history of the Greenville Railroad since June, 1872, when the order of Judge Melton was passed, by which the president and directors were converted into receivers, and the various decisions of this court on the transactions of these receivers and the liability of the funds in their hands to claimants, rendered since 1872, can fail to see that this general rule has not been, in the least, narrowed or contracted in its application to their management. On the contrary, if not enlarged, it has been enforced with a most liberal construction. This was, no doubt, due to the anomalous character of the order and the necessities which prompted it, and for the accomplishment of which, no doubt, it was passed. See *Fifty-four Bond Case*, 15 S. C. 304; *Ex parte Brown and Wife*, *Ib.* 531; also the recent case of *Ex parte Benson & Co.*, ante 38 [44 Am. Rep. 564].

While this court clearly held in the two former cases, that this order constituted the president and directors receivers, yet a distinction was drawn, especially in the case of *Ex parte Brown*, p. 531, by Judge Fraser, as

to their powers, and the powers of General Conner, who was subsequently distinctly and in terms appointed receiver, displacing the president and directors. This distinction grew out of the different language employed in the two appointments. In the first, the

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president and directors were \*ordered to continue in the possession and management of the property, and to make report, that proper orders may be made. Under the latter, General Conner was appointed receiver *eo nomine*, "and he was required to demand and receive possession of all of the property of the company, to keep and preserve the same subject to the control, order and direction of the court, with power and authority to manage and operate the said railroad, to receive and disburse the income, the disbursements to be confined to the expense of running the road."

Whatever may be the law applicable to receivers generally, we think that the case of *Ex parte Brown and Wife*, and the *Fifty-four Bond Case*, have modified that law as to these receivers; or, in other words, the president and directors were appointed under a peculiar order, which order has been construed by this court in the two cases above referred to, and the law in reference to them is found in said cases. Under this view, and governed by these cases, we repeat that the only question before Judge Fraser was whether the borrowing of the money was necessary to the proper and successful management of the road. Judge Fraser seems so to have understood the case, where he says: "If it were clearly shown that money was borrowed, to carry on the road as a common carrier, I would not say that it ought not to be repaid out of the fund. Before this can be done, however, the court ought to have proper evidence that it was necessary for this purpose, and if not, the parties must look to the personal responsibility of the receiver."

In applying this principle, we think that Judge Fraser erred in his finding when he declined to be controlled by the testimony of Mr. Manson on the subject of the necessity of this loan. This witness had been in charge of the accounting and treasury department of the company since 1872; was treasurer from 1875 to 1878, when General Conner was appointed receiver; was entirely familiar with its financial condition; was a very intelligent and experienced witness, and was the only witness on this subject. He testified that when money was borrowed, there was necessity for borrowing, and this he states without qualification; and the explanations which he gave as to the condition of the road seem to sustain him.

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\*The president and directors were receivers at the instance of the bondholders. These bondholders stood by and suffered

this road to be operated under the order of June, 1872, for over six years, with no intimation that the rigid doctrine, now contended for as to the duties and powers of receivers, should be applied to the case, and we think it too late, now, for such claim. The road certainly received the benefit of this money, and it would be highly inequitable to throw the lender upon the general responsibility of the receiver—inequitable both to the lender and to the receivers, and this should not be done unless imperatively demanded by the legal principles involved. The manifest preponderance of the testimony, in our judgment, is against the finding of fact by the Circuit judge, as to the necessity of the loan in question by the petitioner to the receivers, and this finding is therefore reversed.

As to the counter-claim, we concur with the Circuit judge in dismissing it. "A counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action and arising out of one of the two following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. 2. In an action arising in contract, any other cause of action arising also on contract, and existing at the commencement of the action." Code, § 173.

Tested by this provision of the code, we do not find a single element of a counter-claim in the matter attempted to be set up here by Clyde, Logan and Bryan. In the first place, no separate judgment could be rendered in their favor against the petitioner for the bonds in question, even if the petitioner could be held liable for these bonds. If these bonds were, in fact, trust property, which the petitioner improperly obtained from the trustee, he might, by a proper proceeding, be made to account to that estate for their value, subject to distribution under the order of the court among the *cestuis que trust*; but we do not see how, under this petition, Clyde, Logan and Bryan could obtain a judgment in their behalf for the value of these bonds. In fact, they do not ask this; they claim that

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the bonds in question \*shall be delivered to the master, or their value paid to the master. This at once shows that the matter set up is not a counter-claim, and this is further evident from the fact that the claim does not fall under either of the two classes mentioned in the code above as constituting a counter-claim.

It is neither a claim arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim; nor does it arise on contract existing in favor of Clyde, Logan and Bryan at the



commencement of the action. If it is a valid claim at all, it arises from an equity principle established and to be enforced through the equity jurisdiction of the court. Its foundation, if any, is that wholesome equity doctrine which holds a party responsible for trust property purchased with a knowledge of the trust and in violation of the rights of the cestuis que trust. Here a petition was filed, under a call for creditors, to establish a note against an insolvent company, so as to receive payment out of the funds in court; another creditor resists this debt and sets up, by way of counter-claim, the fact that the petitioner has diverted a portion of the trust fund from its proper destination, and demands that he shall return this property to the trust-estate. If this demand is a just one, and well founded, there is a remedy; but it would be stretching the doctrine of counter-claim beyond all precedent to permit this question to be adjudged and determined under such a proceeding.

We think that the claim of the petitioner should be established against the income fund in the hands of the court, and that the counter-claim should be dismissed. It is the judgment of this court that the decree below be affirmed as to the counter-claim, and reversed as to the claim of the petitioner, and that the case be remanded to be enforced according to the principles herein announced.

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#### 18 S. C. \*299

\*Ex parte WILLIAMS. GIBBES v. GREENVILLE AND COLUMBIA R. R. COMPANY. STATE, ex relatione ATTORNEY-GENERAL v. SAME.

(April Term, 1882.)

[Sales  $\S$  234.]

A purchaser, on new and ample consideration, of bonds constituting a part of the assets of a railroad company in the hands of a receiver, without knowledge or notice of the trust, is not liable to the creditors of the corporation for the value of the bonds.

[Ed. Note.—For other cases, see Sales, Cent. Dig.  $\S$  670; Dec. Dig.  $\S$  234.]

Before Fraser, J., Richland, December, 1881.

George W. Williams, as treasurer of a syndicate formed to assist the South Carolina Railroad Company, received from that company as collateral security for advances made and to be made, certain securities, including two notes given by the Greenville and Columbia Railroad Company to the South Carolina Railroad Company, secured by a deposit of mortgage bonds of the former company, which bonds passed to Williams, treasurer, with the notes they were intended to secure. One of these notes was for \$51,432, secured by 103 Greenville

and Columbia Railroad second mortgage bonds, of \$500 each, dated December 30th, 1876; and the other of the same date, was for \$135,818.74, secured by 543 like bonds.

All of these bonds were, after the maturity of the notes, sold by the syndicate, and G. W. Williams, as their treasurer, presented two petitions in this cause, asking in each for the payment of the balance due on the notes, respectively, out of the receiver's fund, inasmuch as the notes were given for the necessary expenses of the road while in the hands of the receivers appointed by Judge Melton's order of June 18th, 1872. The petition as to the note for \$51,432, was disposed of by the opinion of this court refusing it, to be found reported as Ex parte Williams, 17 S. C. 396.

This case is the petition as to the note for

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\$135,818.74, which \*was also refused by the Circuit decree in this cause, and from such refusal no appeal was taken. But in answer to this petition, Clyde et al., holders of second mortgage bonds (and who as such would receive all the funds in the cause not absorbed by claims of higher rank) interposed as a counter-claim that the pledge of the bonds to the two notes above described was illegal, and that G. W. Williams, treasurer, should be decreed to account for the said collaterals or their value.

Judge Fraser also dismissed the counter-claim. So much of his decree as relates to this counter-claim was as follows:

The only question then left for my consideration is that of the counter-claim set up by W. P. Clyde and others, that the petitioner, George W. Williams, treasurer, should be held to account for the 543 and 103 second mortgage bonds above referred to, on the ground, as I understand it, that they were assets in the hands of the receivers, who sold them without authority, and that of this the petitioner was bound to take notice, so that in his hands the bonds were effected with the trusts under which the receivers held them. The counter-claim is filed by William P. Clyde, Thomas M. Logan and Joseph Bryan, on behalf of themselves and other holders of second mortgage bonds, who claim to be entitled to the net proceeds of the sale and income in the hands of the master. These are the same parties who bought these bonds from the petitioner.

The first provision of Judge Melton's order was one which enjoined all creditors from commencing or prosecuting any suits against the corporation, or enforcing judgments already obtained by execution against the property. The second provision was one which put the property in the hands of the president and directors, and substituted the "order" and direction "of the court" for the will of the stockholders.

The corporation, whose will is expressed only by the stockholders, were displaced by the order, and President Magrath, in his annual report for the fiscal year ending December 31st, 1872, says: "Under the operation of the orders growing out of these proceedings no suits could be instituted, and no payments made, except for the absolutely necessary wants of the road." If this clear and correct view of their powers and duties had not been lost sight of by the

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\*president and directors, many of the embarrassing questions which have arisen in this administration would have been avoided.

If any other orders of the court were necessary before they assumed any conduct of the business, then not one train could have moved from the depot, as no order was made except the one referred to, "to continue to conduct and carry on the business of the said company." The true conception of the scope of this order, in my view, is that every act of the president and directors was subject to the supervision and control of the court, and that to them, as to all receivers, necessary expenditures for labor and material would, as a matter of course, be allowed; but when they went beyond this to make permanent improvements and changes, speculative contracts for rebates, and the purchase and sale of bonds, they, and all who dealt with them, should have understood that their contracts might not meet the approval of the court. I find neither in the order itself or in any decision or dictum of the court any warrant for that unlimited power claimed in some quarters, and expressed by the words "in like manner as they have heretofore done."

We must, therefore, look to other considerations to determine whether this is a valid counter-claim. The objection to the mode in which this counter-claim is presented has been waived at the hearing, and we must look to its merits. The peculiar order of Judge Melton was perhaps the best which could have been made for the interest of all parties in the abnormal condition of the country at the time it was made. Perhaps it was never intended to interfere with the corporate existence of the railroad company, and there is nothing in the order which does (see *High on Receivers*, § 397, note 2); and it does not follow that third parties who dealt with the president and directors in a manner lawful with them as officers, and unlawful as receivers, necessarily knew that they dealt in the latter capacity.

To make the petitioner liable to this counter-claim, there must have been something in this transaction which affected him with notice that he was dealing with trust funds. If any third person, entirely unconnected with the company or its business, had been appointed receiver, the mere fact of dealing

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in this way \*might have been sufficient, at least, to put a prudent man on his guard. It does not strike me that the same conclusion would follow here. There is nothing on these bonds which show that they were a part of the assets in the hands of the receivers, either as a part of the corpus or as being an investment temporarily made of the income, and there is no evidence to show that they were not purchased with money, which the evidence shows was from time to time borrowed by the president and directors.

If the old doctrine of *lis pendens* is any longer applicable, except as to the specific cases prescribed in the code, it will be found that it was only applicable to specific property, which "must be so pointed out by the proceeding as to warn the whole world that they meddle at their peril." See *Lewis v. Mew*, 1 Strobb. Eq. 183; *Edmonds v. Crenshaw*, 1 McC. Eq. 261. Cash and negotiable paper not due are not affected in the absence of actual notice. *Wade Law of Notice*, §§ 371, 372. I do not see why corporation bonds can be subject to a different rule. "There must be something in the pleadings or in the published notice at the time of the purchase to direct the purchaser's attention to the identical thing, which is the subject of the litigation, the notice being purely constructive of the facts contained in the bill and nothing more." *Wade on Notice*, § 351.

The purchase of these bonds by the South Carolina Railroad Company to secure an antecedent debt may not have had a sufficient consideration to support it, but the purchase by George W. Williams, as treasurer of the syndicate, from the South Carolina Railroad Company, was upon a new and ample consideration, the loan of money or credit, which was sufficient even if the original purchase from the receivers had been tainted with a want of proper consideration.

There is, however, another feature of this case which makes it a very peculiar one. In order to entitle litigants to the protection afforded by the constructive notice of the *lis pendens*, there must be diligence in the prosecution of the suit. I have found no case where the parties lost that protection unless there was laches in reviving a suit which had abated. 2 *Lead. Cas. Eq.* 125, 126, 127; but I see no good reason why it should not be lost by other conduct of

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the parties. In this case the order \*of Judge Melton was made in 1872, on June 17th, and for over six years, until 1878, November 23d, not one single report was made or called for from the custodians of the property appointed by the court. In the meantime, while enjoying the protection of the court from suits and executions, the lien creditors, including the holders of these second mortgage bonds, received their interest from the surplus income and from borrowed money from



July, 1873, to July, 1877. Thus every holder of these bonds was a party to this infringement of the order of the court, and all who purchased these bonds, or any of them, are subject to such equities as existed against these bonds in consequence of these transactions.

I think those who then held these bonds would be estopped from claiming, in the face of these proceedings (for they were all called in as parties to the suit), the protection of the *lis pendens* as amongst themselves, or in transactions with others who dealt in these bonds, on the faith that they were on the market, free from all entanglements, which might impose on them the character of trust funds, because they may have been at one time in the hands of those who, though officers of the company, were also receivers appointed by the court. I do not see how these receivers had any right to make a payment of interest on second mortgage bonds, to which the blue bonds and the guaranteed bonds were prior, or even the interest on these latter bonds themselves, under the order of Judge Melton.

As to all creditors there was an exhaustive order to prove their claims before the referee, and President Magrath was right when he said to the stockholders that there could be "no payments made" under this order; and when subsequently these lien creditors did accept for four years successively payment of their interest coupons, they opened the way to unsecured creditors to accept, I think with safety, any money or security they could obtain. Clyde and others, who now hold these bonds, I think ought to be bound as privies. 2 Lead. Cas. Eq. p. 653. I find no evidence to contradict the sworn statement of George W. Williams that he never qualified or acted as a director of the Greenville and Columbia Railroad Company, and if he was ever an acting director, I do not

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see how he can be made to answer to parties or their privies for acting without the authority of the court, who, to say the least, were equally at fault. The rights of parties who were not admitted to this premature division of assets, stand on a different footing, and some of them have been recognized by the court. The counter-claim cannot therefore be allowed.

It is therefore ordered and adjudged that the petition be dismissed, each party paying his own costs.

Clyde et al. appealed from so much of this decree as dismissed their counter-claim.

Mr. James Conner for appellants.

Messrs. Buist & Buist, Lord & Inglesby, Simonton & Barker, contra.

November 27th, 1882. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case the only question involved is the question of the counter-claim set up in the answer of the defendants. This claim was dismissed by the Circuit judge.

The question involved in the appeal is the same as that raised and decided in the recent case of *Ex parte The Carolina National Bank, In re The Attorney-General et al. v. The Greenville and Columbia Railroad Co.*, ante 289. It is true that, in this case, the objection to the mode in which the counter-claim was presented was waived at the hearing, and the case was heard upon its merits.

The decree of the Circuit judge is based upon the fact that there was not sufficient evidence before him that the petitioner had notice that he was dealing with trust funds when he became possessed of the funds in question. We think this was the turning-point in the case, and we find nothing in the testimony which would authorize this court to overrule the Circuit judge in his conclusions upon this subject. The petitioner never qualified or acted as a director of the Greenville and Columbia Railroad. He purchased

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these bonds as treasurer of the syndicate from the South Carolina Railroad Company upon a new and ample consideration. There was nothing in the bonds themselves which advertised parties that they constituted part of the assets in the hands of the receiver. And finally, there was no sufficient testimony to bring the case under the operation of the equity doctrine which holds parties responsible for trust funds or property obtained from a trustee with a knowledge of the trust. The counter-claim can have no standing even as a cause of action except upon this doctrine, and the important fact of knowledge by the petitioner of the trust character of the bonds being absent, there is nothing through which this doctrine can be applied and enforced.

It is, therefore, the judgment of this court that the judgment of the Circuit Court be affirmed.

18 S. C. 305

TRUMBO v. FINLEY.

(April Term, 1882.)

[1. *Gaming* ⚡57.]

A complaint by a common informer, alleging the winning of money by defendants from one A. at a game of faro, on or about a certain day named, states no cause of action and was, therefore, properly dismissed on demurrer, as the only right of action to an informer in such case exists under a statute which authorizes a recovery where the money was won at any time or sitting; that is, at any one time or sitting. To constitute a cause of action under this statute, the money must have been won at one time or at one sitting.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 114; Dec. Dig. ⚡57.]

[2. *Pleading* ⇨193, 367.]

As the complaint stated no cause of action, a demurrer was proper; it was not necessary for defendants to move that plaintiff be required to make his averments more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 64, 425, 428–435, 437–443, 1175–1193; Dec. Dig. ⇨193, 367.]

[3. *Pleading* ⇨236.]

In the matter of permitting a plaintiff to amend his complaint after demurrer, much must be left to the discretion of the Circuit judge, and the exercise of such discretion, as a rule, will not be disturbed, unless it deprives a party of a substantial legal right.

[Ed. Note.—Cited in *Strickland v. Bridges*, 21 S. C. 27; *McSween v. McCown*, 23 S. C. 350; *Sibley & Co. v. Young & Napier*, 26 S. C. 423, 2 S. E. 314; *Stallings v. Barrett*, 26 S. C. 476, 2 S. E. 483; *Suber v. Chandler*, 28 S. C. 386, 6 S. E. 155; *Green v. Iredell*, 31 S. C. 593, 10 S. E. 545; *Cothran v. Knight*, 47 S. C. 256, 25 S. E. 142; *Norris v. Clinkscales*, 47 S. C. 499, 25 S. E. 797; *Heyward v. Williams*, 48 S. C. 565, 26 S. E. 797; *Pelzer, Rogers & Co. v. Morris*, 56 S. C. 90, 34 S. E. 22; *Proctor v. Southern Ry.*, 64 S. C. 493, 42 S. E. 427; *Jones v. A. H. Williams & Co.*, 89 S. C. 583, 72 S. E. 546.

For other cases, see *Pleading*, Cent. Dig. § 601; Dec. Dig. ⇨236.]

[4. *Pleading* ⇨225.]

Upon oral demurrer interposed at the trial in this case, the complaint was properly held not to state facts sufficient to constitute a cause of action, and the presiding judge refused to permit plaintiff to amend by stating a wholly different and new cause of action. *Held*, that this order of refusal should not be disturbed.

[Ed. Note.—Cited in *Strickland v. Bridges*, 21 S. C. 26; *Sullivan v. Sullivan*, 24 S. C. 476; *McKnight v. Cooper*, 27 S. C. 95, 2 S. E. 842; *Hall v. Woodward*, 30 S. C. 575, 9 S. E. 684; *Cuthbert & Co. v. Brown*, 49 S. C. 517, 27 S. E. 485; *Ruberg v. Brown*, 50 S. C. 398, 27 S. E. 873; *Pickett v. Southern Ry.-Carolina Division*, 74 S. C. 243, 54 S. E. 375.

For other cases, see *Pleading*, Cent. Dig. § 578; Dec. Dig. ⇨225.]

Before Kershaw, J., Charleston, June, 1881.

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\*The opinion states the case. The order of the Circuit judge was as follows:

I think the complaint is defective. The authority of Sir William Blackstone, construing the statute from which this is taken almost verbatim, indicates what a "time" or "sitting" is. He defines both of those terms as not referring to a day or a period of time, in the ordinary use of that term, but to a certain specific point of time—to an occurrence more than to a time. I think that is a reasonable and proper construction of this act. I don't think it has reference to the day, because there might be many of those transactions occurring in a day. The rule is, that wherever an action is brought for a penalty under the statute, that the statute must be strictly construed, and that the strict rules of pleading adopted on the criminal side of the court should be applied wherever it is sought to enforce penal statutes on the civil side of the court.

I confess to some embarrassment growing out of the circumstance that we are now proceeding under a code which allows an almost unlimited right of amendment, and in all other actions I should suppose the court could be extremely liberal in trying to lick into shape the proceedings before the court in the interest of justice. But however offensive to our ideas of morals gambling may be (although good people are divided on that point), and however censurable it may be that men should carry on a business to tempt young men in fiduciary positions to violate their trusts, and in many cases perhaps with the full knowledge all the time that their victims are plundering their employers, yet the plaintiff here has no right to recover one cent from these defendants, except under strict compliance with the terms of the law which makes them liable.

While I would most willingly give the plaintiff a status in this court, especially as a great deal of expense has been incurred, and these circumstances make me very reluctant to dismiss this complaint without ordering an amendment, yet it seems to me that the answer to that has been properly made by the defendants. This is a technical action, and if a party come into court to enforce a penalty by a technical action, not one founded on contract, but upon the strict let-

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ter of the law, and misconceive \*the mode of presenting his case, I think the court should not hesitate upon general principles. If an exception could be made, I would most willingly make an exception in this case. I would be glad to see the case taken up to the Supreme Court.

It is ordered that the complaint herein be dismissed, because it does not state facts sufficient to constitute a cause of action. Motion of plaintiff to amend refused.

Messrs. T. M. Mordecai, B. H. Rutledge, for appellants.

Messrs. A. D. Cohen, Simonton & Barker, contra.

November 29th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a quit tam action, brought by Augustus S. Trumbo, the plaintiff, against Thomas Finley and William K. Brown, the defendants, to recover \$75,000, being treble damages for \$25,000, alleged to have been won by them at a game of faro, from one Bentham R. Caldwell "on or about" certain days named in the different counts. The complaint contained one hundred and ten causes of action, of which the first was as follows:

"For a first cause of action: That on or about the 24th day of July, 1879, in the city of Charleston, within the limits of the county and State aforesaid, one Bentham R. Caldwell did, by playing at faro, lose to Thomas



Finley and William K. Brown, the defendants herein, the sum of fifteen hundred dollars, or thereabouts, and did then and there pay over and deliver said sum of money to them the said Thomas Finley and William K. Brown. That the said Bentham R. Caldwell, who, on or about the date aforesaid, at the place aforesaid, and at the game aforesaid, did lose said money, and pay over and deliver said sum of money or thereabouts, to them the said Thomas Finley and William K. Brown, has not within three months then next ensuing from said date, really and bona fide and without covin or collusion, sued for and with effect prosecuted for the said sum of money or thereabouts by him so lost as aforesaid, and the plaintiff herein, Augustus

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S. Trumbo, doth sue the said defend\*ants, Thomas Finley and William K. Brown, for treble the value thereof, to wit, the sum of forty-five hundred dollars, or thereabouts, and the costs herein, the one moiety thereof to the use of him the said Augustus S. Trumbo, and the other moiety to the use of the poor of Charleston county, in the said State; and for said sum of forty-five hundred dollars he doth pray judgment against the said defendants, in accordance with the provisions of the 79th chapter of the Revised Statutes of the State of South Carolina."

The other causes of action were similar to the above, except that the dates and amounts were different, specific amounts being charged as having been lost "on or about" a certain specified day, each amount exceeding \$100. With the exception of the days and amounts, the words were identical. The dates, respectively, are from the said July 24th, 1878, to January 1st, 1879. The answer of the defendants was a general denial of each and every cause of action.

The case came on for trial before Judge Kershaw. After the case was opened and before the testimony was offered, a motion was made to dismiss the complaint on verbal demurrer, that the complaint did not state facts sufficient to constitute a cause of action. The defendants argued that the complaint should have alleged each loss to have been "at one time or sitting," and that it did not otherwise sufficiently allege the offense in accordance with the statute. The plaintiff replied that the allegations of the complaint were sufficient and a compliance with the statute, and that the insertion of the words "at one time or sitting," was not only unnecessary, but would have been improper, and asked the court, if it should hold otherwise, for leave to amend, by inserting in each cause of action such words as the court should deem necessary and proper. Judge Kershaw granted the motion and dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and also refused the motion of the plaintiff to amend. From this order the

plaintiff appeals to this court upon the following exceptions:

1. Because his Honor erred in deciding

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that the complaint \*was insufficient in this, that it failed to contain the allegation that each loss was sustained "at one time or sitting."

2. Because under the statute in question as now of force in South Carolina, the allegations of the complaint are an adequate statement of the cause of action under said statute, whether tested by the principles of the pleadings and practice which formerly prevailed in this State, or by those which obtain under the present system of the code, and that under either system the insertion of the words "at one time or sitting" would be objectionable, and that the allegations of the complaint are in accordance with the statute.

3. Because even if it should be held that to constitute the cause of action contemplated by the statute, the money must be lost "at one time or sitting," this is a matter of proof on the trial, and not of essential allegation in the complaint. The practice, even in case of an indictment (where the charge is in the language of the act creating the penalty declared for, or in words of equivalent import), being for the defendant to move to that effect, where circumstances render it necessary for his defense, that the offense be more specifically stated; and especially is that the case in practice under the code, where the court, on motion of the adverse party, may require the pleadings to be made more definite and certain.

4. Because his Honor erred in deciding that civil actions under a penal statute are to be governed by the technical rules of criminal pleading, even under the old or former system of pleading and practice; and under the code such rule has no application whatever, and that this action is a civil action under the code, and subject to all the rules of practice and pleading existing thereunder.

5. Because if the words "at any one time or sitting," or any other words, be held a necessary allegation of the complaint, the plaintiff ought to have been directed and allowed to amend, as the law requires, and that his Honor erred in refusing the motion, especially as this is a civil action under the code.

This is a novel case. We are not aware that one like it has ever arisen in the State before. Certainly none such was brought

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\*to our attention by the exhaustive argument made here. The statute under which the action is brought is as follows:

"Sec. 6. Any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice-table, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole,

the sum or value of fifty dollars, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

"Sec. 7. In case the person or persons who shall lose such money or other thing as aforesaid, shall not, within the time aforesaid, really and bona fide, and without covin or collusion, sue and with effect prosecute for the money or other thing so by him or them lost, and paid and delivered as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suits as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner or winners as aforesaid; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the county where the offense shall have been committed." Gen. Stat. of 1872, 407.

The object of the statute was manifestly to punish excessive gaming. We regard the important words "at any time or sitting" as only another way of saying "at any one time or sitting." It is true the word "any" is indefinite as to the particular thing referred to, but it is singular, and in connection with a name singular means one of the particular things indicated. In the statute it qualifies both "time" and "sitting," and is equivalent to the expression "at any one time or sitting."

It seems to us that the statute 9 Anne, ch. XIV., from which our act was taken (although it was not all re-enacted), received the proper construction in the case of *Bones v. Booth*, 2 W. Bl. 1227. That was not, as

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this, an action *qui tam* by a stranger \*to recover the penalty, but an action by the loser himself to recover back fourteen guineas lost at gaming. The play was at the West India Coffee House in Bristol. They played at "All Fours" for two guineas a game from Monday evening to Tuesday evening, without interruption, except for an hour or two at dinner; but the plaintiff and defendant never parted company. Booth then owned on Tuesday evening that he had won seventeen guineas. It was insisted at the trial that this was not won at any one sitting so as to fall within the statute, because the dinner had intervened, but the judge thought otherwise. However, the jury found for the defendant, and the court ordered a new trial. Justice Blackstone said: "The statute makes the winning of £10, at one time or sitting, a nullity; and, therefore, gives the loser an action to recover back what still properly con-

tinues to be his own money. To lose £10 at one time is to lose it by a single stake or bet. To lose at one sitting is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time." Nares, Justice, concurred and said: "The statute is remedial where the action is brought by the party injured, but penal where brought by a common informer."

It will be observed that, in this case, the decision was made to turn upon the fact that the guineas were lost "at one sitting," and that, too, in a remedial action by the loser himself. Taking this to be the proper construction of the statute, the question is, whether the complaint stated facts sufficient to constitute a cause of action under it. The seventh section, under which this action was brought, is certainly penal in its character. The action being by a stranger, who had no privity with the defendants, for a penalty on account of an alleged legal wrong which did not exist at common law, but only in the statute, we think it was necessary that the precise facts constituting that wrong should be alleged, and if there was a failure to do so, that failure could not be cured by the common law, which, as to actions of a different kind, has sometimes been called a nursing mother. An act lacking any of the elements of the thing made penal by the statute, was not that for which this peculiar action was allowed. It has been held in New York, in

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reference to a \*similar statute, that "the statute gives no form of declaring where a common informer is plaintiff. And in an action founded on a statute, the plaintiff must state specifically the cause of action coming under the statute." *Cole qui tam v. Smith*, 4 John. 193.

We do not see that our Code of Procedure (which, it seems, in regard to the form of action, makes no exception as to actions for penalties,) alters the case. The leading principle upon which the code proceeds, is that the pleadings shall contain the fundamental facts and no more. Technicalities are disregarded, and it may be that the statutory offense could be stated sufficiently without using the very words of the statute, but that could only be done by the use of such other words as expressed the exact wrong made penal. The general rule in an indictment for a statutory offense, and we suppose the same would apply to an action upon a penal statute, is that it is sufficient if the offense be stated in the words of the act, which is possibly the safest course, but is not indispensably necessary. Penal acts are not to be construed so strictly as to defeat the obvious intention of the legislature. They are to be construed strictly in that sense, that the case in hand must be brought within the definition of the law, but not so strictly as to exclude a case which is within its words taken in their ordinary acceptance. That is to say,



there is no peculiar or technical meaning given to language in penal more than in remedial laws.

Apply this principle to the complaint here. It did, with many reiterations, allege that the defendants won so many dollars at play from the person named, on particular days named, but it did not state the exact facts denounced by the statute as objectionable, to the extent of allowing a stranger to recover from the winner treble the amount so won. It did not attempt to state the offense in the words of the statute, nor indeed in equivalent words. The word "sitting" does not occur in the complaint, nor "any time," unless it may be considered that the words "on or about" a particular day named, meant "some time," and that, as argued, was equivalent to "any time." We do not regard time as important in reference to any particular day within three months, but necessary as

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to the manner in which the money was won, viz., "at one time or sitting," which, as we think, was an important element of the offense under the statute.

It is insisted, however, that if the averments of the complaint were imperfect and incomplete, it was, under the code, incumbent upon the defendants to correct them by a motion to render them more definite and certain by amendment. Sometimes this is the proper remedy, but that must depend upon the inquiry whether the defects amounted to an entire failure to state any cause of action, or only a statement of it in an insufficient or informal manner. In the latter case, the remedy is by motion to make the faulty pleading more definite and certain, as in the case of *Childers v. Verner & Stribling*, 12 S. C. 4.

This proceeding by motion takes the place of a demurrer for want of form, or, as it was called under the old system of pleading, "a special demurrer." But if the averments are so defective, if the omission of material facts is so great, that even under the rule of a liberal construction, no cause of action is stated, it is not a mere case of insufficiency, but one of complete failure, and, in such case as we understand it, the proper remedy is by demurrer, and, subject to the right of amendment in particular cases, the complaint should be dismissed as in the case of a general demurrer sustained under the old system. Mr. Pomeroy says: "The true doctrine to be gathered from all the cases is, that if the substantive facts which constitute a cause of action are stated in a complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegation of these is imperfect, incomplete and defective, such insufficiency pertaining, however, to the form rather than the substance, the proper mode of construction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial

to make the averments more definite and certain by amendment." Pom. Rem., § 549.

According to these well-established principles, was the defect in this complaint one of substance or of form merely? Were the facts necessary to support the action stated in the complaint? It is conceded in all the books on code pleading, that it is very difficult in many cases to discriminate between

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the two conditions of partial and of total failure, and that it is utterly impossible to frame any accurate general formula which shall define the insufficiency of the averments and embrace all the possible instances within its terms. This difficulty touches the precise point of this case. Whilst it is admitted that the authorities on the subject are not all in accord, considering the nature of the action and the fact that the matter omitted constituted the essential element of the statutory offense, we are constrained to hold that really no cause of action was stated in the complaint, and that the defendants could not be required to help the plaintiff to make a case, where none was charged, against themselves. If a good cause of action under the statute had been alleged, no matter how imperfectly, the result would have been different. But taking all the facts as alleged to be true, they do not furnish a cause of action under the statute, and we think the Circuit judge committed no error in sustaining the demurrer.

The cause came on for trial, and, while being heard before a jury, the defendants put in a verbal demurrer under subdivision 6 of section 167 of the code, "that the complaint did not state facts sufficient to constitute a cause of action." The plaintiff joined issue, insisting that the complaint was sufficient, but asked the court, if it should hold otherwise, "for leave to amend by inserting in each cause of action such words as the court should deem necessary and proper." The judge sustained the demurrer and refused the motion to amend, and the question now is whether the refusal of the motion to amend was error of law reviewable by this court. The order proposed was in very general terms, asking leave to insert "such words as the court might deem necessary and proper;" but, seeking only the substantial rights of the parties, we lay no great stress upon that.

The code of procedure, from its dread lest the proper requirements as to form should degenerate into mere technicalities, has made most ample and liberal provisions for amendments at the trial itself, or at any other time in the progress of the cause. We are thoroughly in accord with the spirit of the code in its liberality in allowing amendments and in its opposition to the decision of controversies not involving the merits; but some rules are absolutely necessary, and all the

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writers on the codes agree \*that there is some limit to the right of amendment. If the right were universal, and extended to all parties and under all circumstances, there would be no difficulty, but as it does not, there must be some judgment as to the proper cases for its application.

When the application is made at the trial, it is addressed to the discretion of the Circuit judge, and the exercise of that discretion is a most delicate and responsible duty, enhanced possibly in this case by the fact that if the amendment is not allowed, the action given by the statute will probably be barred. We agree entirely with what Judge Withers said in the case of *Mobley v. Mobley*, 7 Rich. 432: "Than judgments founded on the exercise of legal discretion, there is no description of official duty more perplexing to the judge who renders and the tribunal which reviews such judgments. The efforts of jurisprudence have always been earnest and diligent to render its maxims, its standards, precise, fixed, intelligible, and to substitute exact prescriptions for the necessary uncertainties of discretion." But after all there must, to a certain extent, be the exercise of discretion, sound discretion guided by law, "regulated by rule, not by humor."

Some of our cases would seem to indicate that, when the discretion of a judge has been exercised upon a motion to amend, his decision ordinarily is not appealable. *Cureton v. Hutchinson*, 3 S. C. 606; *Chichester v. Hastie*, 9 S. C. 334; *Mason v. Johnson*, 13 S. C. 20. An order involving merely the exercise of discretion cannot be appealable, as error of law cannot be averred against such an order. No general rule can be laid down upon the subject. There may be cases in which the exercise of that discretion will be reviewed, especially where the motion to amend is refused and the case is thereby ended, such order being somewhat in the nature of a final judgment. But as to amendments, much must be left to the discretion of the Circuit judge, and the exercise of it, as a rule, will not be disturbed, unless it deprives a party of a substantial right, which he can show he is entitled to under the law.

Did the plaintiff, whose complaint had been declared insufficient at the trial, have the right to an order to amend his complaint and go on with his case? The Circuit judge

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thought not, and \*refused it. A demurrer under the code for want of sufficient facts is said to be something like a "general demurrer" under the old system of pleading (*Bliss*, § 413); and there is no doubt an order allowing a general demurrer under that system ended the case, and was a final judgment between the parties. *Bagley v. Johnston*, 4 Rich. 22; *Gaillard v. Trenholm*, 5 Rich. 356, and notes.

But the code is more liberal in allowing

amendments after demurrer allowed. There is, however, difference of opinion as to the extent to which it should go. There is, undoubtedly, much conflict in the cases upon the subject, particularly in the States of New York and Wisconsin. In one class of cases, even after demurrer sustained to the complaint, the plaintiff will be allowed, upon terms, to amend by inserting in his complaint a new cause of action, whenever such new cause does not make it necessary to change the summons. *Brown v. Leigh*, 49 N. Y. 79. But our code, in reference to amendments at the trial, seems to limit the right "to inserting allegations material to the case where the amendment does not change substantially the claim or defense." Code, § 196.

And, as far as we are able to ascertain, the most approved rule, and that certainly most in accord with all the analogies of pleading, is that an exception is made in those cases where the plaintiff proposes to set up a wholly different cause of action in place of the one which he attempted to set up in his original pleading, and, in such case, the motion comes too late. The leading case in this line of decision is that of *Supervisors v. Decker*, 34 Wis., citing *Brayton v. Jones*, 5 Wis. 117, and appendix. See *Bliss Code Pl.*, § 429; *Pom. Rem.*, § 566; *Wait An. Code* 328, note. Mr. Pomeroy expresses it thus: "In giving a practical interpretation to the clauses of the code, a conflict of decision has arisen among the tribunals of the different States, which it is utterly impossible to reconcile. The rule is established by one class of cases, that in all the voluntary amendments before trial, for which the party applies to the court by motion, including those rendered necessary by the sustaining of a demurrer to his pleadings, he cannot, under the form of an amendment, change the na-

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ture and scope of his \*actions; he cannot substitute a wholly different cause of action in place of the one which he attempted to set up in the original pleading," &c.

Taking this as the rule, we have certainly held that the complaint did not state facts necessary to constitute the peculiar action given by the statute to a stranger. The motion to amend it in the manner stated involved the right to insert "a wholly different cause of action;" indeed, a new cause of action, as none under the statute had been sufficiently stated. We think, therefore, that the judge, in refusing the order to amend, committed no abuse of his discretion which this court should correct. In view of the salutary principle of amendment we were inclined to a different result; but we are less reluctant to affirm the judgment when we consider the nature of the action, which, though civil in form, certainly partakes somewhat of the nature of a criminal proceeding. As stated by the judge, "this is a technical action, not founded on contract or considera-



tion, but upon the strict letter of the law, and must be judged accordingly."

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

### 18 S. C. 317

STATE v. PADGETT.

(April Term, 1882.)

#### [1. *Criminal Law* ¶84.]

Where jurisdiction of a misdemeanor is conferred upon an inferior court, the Court of General Sessions has also jurisdiction, unless in terms denied to the superior tribunal, or exclusively given to the inferior.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 122; Dec. Dig. ¶84.]

#### [2. *Criminal Law* ¶86.]

The Court of General Sessions has jurisdiction of the offense of selling seed cotton at certain hours; for the statute prohibiting such sale confers jurisdiction upon that court as well as upon the court of trial justices, and imposes as a punishment a fine of \$50, or imprisonment for thirty days, or both, which last alternative is beyond the jurisdiction of the inferior court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 125; Dec. Dig. ¶86.]

#### [3. *Criminal Law* ¶99.]

A trial justice, having issued his warrant for the arrest of the defendant, did not thereby assume to his court jurisdiction to try the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 196, 197; Dec. Dig. ¶99.]

#### [4. *Statutes* ¶230.]

The amendment by the legislature of a statute which was not clearly expressed, does not show that the former statute was incapable of execution.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 311; Dec. Dig. ¶230.]

#### [5. *Indictment and Information* ¶87.]

"An act to prohibit the sale of seed cotton between the time of the setting and rising of the sun," prohibited such sale "between the

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hours of sun\*down and sunrise of any day." *Held*, that the time within which the sale was forbidden by this act, was between sunset and the next succeeding sunrise, and that the offense was sufficiently charged in an indictment alleging a sale "at nine o'clock in the night of the same day."

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 245; Dec. Dig. ¶87.]

#### [6. *Indictment and Information* ¶110.]

[Cited in *State v. Shuler*, 19 S. C. 143, and *State v. Carroll*, 30 S. C. 92, 8 S. E. 433, 14 Am. St. Rep. 883, to the point that an indictment under a statute must follow the material words thereof.]

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. ¶110.]

Before Hudson, J., Orangeburg, October, 1881.

These were two prosecutions against the same defendant, Joel Padgett, for selling seed cotton on November 2d, 1880. In one case, the alleged sale was of three hundred pounds at nine o'clock at night, and in the other, of

two hundred pounds at ten o'clock at night. Other facts are stated in the opinion.

Mr. M. I. Browning, for appellant.

Mr. Solicitor Jervey, contra.

December 11th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. These were indictments under the act of 1877, "To prohibit the sale of seed cotton between the time of the setting and rising of the sun, and to regulate the sale of seed cotton." 16 Stat. 266. The only difference between the two cases was as to the amount of cotton alleged to have been purchased and the hour of the night at which it was done, and therefore they were heard together.

The cases were commenced as usual by warrants for arrest of the defendant, issued by a trial justice, who, after examination, bound over the defendant and sent the cases up to the Court of General Sessions for trial. The indictments charged "That Joel Padgett, late of the county and State aforesaid, on the second day of November, 1880, with force and arms, at Willow township, in the county and State aforesaid, at nine o'clock in the night of the same day, did unlawfully buy," &c.

The cases were tried by Judge Hudson. The defendant denied the jurisdiction of the Court of General Sessions, claiming that the trial justice, having issued the warrants of arrest, had exclusive jurisdiction to try the

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cases. The judge refused to sustain the objection and sent the cases to the jury. The verdict was "guilty" in both cases, and the judge in each case sentenced the prisoner "to pay a fine of twenty-five dollars and costs, or be imprisoned in the county jail for a period of thirty days."

The defendant moved in arrest of judgment, which was refused, and he now appeals to this court and renews the motion upon the following grounds: First. Because his Honor erred in overruling the pleas to the jurisdiction made in said actions, the defendant contending that this court and the court of trial justice having concurrent jurisdiction of the offenses charged, and the proceedings having originated in the latter court, that the actions should have proceeded to judgment therein. Second. Because the allegations in the indictment, that the said offenses were committed "in the night time," does not state the offense created by the statute which forbids the "buying," &c., "between the hours of sun-down and sunrise of any day."

First. The offense created by the statute, which is charged in this case, did not exist at the time the constitution was adopted, but that instrument contains a provision which covers it. By section 18 of article IV. of the constitution it is provided, "That the Court of General Sessions shall have exclusive ju-

jurisdiction over all criminal cases which shall not be otherwise provided for by law." If the jurisdiction is otherwise provided for, the exclusive jurisdiction of the Court of General Sessions is taken away, but not its jurisdiction. That remains and is concurrent with that of the other tribunal, unless to the inferior jurisdiction exclusive jurisdiction is given, or unless to the superior tribunal all jurisdiction should be in totidem verbis denied. "A statute which simply confers jurisdiction of a crime on an inferior court generally, and not exclusively, cannot be considered to deprive the Court of General Sessions of its jurisdiction, but the jurisdiction remains concurrent with that of the Superior Court." *State v. Williams*, 13 S. C. 548.

This case does not fall under section 19, article I. of the constitution, which provides "That all offenses less than felony, and in which the punishment does not exceed a fine of \$100, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law."

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It \*does not do so for the reason that the punishment of the offense, imposed by the act, may be both fine and imprisonment, so that exclusive jurisdiction is not given to the trial justice from the nature of the punishment imposed. *State v. McKettrick*, 14 S. C. 350. And besides the act itself, which creates the offense, provides "That any person, &c., upon conviction in the Court of General Sessions or of a trial justice, shall be fined in the sum of fifty dollars, or imprisoned in the county jail for a period of thirty days, or both, in the discretion of the court." 16 Stat., supra.

It is said, however, that whilst jurisdiction is expressly given by the act to the Court of General Sessions, it is also given to the court of trial justice, and the jurisdiction being concurrent, and the court of trial justice having first assumed jurisdiction, that of the Court of General Sessions is ousted. There is no conflict of jurisdiction here. The trial justice court is not claiming jurisdiction. It is the duty of the trial justice to issue his warrant of arrest in all proper cases when applied for. We do not think this initiation of the proceedings is assuming jurisdiction to try the case, but merely a preliminary step to arrest the party, which is necessary to his being tried in any court. The trial justice did not claim jurisdiction to try the case, but upon examination sent it to the Court of General Sessions to be tried there. We see no error in that court taking jurisdiction and trying the case.

Second. The other objection is that the offense being one created by statute, was not sufficiently set forth in the indictment. The words of the act are: "That it shall not be lawful for any person to buy or sell, or receive by way of barter, exchange or traffic of any sort, any seed cotton between the hours of sundown and sunrise of any day." The indictment

charges that "Joel Padgett, on the second day of November, 1880, at nine o'clock in the night of the same day, did unlawfully buy," &c., and the question is whether the indictment sufficiently charges the offense created by the act. This is more a question of construction of the act than of pleading. It is certainly true that the act of the legislature is not very clearly expressed, and on that account, perhaps, the legislature, in Decem-

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ber, 1880, \*amended its phraseology. But that was after the offense charged here had been committed, and can have no effect upon this case, which must stand or fall according to the terms of the law as originally expressed. Nor, on the other hand, do we think that, because the legislature chose to amend the law which was not clearly expressed, we would be justified in assuming from that fact, that, in the opinion of the legislature, the law as it originally stood was incapable of being enforced, and the original act was repealed and not merely amended by the last acts. The question simply is, whether under the original act, unaffected by the subsequent amendment, this indictment sufficiently sets forth the statutory offense charged therein.

The rule in regard to indictments framed to cover offenses created by statute is, "that the offense should be set forth with clearness and certainty, and must be so described, if not in the very words of the statute, so as to bring it substantially within the provisions of the statute." 1 Arch. 286; *State v. Vill*, 2 Brev. 262; *State v. Cunningham*, 2 Speers, 246; *State v. Cullum*, Ib. 582. In the case from Brevard the court say: "The offense is charged in the indictment substantially and sufficiently pursuant to the statute, and although there is not a perfect similarity in the words, there is no variance in the sense, nor can the variance create any doubt in the operation or construction of the law."

In the case before us the words of the act are, "between the hours of sundown and sunrise of any day," and the words of the indictment are, "in the night-time." Does the indictment charge that the offense was committed substantially at the time forbidden by the act? We can have no doubt of what was the intention of the legislature in the use of the words "between the hours of sundown and sunrise of any day." The object of the legislature manifestly was to make criminal the sale of such cotton in the night-time. In construing an act we have a right to refer to the title, and the title of this act uses the words "between the time of the setting and rising of the sun," without reference to any day, which shows what was the intention. From these words can there

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be a reasonable doubt that the \*intention was to express the period of time lying between sundown of one day and sunrise of the next?



The law-makers, taking as a starting-point sundown, evidently intended to count forward and not backward, to include the period of time succeeding and not preceding the setting of the sun, the period of darkness until the next and not the period of light back to the last "rising of the sun."

But it is urged that the superadded words in the act, "of any day," negatives this construction; that the use of these words, which have lately been repealed, makes it necessary to inquire whether the night can be said to be "of" the day—that is to say, belonging to or proceeding from the day. The division of time which most strikes us, is that into day and night. One rotation of the earth in twenty-four hours produces a period of light and a period of darkness of about equal length, and it is entirely conventional at what point of the circle we begin to make the count; but of the two periods, that of light, the artificial day, is the most important to us, and from this or some other cause we habitually, in common parlance, speak of the night which succeeds a day as the night "of" that day—that is to say, the night that follows, that belongs to that day. "A day is usually intended of a natural day, as in an indictment of burglary we say in the night of the same day." Co. Litt. 135.

The framers of this act doubtless used the words "of any day" in this sense, and meant the whole period of darkness between sundown of one day and sunrise of the next. According to this construction, the period of time within which the statute inhibited the purchase of seed cotton was the whole of the night succeeding, following, the day indicated, and the charge that the offense was committed in the night succeeding the day of November 2d, 1880, is substantially in accordance with the sense of the act, although not with its exact words. It is insisted that we cannot thus reach the intention of the act, but must construe its words according to their technical meaning, and that thus construed, it cannot be said that the night is "of" the day—that being a penal statute it must be construed strictly. That certainly is the rule, but proper construction in order to ascertain the intention, surely is admissible.

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\*In the case of *State v. Brown*, 2 Speers, 136, Judge O'Neill says: "It is said penal statutes are to be construed strictly and nothing is to be included in them by intendment. There is no doubt this is the general rule, but it is also a rule that the courts are not to narrow the construction so that offenders may escape. 'We are to look to the words in the first instance,' said Buller, J. (1 T. R. 96), 'and when they are plain we are to decide on them; if they are doubtful, then we are to have recourse to the subject-matter,' and in a late work (Dwarries

on Statutes 79) it is said, 'Statutes, though penal, have been taken by intendment to the end that they should not be illusory, but should take effect according to the express intendment of the makers of the act.' " And in the case of *State v. Cunningham*, supra, it was held that "when the intent of an act is plain, to effect it, words and even parts of sentences may be transposed." It is true that the word "night" does not appear in this act, but who can doubt that it was intended by the words "between the hours of sundown and sunrise of any day."

If, notwithstanding the manifest intent, we must be limited to the scientific meaning of the words, then we agree that the division of time adopted by Pope Gregory XIII., is a part of our law. According to that calendar the civil, as distinguished from the artificial "day," is defined to be "the whole time or period of one revolution of the earth on its axis, or twenty-four hours," called the "natural day." "And the evening and the morning were the first day." Genesis, ch. 1. In this sense the day may commence at any period of the revolution. The Babylonians began the day at sunrise, the Jews at sunset, the Egyptians at midnight, as do several nations in modern times, the British, Spanish, American, &c. This day, in reference to civil transactions, is called the civil day. Thus, with us, the day on which a legal instrument is dated, begins and ends at midnight. Webster's Dictionary, Unabridged.

Even according to this scientific definition of the word "day," the act in question prohibited the purchase of seed cotton between the hour of sunset and the middle of the night succeeding, that being the end of the previous day. The indictment charged that the offense was committed "at nine o'clock

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in the night of \*the same day," viz., November 2d, 1880. That was within the time covered by the act, according to the strictest construction, and we cannot say that this manner of stating the offense as to time, was insufficient under the statutes.

The judgment of this court is that the judgment of the Circuit Court in each of the cases stated be affirmed, and the appeal dismissed.

## 18 S. C. 324

## TOBIN v. MYERS.

(April Term, 1882.)

[1. Execution. ◊275.]

Both judgment and execution are links in the title to land purchased at sheriff's sale; and while mere irregularities in them will not avoid the sale, the rule is different where either judgment or execution is absolutely void.

[Ed. Note.—Cited in *Garvin v. Garvin*, 21 S. C. 50.

For other cases, see *Execution*, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. ◊275.]

## [2. Judgment ⚡876.]

A judgment is presumed paid after twenty years have elapsed since its entry, notwithstanding an *ex parte* renewal of the *fi. fa.* within that time. *Dillard v. Brian*, 5 Rich. 502, recognized and followed.

[Ed. Note.—Cited in *Colvin v. Phillips*, 25 S. C. 232; *Adams v. Richardson*, 32 S. C. 141, 10 S. E. 931.

For other cases, see *Judgment*, Cent. Dig. § 1652; Dec. Dig. ⚡876.]

## [3. Execution ⚡7.]

A sale of land under a judgment more than twenty years old, held null and void.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 19; Dec. Dig. ⚡7.]

[This case is also cited in *McNair v. Ingraham*, 21 S. C. 71, 74, and distinguished therefrom.]

Before Hudson, J., Barnwell, March, 1882.

Action by J. Allen Tobin and August Zissett. The case is fully stated in the order of the Circuit judge, as follows:

On May 14th, A. D. 1860, Duncan, Moloney & Co. recovered judgment, by confession, against Gideon S. Brown, of Barnwell, had the same duly entered up, and execution issued and lodged on the same day, for \$290.75 and costs.

This judgment and execution lay dormant from that day until May 11th, 1880—no payments having been made thereon, no levy made, and no renewal of the execution until the last named day, when, without notice, and without leave of the court, either asked or obtained, the execution was renewed by the clerk, and a levy on the said May 11th, A. D. 1880, was endorsed thereon by the sheriff, of a certain lot in the town of Barnwell, the property of said Gideon S. Brown, then in the possession of H. M. Myers, Jr., the executor of the last will and testament of the said testator, Gideon S. Brown, who

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had died in 1878, leaving \*of force his said last will, in which the said Myers was nominated as executor, and had duly qualified. It seems that the other defendant, Marion S. Myers, and perhaps others of the family of the said testator, were likewise in possession; but this we are not sure that the testimony clearly shows. Certainly, the two defendants are in possession.

Under the levy made May 11th, 1880, the lot was sold and bid in by Laura C. Tobin, whose bid was duly transferred to the present plaintiffs, to whom the sheriff conveyed the said lot of land on January 14th, A. D. 1882, the sale having been made September 5th, 1881. On January 17th, A. D. 1882, the plaintiffs began this action to recover the possession of the lot of land of the defendants, who, by their answer, put the title in issue.

To establish title, the plaintiffs put in evidence the deed of the sheriff, based upon the judgment and execution, levy and sale aforesaid, all of which were in due form

proved. This muniment of title and proof of the long possession of the lot of land, and its use and occupation by Gideon S. Brown, made the plaintiffs' case, and they rested.

The defendants' counsel moved for a nonsuit, upon the ground that the levy, sale and conveyance of the sheriff aforesaid, were null and void; that the renewal execution was without authority, and conferred no power whatever upon the sheriff to make the levy and sale.

I concur in the view urged by the defendants' learned counsel, which was earnestly and ably combated by the learned counsel for the plaintiffs. At the date of the renewal of the execution, the judgment wanted but three days of being twenty years old. Even an authorized renewal of the execution would not have infused new life into the judgment, nor have checked the currency of the period of presumption of payment, much less did an illegal renewal have this virtue. Hence the period of presumption of payment ran on and became complete long before the sale on September 5th, 1881. Nor would the levy on May 11th, 1880, on an illegal renewal of execution, have the effect to cut short the currency of the twenty years—the period of presumption—so that when the sale was made, it

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was under a \*judgment that had been dormant for more than twenty-one years; no effort having been made within that time to revive it. The mere renewal of a *fi. fa.*, even when regular, does not arrest the currency of the twenty years which raises the presumption of payment of a judgment. See *Dillard v. Brian*, 5 Rich. 502.

But should we regard the judgment as not affected with this presumption of payment, still there was no execution which authorized a levy and sale; and perhaps this is the turning point in the argument at last.

Twenty years, wanting three days, had elapsed since the lodgment of the first *fi. fa.*, before a renewal is sued out; and this is done without any notice to the executor of the judgment debtor, who had been two years dead. No notice, no summons, no *sci. fa.* is issued, and no order or leave of the court is had. Under the law, prior to the adoption of the code, the original *fi. fa.* was defunct, and could only have been renewed on *sci. fa.* to Gideon S. Brown.

Did the last clause of section 307 of the code revive and restore to the plaintiffs' execution a right which had been forfeited three years before the adoption of the code? Because, after May 14th, 1867, they had lost the right to renew without leave of court upon *sci. fa.* issued. Section 317 of the code saves to executions all their incidents not supplied by or in conflict with the provisions of title IX., chapter I.; and we think the incidents to the renewal of



this execution are not supplied by the last clause of section 307, but rather by the previous clauses of the section, if at all.

Did that law of 1870 confer upon the plaintiffs the right to renew without notice to the executor of the deceased debtor, and without leave of the court, as late as May 11th, 1880, simply because an execution had been issued, but lay dormant, since May 14th, 1860?

We think not. And our conclusion is that the execution issued May 11th, 1880, and lodged as a renewal of that lodged May 14th, 1860, was null and void, and that all proceedings thereunder, including the sale of the lot and conveyance to the plaintiffs, are null, and conveyed no title. The motion

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for \*non-suit is, therefore, granted; and it is adjudged that the complaint stand dismissed with costs.

From this decree the plaintiffs appealed on the following exceptions:

1. For that his Honor erred (as it is respectfully submitted) in holding that the renewal of the execution herein by the clerk, without notice to the executor of the defendants and leave of the court, was null and void. But that his Honor should have held that leave of the court, in a case where the judgment was less than twenty years old, and where the first execution was issued within five years from the entry of the judgment, was not necessary, and that the renewal by the clerk was valid.

2. That his Honor erred in holding that all proceedings under said execution, as renewed by the clerk, including the sale of the lot and conveyance to the plaintiffs, are null, and conveyed no title. But that his Honor should have held that if notice to the legal representative of the deceased defendant, and leave of the court to renew the execution, had been necessary, the failure to give such notice, and to procure such leave, were mere irregularities which do not affect the title of the purchasers.

Mr. Robert Aldrich, for appellant.

Mr. J. C. Davant, contra.

December 11th, 1882. The opinion of the court was delivered by

Mr. Justice McGOWAN. [Omitting the statement.] A judgment is registration of what the court decides. A writ of execution is judicial process to enforce that judgment. One is passive and the other active. Both the judgment and execution are links in the title to property purchased at sheriff's sale; both are necessary, and if either is void, the title of the purchaser fails. For reasons of policy to sustain sheriffs' sales, purchasers at such sales are favored to the extent that mere irregularities in the process will not avoid the sale. If purchasers at their peril were held responsible for the

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perfect regularity of process \*under which property is sold, the result would be that property would be sold at a sacrifice, and the usefulness of such sales be greatly impaired, if not destroyed; but this rule, as to mere irregularities, does not apply where either the judgment or execution is absolutely void.

The first objection to the title in this case is that the judgment under which the sale was made, was, at the time of the sale, paid and satisfied by operation of law, and was, therefore, *functus officio*; that twenty years presumes payment, and that more than that time had elapsed. To this it is answered that three days before the twenty years had expired, the plaintiffs procured the clerk of the court, without notice to the defendant in execution, or, he being dead, to his executor, to issue a new execution, which was levied on the lot in controversy, and that this *ex parte* action of the plaintiffs shows that they did not sleep over their rights during the whole period of twenty years, and stopped the completion of the time necessary to raise the presumption of payment. As the execution is the only means which the plaintiff has to enforce payment of his judgment, and it is in one sense connected with the judgment, there has been some difference of opinion as to the effect of a renewal of the execution in regard to the running of the time necessary to presume payment of the judgment. But, after very full consideration, it was held by the old Court of Appeals in the case of *Dillard v. Brian*, 5 Rich. 501, that "the period of time (twenty years) which raises the presumption that a judgment is satisfied, begins when the judgment is entered up, and not when the last renewal *fi. fa.* is tested or loses its active energy." This is in point, and unless overruled, must control this case. We will not re-open the argument. Counting from the rendition of the judgment on May 14th, 1860, (disregarding the effort to renew by mere copy on May 11th, 1880,) to September 5th, 1881, when the lot was offered for sale, nearly twenty-one years had elapsed, and the artificial force of the presumption had attached. *Willingham v. Chick*, 14 S. C. 102; *Boyce v. Lake*, 17 S. C. 481 [43 Am. Rep. 618].

This view is conclusive of the case, and it is unnecessary to consider the other questions raised, whether the execution, under which the levy was made, was renewed ac-

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cording to law, and if \*not, whether said execution was absolutely void or only voidable. There can be no valid execution or sale under it, when the judgment on which it was issued is satisfied either in law or in fact. When the land in this case was sold, more than twenty years from the rendition of the judgment had expired and

raised the presumption of payment, which was not rebutted by the ex parte effort of the plaintiffs to renew the execution. "To explain the indulgence there must be some act or admission on the part of the defendant, showing the continuance of the debt. In the issuing, returning and renewing of executions, the defendant has no action. It may be done and redone for forty years, and unless he is astute enough to examine the clerk's and sheriff's offices, he will be ignorant of the facts." *Dillard v. Brian*, supra.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 329

EARLE v. HARRISON.

(April Term, 1882.)

[1. *Appeal and Error* ⇐1008.]

A finding of fact by the Circuit judge, from written testimony submitted to him, sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐1008.]

[2. *Witnesses* ⇐140.]

Where a testator, by his will, left a tract of land, the residuum of his estate, to his son F., out of which F. was to pay to another son J. and to a daughter E., to each, one-third of its value, and F., having settled with J., died intestate, J. is an incompetent witness, in behalf of E., to prove communications made to him by F. in relation to a claim of E. against her father's estate, payable out of this residuum. But a son of E., who was also executor of the testator, is not incompetent. Code, § 400 [415].

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 603; Dec. Dig. ⇐140.]

Before Kershaw, J., Anderson, March, 1881.

The opinion fully states the case. It may be added, however, that the case was heard on testimony taken by the master and reported to the court.

Mr. Jos. N. Brown, for appellants.

Mr. B. F. Whitner, contra.

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\*December 11th, 1882. The opinion of the court was delivered by

Mr. Justice MCGOWAN. Francis E. Harrison, late of Anderson county, died intestate in November, 1878, seized and possessed of a considerable estate, and leaving a widow, Elizabeth P. Harrison, and a number of children. Administration upon his estate was granted to E. P. Earle, the plaintiff, who, as early as February 5th, 1879, instituted this proceeding, which was in the nature of a creditor's bill to sell lands in aid of personal assets to pay debts, injunction, &c., although it was not distinctly charged that the estate was insolvent.

The widow and children, the heirs-at-law, were made parties, as well as some of those claiming to be creditors, viz., Mrs. Elizabeth

H. Whitner, J. W. Norris and the State Savings Bank at Anderson. As it appeared from the answer of Mrs. Elizabeth H. Whitner, a sister of the intestate, that she had claims against the estate, growing out of the estate of their father, James Harrison, deceased, the executors of his will, James W. Harrison and James H. Whitner, were also made parties. The creditors of the estate must have been few in number, as there was no order calling in creditors, but Mrs. Whitner, in her answer, presented two claims against the estate, which were resisted by the administrator and heirs, and are the only matters in controversy which have been brought to the attention of the court. They were as follows:

First, James Harrison, late of Anderson county, the father of Mrs. Whitner (wife of Judge J. N. Whitner), Francis E. Harrison, the intestate, and James W. Harrison, executed his will, in 1858, by which he disposed of a large estate to his then aforesaid children. A copy of the whole will is not in the brief, but it is not denied that the extracts given are correct. After disposing of the family homestead on the Savannah river, "Andersonville," to Francis E. Harrison, and making certain other specific devises, the eighth clause provided as follows: "I give and bequeath the rest and residue of my estate, real and personal, in equal shares to my daughter Elizabeth H. Whitner, and my sons James W. Harrison and Francis E. Harrison, desiring and expecting that the same

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may be divided by and amongst themselves in such way as will be convenient and just, with a becoming spirit of confidence and liberality," &c.

It does not appear what property fell under the residuary clause, but it is admitted that the Mason tract of land, in the county of Anderson, constituted part of the residuum under the will, but in reference thereto the testator, on February 18th, 1862, executed a codicil to his will, in these words: "It will be seen by reference to my said will that no specific mention is made of the tract of land in Anderson district, known as the Mason tract, though I have often declared verbally that it was my wish that the same should be held and enjoyed by the proprietor of the Andersonville lands, being in my judgment a necessary appurtenant, the more especially as a provision farm, and now, therefore, I specifically declare and hereby give and devise the said tract of land to my son Francis E. Harrison, the same to be accounted for by him at its fair value, as so much of his share of the residue of my estate, as directed to be divided between and among my children, legatees under my will, as therein set forth," &c.

In June, 1865, the testator, James Harrison, died, leaving in full force the said will



and codicil, naming his sons, James W. Harrison and the said Francis E. Harrison, and his grandson, James H. Whitner, as executors, but, there being no debts and the beneficiaries all being sui juris, and named as executors, the will was never admitted to probate until lately. The parties seemed to suppose that they could settle among themselves, but, as it often happens in such cases, it has turned out that they were mistaken, and we cannot refrain from saying that it would have been better if the will had been admitted to probate immediately after the death of the testator and the estate settled while all the parties were living.

There are some glimpses in the evidence that the parties had some settlement among themselves, but Mrs. Whitner claimed that under the provisions of the will and codicil above stated, she was entitled to one-third of "the fair value" of the Mason tract of land devised to the intestate, Francis E. Harrison, which was a charge upon the

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same; that during his life he always admitted his liability to pay the same, but had never done so at the time of his death.

Second. The other claim of Mrs. Whitner is thus stated by herself in her amended answer: "The claim against her late father and chargeable against his estate in the hands of the said F. E. Harrison, is his obligation for the payment of \$1,020.80, given to equalize the defendant and her late husband in advancements of real estate, bearing interest from 1st of January, 1848, which remains unpaid; that the said James Harrison continued to acknowledge this as a subsisting obligation, and the said F. E. Harrison repeatedly in his life-time recognized it as a claim to be paid out of his father's estate, and agreed with this defendant that the sum should be paid, with interest, from the —day of—; and this defendant alleges that the said Mason tract of land, being the residuum of her father's estate, and held by the said F. E. Harrison at the time of his death, as such is chargeable with the payment of the said sum and interest thereon.

Letters of the intestate, F. E. Harrison, down to a short time before his death, particularly as to the claim for one-third of the value of the Mason tract of land, were given in evidence, and James W. Harrison and James H. Whitner, lately qualified as executors of the will of James Harrison, and made defendants in the case, were, subject to objection, examined as witnesses for the claimant, particularly as to declarations and admissions of the intestate, Francis E., in his life-time, in regard to the second claim on the obligation of her father, James Harrison.

The case was heard by Judge Kershaw, who sustained both claims, and decreed "that Mrs. Elizabeth H. Whitner is entitled as residuary legatee under the will of her father, James Harrison, to one-third of the value of the Mason tract of land, devised to the said

Francis E. Harrison, which was due and payable to the said Elizabeth H. Whitner twelve months after the death of the said James Harrison. That the value of said land at the time the said Francis E. Harrison came into the possession of it under his father's will, and at the time the said legacy was payable, was six dollars per acre, and that this claim of the said Elizabeth H. Whitner was a charge upon the said land.  
\* \* \* It is further ordered that the said

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F. E. Harrison having recognized the obligation of his father, James Harrison, for the payment of one thousand and twenty eighty one-hundredths dollars as a subsisting obligation against his estate, to the extent of its face value, as of the date it was given, to wit, on the 10th day of October, 1851, and having as a compromise of the matters between the estate of James Harrison and the estate of Joseph N. Whitner, deceased, agreed on the — day of January, 1874, that such obligation should be paid to the said Elizabeth H. Whitner, sole executrix and legatee of the said Joseph N. Whitner, the said Elizabeth H. Whitner is also entitled to be paid from the proceeds of the said Mason place, as that portion of his father's estate liable for the payment of debts, the further sum of \$1,289.76, with interest from January, 1874."

From this decree, the administrator and heirs of Francis E. Harrison appeal to this court upon the following grounds:

1. "Because the claim of the defendant, Mrs. E. H. Whitner, founded on the note of James Harrison to the Hon. J. N. Whitner, dated October 10th, 1851, for \$1,020.80, was without consideration, barred by lapse of time and the statute of limitations, and should have been rejected.

2. "Because the supposed obligation to pay \$1,020.80 was met by the acknowledgment of indebtedness of J. N. Whitner to said James Harrison for \$1,400, bearing date the 21st day of September, 1853.

3. "Because the said James Harrison, by his will, dated June 30th, 1858, gave to J. N. Whitner and his two sons, James W. and F. E. Harrison, all his lands in Florida, two-fifths to said J. N. Whitner, and the other three-fifths equally to his two sons, which, of itself, equalized the supposed inequality referred to in said memorandum or note, and should be construed as a substitution thereof.

4. "Because a parol promise, alleged to have been made in January, 1874, by intestate, to pay said sum of \$1,200 on a claim bearing date October 10th, 1851, is not sufficient in law to charge the estate of said F. E. Harrison with its payment.

5. "Because the promise proved by the witnesses was to pay only \$1,200, and the judgment at most should have been for only \$1,200, with interest from January, 1874.

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\*6. "Because the said James H. Whitner

and J. W. Harrison were not competent witnesses to establish said supposed claim.

7. "Because the estate of said F. E. Harrison should have been required to pay only \$5 per acre for the Mason lands, being the sum paid by him to James W. Harrison, his co-tenant."

First. Very little need be said as to the first claim. None of the exceptions object to the Circuit decree, giving Mrs. Whitner a charge upon the Mason tract of land, for one-third of its value in 1866, due to her by the intestate, F. E. Harrison. The evidence was full and uncontradicted, including letters from the intestate himself shortly before his death, that this claim, under his father's will, had never been paid. The only objection made to the decree, in this regard, is by the seventh exception, which insists that the Circuit judge erred in fixing the value of the land at \$6 per acre, claiming, as James W. Harrison sold his third interest in the land to his brother, estimating the value of the land at \$5 per acre, it should have been fixed at that price in reference to the third interest therein of Mrs. Elizabeth H. Whitner.

That was a question of fact decided by the Circuit judge upon the evidence, and in looking through it we see no sufficient reason to disturb that finding. James W. Harrison may have agreed to take from his brother less than the real value of the lands, and that should not control in estimating its value in reference to the interest of Mrs. Whitner. The only three witnesses examined as to the value of the land, Joseph A. McClusky, G. W. Maret and O. H. P. Fant, all concur in saying that in 1866 the Mason land was worth \$6 per acre. So far as this claim is concerned, it is the judgment of this court that the judgment of the Circuit Court should be affirmed.

Second. There is much more difficulty about the other claim. It is certainly very old, not arising under the will of James Harrison, but long anterior to the execution of the will, and entirely independent of it. James Harrison owned property in the State of Florida, as well as in Anderson. He had three children, Mrs. Whitner, James W. Harrison and Francis E. Harrison. It seems that about the year 1848 he made a partial division of his property among his children, and

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to equalize \*them, he gave to Judge Whitner an obligation, of which the following is a copy:

"Inasmuch as certain advances have been made to James W. Harrison beyond those made to J. N. Whitner, to wit, on account of lands adjoining the village of Anderson, being one-half of said lot of land (one-half having been promised him by his brother), which I estimate at five hundred dollars, and from concern of John C. Griffin & Co., the sum of five hundred and twenty and eighty one-hundredths dollars, do execute this

my obligation, to secure as near equality as may be, should I not pay in my own life-time, and hereby promise to pay to J. N. Whitner the sum of one thousand and twenty dollars and eighty cents, with interest from the first day of January, 1848, being about the time of said advances to J. W. H.

(Signed.)

James Harrison.

"Oct. 10, 1851."

After this obligation was given there were money transactions between James Harrison and Judge Whitner, certainly one on September 21st, 1853, in which Judge Whitner acknowledged his liability to account to James Harrison for \$1,400, the price of stock in the Farmers' and Exchange Bank of Charleston.

On June 30th, 1858, James Harrison executed his will, by which he disposed of a large estate to his three children. As before stated, a full copy of the will is not before us, but it is stated that the will gave Mrs. Whitner more than an equal share of the Florida lands. Judge Whitner died in 1864, leaving Mrs. Whitner his sole devisee and executrix, and James Harrison died in 1865, leaving in full force the will with codicils above described, which named as executors F. E. Harrison, James H. Harrison and James H. Whitner, but it was not admitted to probate until after the death of F. E. Harrison, the intestate.

It did not certainly appear whether the parties interested under the will ever had a final settlement of the Florida property, but it was suggested that there had been such settlement, and that Mrs. Whitner had some claim growing out of it against the intestate, Francis E. Harrison. The executors of James Harrison, viz., James W. Harrison and

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James H. Whitner, \*testified, subject to exception, that the intestate, Francis E. Harrison, in his life-time admitted his liability not only on the obligation of James Harrison to Judge Whitner, above described, but also on some claim not explained, growing out of the division of the Florida lands, and as late as January, 1874, agreed, by way of compromise, to pay the sum of \$1,289.76, with interest from January, 1874, which the Circuit judge decreed in favor of Mrs. Whitner, "to be paid from the proceeds of the said Mason place, as that portion of his father's estate liable for the payment of debts."

The administrator and heirs of F. E. Harrison object to this, alleging that the original obligation of James Harrison was without consideration and void; that James W. Harrison and James H. Whitner were not competent witnesses, under the code, to prove admissions of F. E. Harrison, he being dead; that if competent, parol proof of an agreement of F. E. Harrison to pay the debt of his father was inadmissible under the statute of frauds; that if the original obligation was binding as a debt upon James Harrison, it was, in fact, paid in his life-time, or if not paid was barred; and if the original obliga-



tion was not an ordinary debt, but to be accounted for at his death as evidence of advancements to the others, it was necessarily canceled and substituted by the large provision for Mrs. Whitner in the will. From the view this court takes, it will be necessary for this claim to go back to the Circuit for further evidence, and, therefore, it would not be proper to consider now the points made, except that, in relation to the competency of James W. Harrison and James H. Whitner, as witnesses in behalf of Mrs. Whitner, to prove the admission of F. E. Harrison, he being dead. Their testimony was taken subject to objection, but the Circuit judge seems to have made no ruling upon the subject, except by considering the testimony as if no objection had been made.

The general law was that no person offered as witness should be excluded by reason of an interest in the event of the suit. But by section 400 of the code (according to the late revision) it is enacted that a party may be examined as a witness, "provided, however, that no party to the action shall be examined in regard to any transaction or communica-

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tion between such witness and a person at the time of such examination deceased, \* \* \* as a witness against a party then prosecuting or defending the action as executor, administrator, &c., of such deceased person when such examination, or any judgment or determination in such action, can in any manner affect the interest of such witness, or the interest previously owned or represented by him," &c. James W. Harrison, a party, was offered as a witness against the administrator of F. E. Harrison, in regard to communications between him and F. E. Harrison, in his life-time, and the question is whether the judgment in the action can "in any manner affect the interest of such witness, or the interest previously owned by him."

It seems to us that the judgment will affect the interest of James W. Harrison. In order to simplify the matter, let us consider this as an action brought under the statute of 3 and 4 W. & M., Gen. Stat., § 1949, by Mrs. Whitner, as alleged creditor of James Harrison, against the administrator of his devisee, F. E. Harrison, and impleading also the executors of James Harrison, deceased, to make liable for the debt of the ancestor a certain tract of land (Mason) in possession of said F. E. Harrison, as residuary devisee at the time of his death. See *Smith v. Grant*, 15 S. C. 146. If in this action there should be a recovery, upon whom would devolve the liability to pay that recovery? By the will, as it stood originally, that tract of land was given to be equally divided between F. E. Harrison, James W. Harrison and Mrs. Whitner, and if the codicil had not been executed, it is perfectly clear that the loss of payment would have fallen on the three owners equally.

Does the codicil, which simply made par-

tition of the Mason land, by giving specifically the land to one charged with the shares of the others, make any change as to the liability of the respective parties? Two of the tenants in common cannot get their full shares in money, and leave the land in possession of the third to pay the whole debt of the ancestor; each must pay his share of any debt of the ancestor, which falls upon the Mason land. F. E. Harrison has purchased for value two-thirds of that land, ac-

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cording to the terms of the codicil, and \*he only holds one-third of it as a gift from his testator. A residuary devisee cannot be considered as having any interest from his testator until the testator's debts are paid. A man must be just before he is generous.

If James Harrison had left unpaid debts enough to absorb the whole of the Mason land, F. E. Harrison would really have received nothing from him in respect to that land, and if a debt of James Harrison takes a part of it, the same principle *pro tanto* must apply. The debt must be paid first, and then the thirds of James W. Harrison and Mrs. Whitner would be limited to what remained after the debt of the ancestor was paid out of it, or, having already received their shares of the whole, they must each pay one-third of the debt. It cannot alter the case that one of the residuary devisees is also the creditor of the ancestor seeking payment.

If, on the other hand, the execution of the codicil, by specifically giving the Mason land to F. E. Harrison, charged as aforesaid, took it out of the residuum, then it would follow that said land would not be any more liable for this debt of the ancestor than any other lands which passed under the will of James Harrison which are still in possession of the devisee. So that, in any view of the case, we think that the judgment would affect the interest of James W. Harrison, and that it was error to admit him as a witness against the administrator of F. E. Harrison as to communications had with him in his life-time. That he had sold his interest in the Mason tract of land to his brother, makes no difference; the words are "or the interest previously owned or represented by him."

James H. Whitner, the other executor of James Harrison, does not seem to have any interest in the event of the suit which would be affected by the judgment. He is the son of Mrs. Whitner, but relationship does not disqualify. We do not see that he was an incompetent witness.

The judgment of this court is that the judgment of the Circuit Court be affirmed, so far as relates to the claim of a charge upon the Mason tract of land to the extent of one-third of its value, and that in all other respects the decree be set aside without prejudice, and the case remanded for further

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evidence and \*consideration. If the claim of Mrs. Whitner against the estate of her father, James Harrison, should be established in whole or in part, the said recovery to be paid in equal parts by the three devisees, viz.: one-third by James W. Harrison, one-third by Mrs. Whitner herself, and only the remaining third by the estate of Francis E. Harrison, deceased.

18 S. C. 339

HERNDON v. MOORE.

(April Term, 1882.)

[1. *Partition* ⇨40.]

The decision in *Davenport v. Caldwell*, 10 S. C. 317, that the legislature cannot confer upon Probate Courts jurisdiction in partition, affirmed.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 97-104; Dec. Dig. ⇨40.]

[2. *Courts* ⇨40.]

Proceedings for partition regularly had in the Probate Court prior to November 27th, 1878, when the judgment in the case of *Davenport v. Caldwell* was filed, is binding upon all the parties concerned.

[Ed. Note.—Cited in *Schumpert v. Smith*, 18 S. C. 358, 360; *Thomas v. Poole*, 19 S. C. 334; *Tederall v. Bouknight*, 25 S. C. 280; *McKibben v. Salinas*, 41 S. C. 108, 19 S. E. 302; *State ex rel. Elliott v. Jeter*, 59 S. C. 486, 38 S. E. 124.

For other cases, see *Courts*, Cent. Dig. § 160; Dec. Dig. ⇨40.]

Per McGowan, A. J.—

[3. *Partition* ⇨40.]

The legislature has no power as *parens patriæ* to authorize the Probate judge to sell or partition the property of one not sui juris, especially where the property is owned in common with others.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 97-104; Dec. Dig. ⇨40.]

[4. *Partition* ⇨40.]

The jurisdiction given by the constitution to Probate Courts "in all matters testamentary and of administration," does not include the right to make partition.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 97-104; Dec. Dig. ⇨40.]

[5. *Partition* ⇨40.]

And "business appertaining to minors" in this grant of jurisdiction, means business peculiar to minors, and, therefore, does not include partition.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 97-104; Dec. Dig. ⇨40.]

[6. *Partition* ⇨109.]

Adult parties to proceedings in partition in a court without jurisdiction, under which the lands are sold, and who receive the proceeds, are estopped from asserting title against the purchasers at such sale.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 375-397; Dec. Dig. ⇨109.]

[7. *Courts* ⇨93.]

*Communis error facit jus* is a doctrine exceptional in character, but should be applied where the erroneous opinion has furnished the ground-work and substratum of practice, and

has, to a large extent, affected the titles to land.

[Ed. Note.—Cited in *Anderson v. Cave*, 49 S. C. 511, 27 S. E. 478; *Germania Savings Bank v. Town of Darlington*, 50 S. C. 365, 27 S. E. 846.

For other cases, see *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. ⇨93.]

[This case is also cited in *Feldman & Co. v. City Council of Charleston*, 23 S. C. 57, 68, 55 Am. Rep. 6, and in *McLure v. Melton*, 24 S. C. 559, 567, 58 Am. Rep. 272, and distinguished therefrom.]

Before Hudson, J., Union, March, 1881.

The facts of this case appear in the opinion. The Circuit decree, after a statement of these same facts, was as follows:

It seems to the court that the purchasers of these lands would have been proper parties to this cause, but as no objection has been taken by the pleadings to their non-joinder, I will consider the case as between the parties to the cause. The case discloses

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\*an equity in the plaintiff, which entitles her, as against her co-distributees, to a part of the relief which she demands.

The Court of Probate established by the constitution of 1868 was designed to take the place of the Court of Ordinary, but with enlarged powers. From the fact that the Court of Ordinary exercised jurisdiction in cases of partition within certain limits, no question was made of the right and power of the legislature to confer jurisdiction upon Courts of Probate, in cases of partition. The legislature of the summer of 1868, in their act organizing the Courts of Probate, conferred upon such courts jurisdiction in all cases of partition. No question was made of the constitutionality of this act. Lawyers in all parts of the State acted under it, Courts of Probate exercised this jurisdiction unchallenged, and the Circuit Courts recognized it and adjudged questions arising from such proceedings. Lands sold under orders of the Courts of Probate, realized the same prices as when sold under judgments of the Circuit Courts. The Supreme Court of this State recognized this jurisdiction in the Courts of Probate, and adjudged without question rights which arose out of such sales.

In *McNamee v. Waterbury*, 4 S. C. 156, a case of November Term, 1872, the Supreme Court was called upon to determine whether the Courts of Probate of this State could order the sale of the lands of a decedent in aid of assets, upon proper application by the administrator of an insolvent estate. The court held that the Courts of Probate did possess such power; and the titles of the purchasers at such sale were held to be valid. There was in this case a dissent by Chief Justice Moses; but in neither the opinion of the court nor in the dissenting opinion is there any suggestion of doubt as to



the jurisdiction of the Court of Probate in matters of partition; and Chief Justice Moses used expressions which show that he considered the Court of Probate possessed of the jurisdiction theretofore exercised by Courts of Ordinary. It is manifest that if Courts of Probate could exercise jurisdiction to sell land in aid of assets, they could in all cases, when the lands sold for more than sufficient to pay the debts, indirectly accomplish partition among the heirs.

In the subsequent case of *Hancock v.*

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*Caskey*, 8 S. C. 282, the \*question was as to the ownership of the growing crop upon lands sold by the Probate Court for partition. The right thus springing wholly out of one of these sales is not questioned, but, on the contrary, the court, in their opinion, speak of the sale as a valid sale, of the parties as bound by the proceedings, and that a party to the cause was estopped from asserting in his own right, or as guardian for his children, any title to the growing crops.

It thus appears that not only the profession at large, and the Probate Courts, but the Circuit Courts and the Supreme Court have all recognized and acted upon a conceded jurisdiction to Courts of Probate in matters of partition. *Communis error facit jus*. Under this conceded and recognized jurisdiction, from 1868 to 1878, thousands of acres of land have been sold in all parts of the State, a vast amount of money invested, conveyances and reconveyances made, titles and rights vested; and innocent purchasers, acting under this common error, shared by legislatures, lawyers and courts, have become involved. I cannot think that the decision in *Davenport v. Caldwell*, 10 S. C. 317, can affect rights thus vested; that it can have any retroactive effect. The question of jurisdiction raised at a late stage of that case in the Supreme Court, as I have been informed, required from that court an examination of the question and a decision; but I am satisfied that the decision there made cannot have any retroactive effect—cannot undo what had been done without question in a vast number of cases in the Probate Courts generally throughout the State, with the sanction of the Circuit Courts and under the recognition of the Supreme Court.

Rights vesting under such circumstances cannot be disturbed by subsequent decisions of a contrary effect. In *Gelpeke v. City of Dubuque*, 1 Wall. 175 [17 L. Ed. 520], the Supreme Court of the United States held that holders of municipal bonds issued under an act of the legislature of Iowa, sustained by the courts of that State, were valid obligations notwithstanding a later decision by the Supreme Court of Iowa, that such act of the legislature was invalid. In delivering the opinion of the court, Mr. Justice Swayne quotes with approval the doctrine in the words of *The Ohio Life and Trust Co. v. De-*

*bolt*, 16 How. 432 [14 L. Ed. 997] as follows: "The sound and true rule is, that if the con-

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tract when made was \*valid by the laws of the State, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decisions of its courts altering the construction of the law." This rule is cited at length and approved in the *Bond Debt Cases*, 12 S. C. 282: "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

In *The State, ex relatione Brown, v. The Chester and Lenoir Railroad Company*, 13 S. C. 290, it was held that the county commissioners of York had no power to issue certain railroad aid bonds, but having been issued and their issue approved by the Circuit Court, and the appeal from that decision dismissed by the Supreme Court, that the bonds could not now be affected by the want of authority to issue.

The same rule governs when rights of property and titles to land have become fixed by common acceptance and consent of courts and people. And settled rules cannot be reversed and vested rights disturbed, by a decision of the courts against the correctness of such construction. Such a decision only affects the case under consideration, and establishes a new rule for the future, but does not act retrospectively. I, therefore, think that this sale, having been made prior to the decision in *Davenport v. Caldwell*, should not be affected by that judgment.

The complaint prays that the sales be validated and confirmed, but, as the sales were void, this prayer cannot be granted. Nevertheless, rights may be vested under void sales, and rights have vested under these sales, which should be protected; and every party to the proceedings under which the sales were made is estopped from asserting the invalidity of the sale, or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale. But this is just what the infant defendants allege cannot be done, because of the inability of their guardians to have the money forthcoming. In no case whatever would equity allow either minors or adults to retain the money and regain the land also. They would alike be estopped in this attempt. The parties to this cause should, therefore, be restrained from hereafter asserting any

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claim, title \*or interest in or to these lands by reason of any invalidity in the sales made by the Court of Probate.

It is therefore adjudged, that the plaintiff and all the defendants to this cause, the widow and children of the late Dr. John N. Herndon, late of Union county, deceased, be and they are hereby perpetually enjoined and

restrained from ever bringing any action or suit to recover the possession of the lands of the said Dr. Herndon, or any tract or tracts or portions thereof, or any interest therein derived by inheritance from the said Dr. John N. Herndon, and from ever asserting any interest therein, or to any share or portion thereof, as distributees of the said Dr. Herndon, so far as the said lands were sold or pretended to be sold under proceedings instituted in the Court of Probate for Union county, in September, 1872, and in a cause entitled *Caroline E. Herndon v. M. L. Moore* and others.

Mr. David Johnson, Jr., for appellants.

On the point upon which the judgment of the court is rested, counsel's argument was as follows: The sales are admitted to be void. It is impossible to avoid the conclusion that this is giving to proceedings confessedly void, ending in a sale confessedly void, the essentials of a judgment, and at the same time admitting that the court of probate could render no judgment in actions for partition. In *Davenport v. Caldwell*, we have the first authoritative construction of the section of the constitution conferring jurisdiction upon courts of probate. This construction established no new rule, but declared what had been the law since 1868. Then, the court was without jurisdiction when this sale was made; yet the questions involved have become *res adjudicata*; minors are enjoined from asserting rights divested by a void proceeding. Further, minors represented by a guardian *ad litem*, appointed without authority, whose property has been sold and the proceeds paid over to guardians without warrant of law, are held to be estopped "unless prepared to restore things to the exact status of the day of sale."

With the most profound deference to his Honor, the Circuit judge, it must be said

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that these conclusions are inconsistent with the principles declared in the authorities cited for their support, and are irreconcilable with the plainest principles of law and equity. [After commenting upon the cases cited in the Circuit decree, the argument proceeded.] With regard to the jurisdiction of the Probate Court, there had been no adjudication up to 1878. This statement of fact destroys every semblance of analogy to the cases cited in the decree. The reason of the rule not existing, the rule has no application.

But, it is said, the jurisdiction was the result of an act of the legislature, was recognized by the courts of the State, and acquiesced in by the people. Can unconstitutional acts of the legislature, and the non-action of courts *sua sponte*, have such an effect upon legal questions that they will become *res adjudicata* to all the State? The acquiescence of the people can have no more effect upon the questions here involved than the acts of the lynchers of Judy Metts upon the criminal

law of the country. The rule in *Gelpcke v. City of Dubuque*, rests upon solemn decisions of a court of last resort in relation to contracts. The decree here rests upon the non-action of courts and the consent of the people. In the one case, the court of last resort declared in favor of the power to contract, and the bonds were negotiated with reference to that decision. In the other case, the court of last resort declared against the power the first time its power was invoked.

If this case is to be determined by the principles of the law of contract, then the rule is as laid down in the *Bond Debt Cases*, 12 S. C. 277, that bonds issued by the legislature without authority are void. It does not conflict with the rule declared in *Gelpcke v. Dubuque*, and rests upon the same broad principle that declares the act of a court without jurisdiction of the subject matter of the action absolutely and incurably void. The rule contended for should apply with peculiar force in cases involving the rights of minors. The magnitude of the interests that may be affected, the hardships that may result indirectly from the decision, cannot affect the conclusion. It is a question of legal science which must be determined by the application of the universal principles of that science. Mr. Justice Story (2 Sumner 354) says: "It is not for courts of justice to pro-

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vide for all the defects or mischiefs of imperfect legislation." And in his *Cond. L. 17*, he says: "Arguments drawn from impolicy or inconvenience ought to have but little weight. The only sound principle is to declare *ita lex scripta est*—to follow and obey."

Mr. R. R. Rawls, same side.

Mr. R. W. Shand, contra.

January 9th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Dr. John N. Herndon, of Union, died intestate in March, 1872, possessed of considerable real and personal property, leaving surviving him, as distributees, his widow, Caroline E. Herndon, the plaintiff, and six children, viz., the defendants, Mrs. Mary L. Moore, Blanche Herndon, Addie Herndon, Eliza Herndon, John Herndon and Cornelia Herndon. Soon after his death (1872) the plaintiff, his widow, instituted proceedings in the Court of Probate for Union county, against the other distributees, to partition the lands of the estate, considerable in extent and value, and lying in the counties of Union, Newberry and Laurens. Blanche, Addie, Eliza, John and Cornelia, were minors, represented by guardians *ad litem*, and the proceedings in all other respects were regular and formal. The Probate judge, to effect partition, granted order of sale, and the lands were sold, those in Union for \$12,866, those in Newberry for \$32,859, and those in Laurens for \$1,475; aggregating the sum of \$47,200. The pur-



chasers complied with the terms of sale and received titles. The purchase-money of the lands was also paid and distributed among the parties, and the business nearly ended. The lands brought full value.

Matters stood in this condition for six years, until 1878, when this court filed its judgment in the case of *Davenport v. Caldwell*, 10 S. C. 317, which declared that the act of the legislature, giving to the Probate Court jurisdiction to partition lands, was unconstitutional and void. In November, 1879, the plaintiff, Caroline E. Herndon (who had also been plaintiff in the proceedings before the Probate Court), fearing that some of the parties, in consequence of that deci-

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sion, might make an effort to \*disturb the proceedings had, as stated, in the Probate Court, instituted this action in the Court of Common Pleas, against the other distributees, to validate that proceeding in the Probate Court, and quiet the titles thereunder, and to restrain and perpetually enjoin each and all of the distributees from prosecuting any action for the recovery of the lands, or any part of them, or any interest therein under a claim by inheritance from Dr. John N. Herndon, deceased.

The adult defendants interposed no objections. The defendant Addie, a minor at the time the action was brought, has since attained her majority, and, by her answer, joins in the prayer of the complaint. The infants Eliza and Cornelia, answer by their guardian ad litem, David Johnson, Esq., and the infant John answers by his guardian ad litem, R. R. Rawls, Esq., and object to the confirmation prayed for. The clerk of the court as referee took the testimony, and reported the record of the proceedings in the Probate Court, that nearly all the purchase-money had been paid into the office of the judge of Probate according to the terms of sale, and by him paid out to the distributees respectively; that the shares of the infant distributees were paid to their guardians, duly appointed; that all the guardianship bonds were good at the time they were taken; that the bonds of the guardians of Blanche and Addie are still good; that the bond of the guardian of Eliza is not good for the amount of the penalty, and that the bonds of the guardians of John and Cornelia are worthless and not good for any amount.

The case came on to be heard before Judge Hudson, who held that the sales under the proceedings in the Probate Court, having been made prior to the decision in *Davenport v. Caldwell*, should not be affected by that judgment, and that all the parties "to the proceedings under which the sales were made are estopped from asserting the invalidity of the sale or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale, \* \* \* in no case whatever would equity

allow either minors or adults to retain the money and regain the land also. They would alike be estopped in this attempt. The parties to the cause should therefore be restrained from hereafter asserting any

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claim, title or interest in \*or to these lands by reason of any invalidity in the sales by the Court of Probate," &c.

From this decree the minors Eliza, Cornelia and John appeal to this court upon the following exceptions:

1. "Because his Honor decides 'That the case discloses an equity in the plaintiff which entitles her, as against her co-distributees, to a part of the relief which she demands.'

2. "Because his Honor decides 'That it would be giving retroactive effect to the decision in the cause of *Davenport v. Caldwell*, 10 S. C. 317, to refuse the perpetual injunction prayed for.'

3. "Because his Honor decides 'That every party to the proceedings under which the sales were made is estopped from asserting the invalidity of the sale or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale.'

4. "Because his Honor should have decided that the plaintiff had no cause of action against the defendants.

5. "Because his Honor should have decided that inasmuch as the Court of Probate was without jurisdiction of the subject matter of the action for the partition or sale of the real estate of Dr. John N. Herndon, that said sale was a nullity so far as rights of the infants in said real estate were concerned, and that the receipt by the Court of Probate of the infants' distributive share of the proceeds of said sale, and payment thereof to the general guardian of said infants, was without authority of law, could not operate as an estoppel, and divested no rights of said infants in the real estate sold.

6. "Because his Honor decides 'That because of the common error as to the jurisdiction of the Court of Probate in actions for partition of real estate, participated in by the lawyers, legislature and the courts of the State, the rights of purchasers at said sales anterior to the decision of the Supreme Court in the case of *Davenport v. Caldwell* are as full, and the titles to property purchased at said sales are as perfect, as they would be if there had been no lack of jurisdiction in the court making the sale.'

This action having been brought in the Court of Common Pleas to validate certain

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proceedings previously had in a court \*of limited jurisdiction alleged to be void, and to enjoin all the parties, plaintiffs and defendants from claiming title or interest in certain lands sold or conveyed, under the orders of that court, in a proceeding in which the

identical parties were before it, we agree with the Circuit judge that it would have been more regular if the purchasers under the order of said court, whose titles are substantially in issue, had been made parties, but as the appellants declare "a desire to have an authentic decision of the court of last resort as to the effect of a Probate Court sale in partition proceedings upon the rights of minors," we do not feel called upon to order the case back to the Circuit in order that additional parties may be made. We assume that the purchasers are desirous of retaining the lands purchased by them and proceed to consider the case.

Besides the case itself, the question involved is one not only of novel impression but of great importance, effecting as it does titles to thousands of acres of land purchased bona fide by innocent parties without notice, on the faith of the orders of the Probate Court, made in conformity with the express terms of an act of the legislature, the opinion of the courts and a practice well nigh universal. Under these circumstances the court ordered a re-argument of the case, and in doing so gave permission of the counsel to examine the grounds upon which the case of *Davenport v. Caldwell* was rested, and the extent to which the judgment as an authority must necessarily go. Exhaustive arguments have been made here upon the subject, and, in order that the law may be regarded as no longer in doubt, we will preface the judgment we are about to render by a few observations upon that case and the circumstances under which it was decided.

Under our old law the ordinary had jurisdiction to partition real estate not exceeding in value \$1,000. The constitution of 1868 abolished the old Court of Equity, and made a new division of judicial powers. It created the Probate Court, giving it generally the jurisdiction of the old Court of Ordinary and also additional powers, but without expressly naming the power to partition lands even to the extent of \$1,000. Upon the subject of partition, as a distinct matter of jurisdiction, it is entirely silent. The provision is in these words (Art. IV., § 20):

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"A \*Court of Probate shall be established in each county, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and lunacy, and persons non compotes mentis," &c.

Soon after the adoption of the constitution, and to a large extent by the persons who framed it, the legislature, in 1868, passed an act "To define the jurisdiction and regulate the practice of Probate Courts," which, among other things, provided that "every judge of Probate, in his county, shall have jurisdiction in all matters testamentary and of administration, in business appertaining

to minors and lunacy and persons non compotes mentis. \* \* \* He may exercise jurisdiction of all petitions for partition of real estate when no dispute exists in relation to the title thereof; and when the title to such real estate is disputed, he shall refer the same to the Circuit Court for adjudication, unless the parties shall consent to his determination of the same." &c. 14 Stat. 77.

This express grant of jurisdiction contained in the act was exercised by the different Probate Courts, and lands in all parts of the State were without question partitioned under it until 1878, when, as stated, the judgment of this court was filed in the case of *Davenport v. Caldwell*, supra. That was a petition in the Probate Court of Abbeville county to partition lands of an intestate between two adults as heirs-at-law of one Caldwell. The precise question was whether the petitioner, Katie Davenport, a person of color, born of slave parents before emancipation, and who were dead before that event, was legally the sister and heir of the intestate, and as such entitled to a share of his lands, and, if so, she prayed partition of a tract of land of the intestate. The judge of Probate decided that the petitioner was an heir-at-law under the statute of distributions, and, as a consequence, issued orders to partition the land between the widow and sister. The Circuit Court affirmed this judgment, and upon appeal this court also affirmed the judgment upon the point of heirship, but denied petitioner's right to partition upon the ground that the Probate Court had no jurisdiction to partition lands. The court say "the Court of Probate is unquestionably a court of inferior and limited jurisdiction, and, looking to the

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constitution for the \*limits of the jurisdiction of the court, we find the limit is defined in section 20, article IV., and, as there defined, cases for the partition of real estate are not embraced," and ordered that "the judgment of the Circuit Court be reversed, and the case remanded with instructions that the proceedings in the Court of Probate be dismissed, so far as they relate to partition of real estate."

It appears that there were no minors interested in the case, and the question in that aspect could not have been considered. Indeed, there seems to have been very little argument at the bar on the subject of the constitutionality of the act conferring the jurisdiction, but the question was made in the brief, and the judgment furnishes evidence that the case, at least upon some of the points involved, was fully considered by the court. The constitutional point being in the record, the court held the general proposition without qualifications that the act of the legislature, purporting to give the Probate Court jurisdiction in the partition of lands, was unauthorized by the constitution and void. There were other questions in the case which were, as stated, elaborately considered,



but this one also was distinctly decided. The judgment proceeded on the ground that the section of the constitution conferring jurisdiction upon the Probate Court was exhaustive in its character, and inhibited the legislature from adding thereto.

If the question were still open, we are not prepared to say that the judgment was erroneous. There are several obvious points of difference in the circumstances of that case, and those in *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 S. C. 581 [40 Am. Rep. 705], cited at the bar, which gives a different construction to what is called the "married woman's clause" of the constitution. Influenced by these considerations, and a strong sense of the importance of preserving uniformity and consistency in the interpretation of the laws, we will not re-open the argument involved in the case, but stand upon the principle of *stare decisis*.

It is true there were no minors interested in the case, but we see nothing in our law to sustain the view that the legislature, without regard to the limited jurisdiction given to the Probate Court, has the right as *parens patriæ*, without a case made, to authorize the judge of Probate to sell or partition the prop-

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erty \*of one not *sui juris*. The constitution divided the functions of government into the legislative, executive and judicial, and it is the fundamental theory of our system that the departments shall be kept separate, and each in its own sphere, independent of the others. The power claimed to exist, especially when the property of the person to be sold is owned in common with others, is clearly judicial in its character, and all judicial power has been taken away from the legislature and deposited in the courts of the State, created or to be created. Besides, if such power did exist in the legislature, it is plain that the act in question was not intended to be the exercise of such power, but a general law manifestly intended to confer jurisdiction in a particular matter upon a court already in existence. *Cooley Const. Lim.* 97, 98.

It seems to us also that we cannot derive the jurisdiction from the words of the constitution in "all matters testamentary and of administration." By these words nothing more was meant, as we suppose, than matters appertaining to proceedings in an Orphans' Court, in supervising and directing executors and administrators in the discharge of their duties. This would seem to be the ordinary meaning of the words, not as conferring jurisdiction in any particular matter, but rather indicating the character of matters properly belonging to that court. Where there are no debts of an intestate, parties interested in his lands may take by partition their shares of the land itself in severalty, without sale, and we can hardly suppose that the most liberal construction of the words "matters of administration" would include such a proceeding. What are matters of ad-

ministration must be determined by the laws of the State, existing at the time the language in question was introduced into the constitution. The object of administration is to pay the debts of the deceased, and distribute his personal estate among those entitled to it, and any act that may properly be performed by an administrator looking to this end, is a matter of administration. *McNamee v. Waterbury*, 4 S. C. 156.

Nor can we say that the words in the constitution granting jurisdiction to the Probate Court "in business appertaining to minors" gives to that court the right to partition land quoad the interest of minors. "Jurisdiction

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of the subject matter is a \*condition precedent to the acquisition of authority over the parties, and is conferred by the authority which organizes the court and is sought for in the general nature of its powers, or in authority specially conferred." *Freem. Judg.*, § 119. It seems to us that jurisdiction of a subject matter given to a court must be an entirety, and cannot be given in part only, to be determined by the ages of the respective parties who may be interested. It is true that the words "in business appertaining to minors" seem very general and comprehensive, but taken altogether they can hardly mean more than "business peculiar to minors." Otherwise any case upon any subject in which minors happened to be interested, would be, to that extent, carried into the Probate Court, which division of cases would necessarily lead to inextricable confusion.

Assuming, then, that the decision in *Davenport v. Caldwell* must stand without limitation or qualification as to infants, as well as to adults, what then must be the effect of it upon the proceedings in the case of *Herndon v. Moore*, which had been instituted in the Probate Court and nearly ended long before that judgment was filed? Does it follow that the innocent purchasers at the sale ordered by the Probate Court in the *Herndon* case, who purchased in good faith and paid for lands sold under proceedings expressly authorized by a law standing upon the statute book, must be required to yield up their lands to be again partitioned? We cannot accept a conclusion which would open up such a prolific source of litigation and result in such flagrant injustice.

In the first place there can be no doubt that all persons of full age, who were parties to the proceedings of *Herndon v. Moore* in the Probate Court, are estopped from denying the validity of those proceedings. When land descends to heirs upon the death of an intestate, they become the legal owners as coparceners and may enjoy it in common, or divide it among themselves, or they may go into the courts provided by law for that purpose. When they choose to do the latter, they select the court and its officers as the instrumentality through which to effect partition, and they are bound by the acts of

that court, as in one sense their agent. *Commissioner v. Thompson*, 4 McC. 434. Whether that court had constitutional jurisdiction

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or not, they consented to its proceedings. They held it out as authorized to act in the matter for them, they did not appeal from its order of sale, and they are estopped from claiming against their own sales made in this way for the purpose of partition. "If lands be sold at a partition or other Chancery sale, no co-tenant who has claimed and received his share of the proceeds, can deny the validity of the partition." *Freeman Vold* J. S. § 48; *Story Eq. Jur.* 387; *McNish v. Guerard*, 4 Strob. Eq. 76.

So far as the adult parties are concerned there can be no doubt that the purchasers are entitled to hold the land. It may be true that in this view they do not get title. It is not the office of an estoppel to pass the title, which remains unaffected, but it cannot be asserted against the party who acted upon the faith of the representations which created the estoppel. *Big. Estop.* 450.

It is, however, strongly urged upon us that the result must be different as to the minors, Eliza, Cornelia and John, who, being under the disability of infancy, could do no act, either in going into the Probate Court or in confirming the sales afterwards.

Estoppel in pais ordinarily is based upon the conduct of parties, and as minors are incapable of responsible action, it would seem to follow that as a general rule the doctrine of technical estoppel has no application to them. This rule, however, is not without exceptions. Minors, of age of discretion, are certainly liable *ex delicto* for fraudulent misrepresentations as to title, and in such case, to prevent circuitry of action, the court will in the first instance charge the land in favor of the purchaser with the amount of the purchase-money. *Big. Estop.* 448. It is, however, unnecessary to pursue this view, as it is not claimed that any such representations were made by the minors in this case.

But a higher right is invoked in behalf of the purchasers, which, under the circumstances of the case, we think they are entitled to. This does not rest upon any theory of confirmation by the parties, but upon the fact that the purchasers bought *bona fide* at a sale judicial in form, at the time believed to be valid, and paid the purchase-money for the land thus purchased. It is urged that the sale for partition by the Probate Court in the case of *Herndon*, having been

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made prior to the decision in *\*Davenport v. Caldwell*, and while the jurisdiction of the Probate Court was generally recognized, should not be affected by that judgment. Certainly the judgment in that case only bound the parties before the court, but a decision of the Supreme Court upon a constitutional question, not only affects the case be-

fore the court, but stands as an authoritative construction of the clause interpreted, and, as a general rule, is conclusive upon other cases involving the same question.

This is certainly true of all cases arising after the decision. And although in its effect upon cases decided before, there may be something of the element which makes *ex post facto* laws so objectionable, yet there is undoubtedly a difference in effect between repealing a valid law, and declaring that one in form never was law. In the former case all acts done and rights vested under the law before its repeal, will be maintained, while in the latter the declaration of its unconstitutionality ordinarily reaches back to the date of the act itself. But there is an exception as to a class of cases in which, for sufficient reasons, the declaration of the unconstitutionality of a law is not allowed to have greater effect than a simple repeal sustaining all acts done and all judicial proceedings had under it before such declaration, in analogy to the principle of *res adjudicata*.

In such case, rights acquired under an act having the form of law, are sustained, although the act be afterwards declared unconstitutional upon the principle involved in the maxim *communis error facit jus*. This proceeds upon the view that to annul everything done under an act solemnly passed by the lawmaking power of the State, generally received as valid and so expounded and administered by courts of justice, would operate as a fraud upon the parties thus misled. This doctrine, although exceptional in character, is well sustained by authority. Mr. Wharton, in his law of evidence, section 1242, says: "It should also be kept in mind that there are cases in which *communis error facit jus*, and in which therefore the courts will sanction a prevalent construction which is erroneous, rather than disturb titles which have been settled under such construction."

Perhaps the leading case upon the subject in this country is that of *Gelpcke v. City of Dubuque*, 1 Wall. 175 [17 L. Ed. 520]. It ap-

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pears in \*that case that the legislature of Iowa passed a law authorizing the city of Dubuque to aid in the construction of a certain railroad by issuing bonds in pursuance of a vote of the citizens of the city. The Supreme Court of the State decided that the legislature had the right to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly. During the time the law was thus expounded, bonds were issued upon the faith of it. Afterwards, the Supreme Court of the State decided that the legislature had no such power. It was held by the Supreme Court of the United States that the latest decision, declaring the act unconstitutional, did not affect rights which had been acquired before



its rendition, thus giving the judgment the effect only of the repeal of a valid law. In delivering the judgment of the court, Mr. Justice Swayne said: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is that if the contract, when made, was valid by the law of the State, as then expounded by all departments of the government, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decisions of its courts altering the construction of the law. *Ohio Life and Trust Co. v. Debolt*, 16 How. 432 [14 L. Ed. 997]."

The same principle applies where there is a change of judicial decisions as to the constitutional power of the legislature to enact the law. It rests upon the plainest principles of justice. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." This principle has been incidentally recognized in our State in the *Bond Debt Cases*, 12 S. C. 282, and also in the case, *State, ex rel. Brown, v. C. and L. R. R. Co.*, 13 S. C. 291. In the *Bond Debt Cases*, Mr. Justice McIver, in delivering the judgment of the court, said: "This rule was again affirmed in the case of *Lee Co. v. Rodgers*, 7 Wall. 181 [19 L. Ed. 160], and the question was there said not to be open for re-examination in the Supreme Court of the United States. It is perfectly manifest, therefore, that even were we to overrule the case of *Morton, Bliss & Co. v. The Comptroller-General* [4 S. C. 430], it would not help the case of the State, in view

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of the rule thus \*firmly established (whether correctly or not we are not called upon to say) in the tribunal of last resort."

In England they have no written instrument which embodies in form the fundamental law, but the doctrine has always been recognized there, especially in reference to conveyances of real estate. In *Broom Max.* 141, under the head of *communis error facit jus*, it is said: "The law so favors the public good that it will in some cases permit a common error to pass for right, as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraud* to elude the statute *de donis*, and which were yet allowed by the courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became by long usage and acquiescence a most common assurance of lands, and were looked upon as the legal mode of conveyance whereby tenant in tail might dispose of lands and tenements."

In *Jones v. Tapling*, 12 Com. B. (N. S.) 846, Mr. Justice Blackburn said: "There are cases in which a decision originally erroneously has been so long acquiesced in and

acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing lands. There the maxim applies, *communis error facit jus*."

In *Regina v. Sussex*, 2 Best & S. 680, the same judge said: "I think there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted by and acted upon as to render it probable that business has been regulated, and the position of the parties altered in consequence; and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error."

In the case of *Isherwood v. Olknow*, 3 M. & S. 396, (54 Geo. III.,) Lord Ellenborough said: "It has sometimes been said *communis error facit jus*, but I say *communis opinio* is evidence of what the law is, not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been the groundwork and substratum of practice."

In the great case in the House of Lords of *Phipps v. Ackers*, 9 Cl. & F. 598, Lord Brougham said: "The courts and even the house have frequently proceeded upon this principle,

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and \*have sanctioned what even plainly appeared to be erroneous principles introduced and long assumed as law, rather than occasion the great inconvenience that must arise from correcting the common error and recurring to more accurate views."

All the cases which admit the principle at the same time declare that it is exceptional and should be applied with the greatest care. Do the facts of this case fairly bring it within the rule as announced by Lord Ellenborough, that it is not enough that the erroneous opinion be merely speculative and floating in the mind, but must furnish "the groundwork and substratum of practice." We cannot resist the conclusion that the facts here make such a case. The partition sale ordered was in no sense tortious, and it would operate as a fraud upon innocent parties to vacate the titles acquired under proceedings in the Probate Court, established by authority of the State, and the parties thereby invited to use it for the purpose of partition. The legislature at its first session after the adoption of the constitution, on September 21st, 1868, passed "An act to define the jurisdiction and regulate the practice of the Probate Court," by which jurisdiction was expressly given to that court to partition lands. This might well be considered as a contemporaneous construction of the constitution. This act was re-affirmed in the code of 1870, and re-enacted again in the general statutes in 1872.

For more than ten years, until November, 1878, when *Davenport v. Caldwell* was decided, it was generally accepted as the undoubted law of the State. The jurisdiction

was exercised without challenge, and a great number of cases were instituted in that court and thousands of acres of land sold in all parts of the State. As Judge Hudson says: "Lawyers in all parts of the State acted under it, Courts of Probate exercised this jurisdiction unchallenged, and the Circuit Courts recognized it and adjudged questions arising from such proceedings." The truth is that all parties acted in good faith and were misled. According to our view, the proceedings for partition of Herndon's estate, regularly had in the Probate Court, prior to the decision of *Davenport v. Caldwell*, should be held binding upon all the parties concerned.

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\*The judgment of this court is that the judgment of the Circuit Court be affirmed.

Chief Justice SIMPSON and Associate Justice McIVER concurred in the result.

## 18 S. C. 358

## SCHUMPERT v. SMITH.

(April Term, 1882.)

1. The decision of this court in the case of *Herndon v. Moore*, ante p. 339, approved.

[2. Courts  $\hookrightarrow$  40.]

[Cited in *Thomas v. Poole*, 19 S. C. 334, and in *State ex rel. Elliott v. Jeter*, 59 S. C. 486, 38 S. E. 124, to the point that to the decision announced in *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, that the Legislature was without power to confer upon probate courts jurisdiction in partition cases, no retroactive effect should be given, on the principle of "communis error facit jus." Where proceedings have been regularly had under the law, as, before the announcement of that decision, it was supposed to exist, they will not be disturbed.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 160; Dec. Dig.  $\hookrightarrow$  40.]

This case was heard in connection with the case of *Herndon v. Moore*, ante p. 339, and involved the same questions. The opinion fully states the case.

Messrs. Moorman & Simkins, J. Y. Culbreath, for appellants.

Messrs. Jones & Jones, contra.

January 9th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This case was heard in connection with that of *Herndon v. Moore*, just decided, ante p. 339. That was an action to validate proceedings in partition before a Probate Court, and this is the counterpart of it—to ignore entirely such proceedings as void and partition the lands anew—but the principles announced in that case must be conclusive of this, except in so far as the facts may differ.

The facts of this case are as follows: Elisha K. Schumpert, of Newberry, died intestate, leaving distributees—a widow, Mattie, now the wife of Smith, and children,

William F. Schumpert, Harriet M. Moseley, Beauregard S. Schumpert, John E. Schumpert, Franklin E. Schumpert, Frederick L. Schumpert and James C. Schumpert. Some of these are minors, but which does not appear. The intestate died seized and possessed of lands, and it seems that it is probable the personal assets will not be sufficient to pay the debts of his estate.

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\*However that may be, the appellant, William F. Schumpert, filed a petition in the Probate Court of Newberry county, to partition the lands among the distributees, of whom he was one. In order to effect partition, the judge of Probate ordered the lands sold, and accordingly they were sold on sales day in November, 1878, in three separate tracts, upon the terms one-third cash and the remainder in two equal annual installments, secured by bond and mortgage of the premises sold. The plaintiff bid off tract No. 1, Benjamin F. Nickols took No. 2, and Brown & Moseley No. 3. Brown & Moseley and Nichols, respectively, complied with the terms of sale, paid the cash installment into the Probate Court, and were let into the possession of the lands purchased by them. William F. Schumpert did not comply with the terms of sale as to the tract of land purchased by him.

The matter stood in this condition when this court decided the case of *Davenport v. Caldwell*, 10 S. C. 317, holding that the act of the legislature passed in September, 1868, purporting to give to the Probate Court jurisdiction to partition lands, was unconstitutional and void. Whereupon, in September, 1879, William F. Schumpert, the plaintiff, who had been the actor also in the Probate proceedings, instituted this action in the Court of Common Pleas, to partition the lands anew, simply reciting the former proceedings before the Probate Court, and proposing to ignore and disregard them as absolutely void. The heirs, as well as the administrator of the intestate, were made parties, as also the purchasers at the Probate sales. The widow, Mattie (now Smith), answered, concurring in the prayer of the complaint for a new partition. The guardian ad litem of the infant defendants submitted their rights, and the purchaser, Nickols, resisted the new partition and insisted that he should not be disturbed in the possession of lands which he had purchased bona fide at a judicial sale for full value, and had paid the purchase-money and made improvements thereon.

The case was heard by Judge Wallace, who ordered the complaint to be dismissed. From this order William F. Schumpert and Mrs. Smith, and the infant defendants, by their guardian, James Y. Culbreath, Esq., appeal

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to this court upon the following ground: "Because the presiding judge erred in dis-



missing the complaint for the reason, as he stated, that the sale of the land made by the Probate judge was a good and valid sale, as shown by the facts set forth in the pleadings."

This court has just held, in the case of *Herndon v. Moore*, ante p. 339, "that proceedings for partition regularly had in the Probate Court prior to November 27th, 1878, when the judgment in the case of *Davenport v. Caldwell* was filed, should be held binding upon all the parties concerned." That judgment is conclusive of this case, and reference is made to it, without repeating here the grounds upon which it was placed.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Chief Justice SIMPSON and Associate Justice McIVER concurred in the result.

18 S. C. 360

O'NEILL v. O'NEILL.

(April Term, 1882.)

[*Executors and Administrators* ⚡221.]

An unpaid due bill signed by a decedent in favor of another and found among his papers after his death, is not of itself sufficient to establish an existing legal obligation. But where coupled with confidential communications by decedent to his brother and executor, made orally just before his death and contained in a letter found in his private box after death, stating that it represented an amount of money belonging to the payees of the due bill "misaid or mismanaged" by decedent while their confidential agent, and which he thereby instructed his brother and executor to pay in some private manner, the due bill will be sustained as evidence of a debt due by the decedent to the payees.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 903; Dec. Dig. ⚡221.]

Before Kershaw, J., Charleston, June, 1881.

The facts of this case are all stated in the opinion. Upon these facts W. D. Clancy, Esq., master, to whom the case had been referred for inquiry and report, reported as follows:

The character of the paper found in the tin box of Edward O'Neill, addressed to his brother (Dennis O'Neill), and containing a due bill in favor of Douglass, Jackson & Pickett

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for fifteen hundred dollars, not delivered to them in the life-time of the testator, is not such an obligation to pay money as will warrant the executor in paying this sum as a legally established claim against the estate of the testator. The will of Edward O'Neill must be regarded as the voice of the dead man speaking as to all dispositions to be made of his estate, and any other paper lacking the formality required by law, however solemn its moral import, is, as a legal paper, null and void. The executor in this case gave

public notice, calling upon persons having claims against the estate of Edward O'Neill to come in and establish the same. It does not appear that Douglass, Jackson & Pickett made any claim as creditors, nor is it surprising that they did not from the nature of O'Neill's letter.

Jackson and Pickett, survivors of Douglass, Jackson & Pickett, excepted to this report. Upon this exception the circuit decree was as follows:

There can be no doubt that in some manner, known only to the deceased, he was indebted to Douglass, Jackson & Pickett, in this amount; that the obligation to pay it pressed on his conscience, and that discharging himself of the obligation by payment of the money, he wished to conceal from the parties all knowledge of his connection with the money so paid. It is not possible to discover that secret, which he carried with him to the grave. It is not necessary that it should be known. His confession of his indebtedness is the highest evidence that can be given of the fact that he owed this money to these parties, and that he died in the expectation that they would receive it. If it has so happened that the secrecy he so much desired has not been secured, that does not affect the question of fact of his indebtedness. Of that, there cannot be a doubt; the evidence establishes the fact of the indebtedness of the testator to Douglass, Jackson & Pickett, for the sum of fifteen hundred dollars, and the exception of the parties to the report of the master on this point is sustained, and the report as to this overruled. \* \* \* It is therefore ordered and decreed, that Douglass, Jackson & Pickett be entitled to receive from the assets of Edward O'Neill in the hands of the plaintiff, as his executor, the sum of fifteen hundred dollars, with in-

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terest from May 26th, \*1879, the date of the written admission of indebtedness; and to have execution therefor, if not paid by the plaintiff; and that the costs of the case be paid from the assets of the testator in the hands of the executor, &c.

From this decree, Mrs. Catherine O'Neill appealed upon five exceptions. The first is immaterial; the others were as follows:

2. Because the Circuit Judge erred in holding that the "letter and due bill" signed by the testator, and found in his private box after his decease, but which had never been delivered to any one in his life-time, were evidence of the fact that the said Edward O'Neill was indebted to Douglass, Jackson & Pickett, at the time of his decease, in the sum of fifteen hundred dollars.

3. Because the Circuit Judge erred in not holding as matter of law that the onus was on Douglass, Jackson & Pickett to show affirmatively that the testator was indebted to them, at the time of his decease, in the sum

of fifteen hundred dollars; and further, in not finding that the evidence established simply, that prior to his death the testator imagined that he was indebted to them by reason of some supposed mismanagement or want of care in respect to the moneys which had come into his hands as their agent.

4. Because the Circuit Judge erred in decreeing that Douglass, Jackson & Pickett were "entitled to receive from the assets of Edward O'Neill, in the hands of the plaintiff, as his executor, the sum of fifteen hundred dollars, with interest from May 26th, 1879."

5. Because the Circuit Judge erred in admitting as evidence the statements made by the testator to the plaintiff, Dennis O'Neill.

Messrs. Hayne & Ficken, for appellant.

Mr. A. G. Magrath, contra.

January 9th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The sole question raised by this appeal is whether the estate of

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the testator, Edward O'Neill, is \*liable to pay the survivors of Douglass, Jackson & Pickett a certain alleged debt, for at the argument here the last ground of appeal was abandoned.

The circumstances which gave rise to this claim are peculiar, and may be stated as follows: Edward O'Neill had been for many years in the employment of Douglass, Jackson & Pickett, proprietors of extensive livery stables in the city of Charleston, and had eventually become their confidential clerk and general manager. In 1879 his health began to fail, and, being about to remove to Summerville, he made a confidential communication to his brother Dennis, the plaintiff in this case, which was testified to by Dennis at the hearing before the master, in the following words: "My brother told me, when his health was failing, and when he was about to go to Summerville, that I would find instructions in a letter, in his tin box, what to do in reference to a certain sum of money mismanaged or mislaid during the time when he was in the employment of Douglass, Jackson & Pickett."

The testator died June 27th, 1879, leaving a will dated May 20th, 1879, whereby he appointed his brother Dennis executor, and guardian of his child or children, and, after providing for the payment of all his just debts and funeral expenses, devised and bequeathed his whole estate to his wife, for life, or during widowhood, with remainder to his child or children. The will was duly admitted to probate, the executor qualified and published the usual notice to creditors to present their demands, but no claim was presented by Douglass, Jackson & Pickett, for the reason, as they allege, that they did not then know of any indebtedness on the part of the testator to them. The executor having procured the key of the tin box above refer-

red to, from the testator's house, repaired to the office of the judge of probate in company with the counsel of the widow, where the tin box, which had been obtained from the safe of Douglass, Jackson & Pickett, where the testator was in the habit of keeping it, was opened and found to contain, amongst other things, the will of the testator, and a sealed envelope, addressed "Dennis O'Neill, private," upon which was the following endorsement:

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ment: "Don't \*open this as long E. O.N. is living." The envelope, when opened, was found to contain the following letter:

"Dear Brother—Pay the amount over to Douglass, Jackson & Pickett, when Wm. Jackson pays you over five thousand dollars. Send it to them by express, so they will not be able to find out who sent it. It will be all right as long as they get the money. This is as near as I can come to the amount. Ask them to forgive me if it is any more. Your B., E. O'Neill. May 26th, 1879."

On the opposite page of the same sheet of paper upon which this letter was written, is the following:

"Charleston, S. C., May, 1879.

"Due Douglass, Jackson & Pickett, fifteen hundred dollars for value received.

"1,500.

E. O'Neill."

The executor having instituted proceedings for the settlement of the estate of his testator, brought to the attention of the court this claim in favor of Douglass, Jackson & Pickett, to the payment of which the widow objected upon the ground that the claim was not a legal one, whereupon the survivors of Douglass, Jackson & Pickett intervened by petition and asked to have the claim paid.

There is no other evidence in support of the claim, except that above stated, and the question for us to determine is whether this evidence is sufficient to establish the claim. The mere fact that the testator signed a paper in the form of a due bill, acknowledging himself indebted to Douglass, Jackson & Pickett in the sum of \$1,500, is certainly not of itself sufficient, for the so-called due bill was never delivered. 1 Dan. Neg. Inst., § 63. But the question is whether this, taken in connection with the other evidence, may not be sufficient to establish the legality of the claim. The reason why a paper in the form of a note constitutes no evidence of indebtedness until it is delivered, is because the transaction is inchoate as long as the paper

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remains \*in the possession of the maker, and, at most, only furnishes evidence of an intention to give the note, which may or may not ripen into an act. Until it is delivered, it is entirely under the control of the maker and may be destroyed or canceled by him. It cannot by itself even be regarded as an admission of liability, for, until it is delivered, or until the maker does some irrevocable act showing an intention to deliver, it is sim-



ply an admission to himself and amounts to no admission at all. But where a person, after signing such a paper, retains it in his possession, and does other acts or makes other declarations, showing that the retention of possession was not for the purpose of enabling him to destroy or cancel it, in case he should change his mind, but for another and different purpose, entirely consistent with the idea that the paper was regarded by him as the evidence of an absolute, binding contract, constituting a valid obligation, then it seems to us that such a paper may be regarded as furnishing evidence of a legal liability.

There cannot be a doubt, from the evidence in this case, that the testator thought that he was indebted to Douglass, Jackson & Pickett, and that such liability grew out of the fact that while he was in the employment of that firm, he had so improperly "mismanaged or mislaid" some of their money as to make him liable for the same, and that he displayed extreme anxiety to keep this a secret, especially from his employers. This conclusively shows that his sole purpose in retaining possession of the paper in the form of a due bill was to conceal the facts which gave rise to the indebtedness, and not for the purpose of enabling him to cancel the evidence of such indebtedness, or to recall the admission contained in the paper. His declaration to his brother before his death, was an implied admission that he was liable to make good the loss resulting from his mismanagement, the particulars of which were known only to himself; and this, coupled with his written instructions to his brother as to how he wished the loss repaired, cannot be construed in any other light than as an admission of liability and a promise to pay the same, and then the written memorandum in the form of a due bill indicated the amount for which he admitted his liability.

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\*The whole evidence, taken together, amounts to the same thing as if he had said to his brother, "While I was in the employment of Douglass, Jackson & Pickett, I so mismanaged their funds as to make me liable to them in a sum which you will find stated in a paper in the form of a due bill in my tin box; and this amount I wish you to pay them in such a way that they may not know from whom it comes." If he had said this, could any one doubt that the evidence would be sufficient to establish the legality of the claim?

Suppose he had said to his brother: "I owe the estate of a neighbor, who has recently died, a sum of money, which I borrowed from him shortly before his death, under circumstances that I do not wish disclosed, but gave him no note or other evidence of such indebtedness, and I wish you

to pay the debt in such a way as that it may not be known from whom it comes, and you will find the amount stated in a memorandum amongst my private papers." Such a declaration, whether made orally or in writing, would not be testamentary in its character, but would be simply furnishing the evidence of an indebtedness incurred during his life-time. So, here, the indebtedness of the testator to Douglass, Jackson & Pickett arose during his life-time, but he did not choose to let any one have access to the evidence of such indebtedness until after his death, and, therefore, took care to let his brother, whom he had selected as his executor, know where such evidence could be obtained after his death.

We agree, therefore, with the Circuit judge, that the evidence adduced was sufficient to establish the claim set up by the survivors of Douglass, Jackson & Pickett.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 18 S. C. 366

## STATE OF SOUTH CAROLINA v. MOSES.

(April Term, 1882.)

[1. *Clerks of Courts* ¶75.]

It would seem that an action on the official bond of a clerk of court, may be brought in the name of the State alone, but an objection on this ground can be raised by demurrer only.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 135-142; Dec. Dig. ¶75.]

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[2. *Husband and Wife* ¶229.]

\*An action may be maintained against a married woman as surety on a bond without any allegation that she has a separate estate, and without apt and proper words to charge such estate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 822; Dec. Dig. ¶229.]

[3. *Clerks of Courts* ¶74.]

A clerk of court neglecting to deposit his official moneys in bank as required by law, or to pay out in proper cases under orders of the court, is guilty of a continuing default, for which (without demand by the parties in interest) he and the sureties on his second and additional official bond are liable, although the moneys were received before the execution of such bond.

[Ed. Note.—Cited in *State v. Edwards*, 89 S. C. 228, 71 S. E. 826; *Richland County v. American Surety Co. of New York*, 92 S. C. 335, 75 S. E. 549.

For other cases, see *Clerks of Courts*, Cent. Dig. § 129; Dec. Dig. ¶74.]

[4. *Bonds* ¶143.]

And a verdict for the penalty of the bond is in proper form, and is not vitiated by additional findings for the parties injured by the default, which may be rejected as surplusage. The proper practice in such cases indicated.

[Ed. Note.—Cited in *Johnson v. Dawkins*, 20 S. C. 533; *State of South Carolina v. Foot*, 27 S. C. 344, 3 S. E. 546; *Strain v. Babb*, 30 S. C. 347, 9 S. E. 271, 14 Am. St. Rep. 905;

State v. Sandifer, 68 S. C. 209, 46 S. E. 1006; Williams v. Weeks, 70 S. C. 8, 48 S. E. 619.

For other cases, see Bonds, Cent. Dig. § 251; Dec. Dig. § 143.]

[This case is also cited in State ex rel. Causey v. Causey, 93 S. C. 300, 308, 310, 76 S. E. 707, and distinguished therefrom.]

Before Kershaw, J., Newberry, November, 1880.

This was an action commenced October 2, 1879. The opinion states the case.

[For subsequent opinion, see 20 S. C. 470.]

Mr. James Y. Culbreath, for appellants.

Moses committed no default in failing to account to one who had forcibly ejected him from his office. 14 Barb. 397. Nor in failing to account to the parties in interest, for there had been no order to pay out. 5 Rich. Eq. 38. And in no event could there be action before demand made. 2 Bail. 51; 1 Hill Ch. 423. For a failure to deposit, only the first sureties are liable. 5 Rich. Eq. 240. And there was no order to deposit and no damages shown. The verdict is irregular and inconsistent with the complaint. The action was improperly brought in the name of the State. 11 Rich. 111. There can be no interest until demand. 2 Bail. 51.

Messrs. Jones & Jones, G. S. Mower, contra.

The second sureties are liable. Brandt Sur. & Guar., § 453; 2 Bail. 397, 480, 524; McM. Eq. 370; 2 Hill 312; 2 McC. Ch. 55; 59 Ill. 148; 4 Strob. Eq. 149; 5 Leigh 414. Objection to party plaintiff could be taken only by demurrer. Code, § 167; 12 S. C. 130. But State could sue under section 137 of the Code. 6 S. C. 119; 21 Barb. 214; 9

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N. Y. 176; Pom. \*Rem., § 176; 11 Ohio 515; 19 Mo. 369; 21 Id. 112; 33 Iowa 345. Mrs. Moses is liable. 15 S. C. 581, 602; 8 Kans. 525.

January 9th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action on the official bond of H. C. Moses, as clerk of the Court of Common Pleas for Newberry county. It seems that Moses was appointed clerk by the judge of the Seventh Circuit, within which the county of Newberry is embraced, on February 16th, 1875, and that he then entered into bond for the faithful performance of the duties of the office. He was subsequently required to give a new bond, and accordingly, on April 4th, 1877, he entered into another bond, with all the other defendants, except Montgomery Moses, as his sureties, and the action is brought on the last-mentioned bond.

The breaches assigned are: 1. That he received large sums of money in certain cases stated in the complaint, "which he has neither deposited to the credit of the court in

the National Bank of Newberry, nor in any other bank in the Seventh Judicial Circuit, as required by law to do, nor has he turned the same over to Ebenezer P. Chalmers, who was duly elected clerk of the Court of Common Pleas for Newberry county, on July 26th, 1877, and commissioned on August 14th, 1877, nor has he paid the same over to the parties entitled thereto, although often requested so to do." 2. That the said H. C. Moses "has neglected and refused, and still doth neglect and refuse, to turn over to the said Ebenezer P. Chalmers, clerk as aforesaid, as required by law, certain of the furniture and papers of the said office, to wit: the iron strong box, or safe, and the money bonds given in cases in said court." 3. That the said H. C. Moses "did not at each stated session of the Court of Common Pleas for Newberry, present, as required by law, an account to said court of all moneys remaining therein, or subject to the order thereof, stating particularly on account of what cause or causes said moneys are deposited, nor did he file the vouchers thereof in court." Judgment was demanded for the penalty of the bond, ten thousand dollars, and for costs and disbursements.

The defendants, by their answer, submit

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that the action was \*improperly brought in the name of the State alone, but that it should have been brought upon the relation of some party in interest, who might be held liable for costs, and upon the written authority of the attorney-general. 2. They admit the execution of the bond sued upon. 3. The defendant, Catherine Moses, denies her liability, because she was and is a married woman, the wife of Montgomery Moses, who should have been joined with her as a defendant in the action, and also because there is no allegation in the complaint that Mrs. Moses had any separate estate, or any apt words to fix liability thereon in this action. 4. They deny that said H. C. Moses committed any default in the discharge of the duties of his office as clerk, from the execution of the bond sued until August 18th, 1877, "when he was ejected by an overpowering force, and in violation of law, from his said office, whereby all liability under said bond ceased."

When the pleadings were read, the written authority for the institution of this suit in the name of the State, signed by the attorney-general, was exhibited to the court, whereupon an order was passed by which it was adjudged: "That this suit is properly brought in the name of the State, and that Montgomery Moses should be made a party defendant with his wife, Catherine Moses," and leave was granted to amend the complaint accordingly. This being done, Montgomery Moses filed his answer, admitting that he was the husband of the defendant, Catherine, denying all liability on the bond,



and adopting the answer filed by the other defendants.

The cause being thus at issue came on to be heard before his Honor, Judge Kershaw, and a jury, when testimony on the part of the plaintiff, to the following effect, was adduced: 1. That it appeared from the account book kept by H. C. Moses, as clerk, that the several sums of money mentioned in the complaint had been received by him in the cases there mentioned. 2. That E. P. Chalmers was elected clerk on July 26th, 1877, and commissioned as such on August 14th, 1877; that he had qualified, and, on August 18th, 1877, took possession of the office of clerk, and had since that time been acting as such; that on August 18th, 1877, he demanded the office from H. C. Moses,

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\*who refused to comply with said demand, and that the said several sums of money above referred to had not been turned over to Chalmers. 3. That demand was made upon H. C. Moses for the money collected in the case of Harrington and others v. O'Neill and others, by the attorney of persons interested in said money; that such demand was not complied with, and another suit was then pending for said money. 4. That H. C. Moses had no money on deposit in the National Bank of Newberry, to his credit as clerk, except the sum of \$26.11, and that he had no other account, as clerk, with any other bank in the Seventh Circuit. 5. That the money bonds in the clerk's office remained in the iron safe therein, the key of which was kept by H. C. Moses, who permitted said Chalmers to have the use of it whenever he desired it, and that eventually it was delivered to Chalmers some time before the trial.

The testimony adduced upon the part of the defendant was to the effect: 1. That suit had been brought on the first bond of Moses as clerk. 2. That the several sums of money mentioned in the complaint were all received by H. C. Moses prior to the execution of the bond sued on in this case. 3. That E. P. Chalmers, on August 18th, 1877, forcibly ejected H. C. Moses from the office of clerk, and that an action brought by Moses against Chalmers, to regain possession of the office, was then pending. 4. That no order of court, to deposit money in any of said cases, was ever served upon said H. C. Moses, though notices of application for such orders, in several of the cases mentioned in the complaint, had been served, which were resisted by H. C. Moses, and were not considered by the Circuit judge to whom such applications were addressed.

In the progress of the testimony the Circuit judge announced that there could be no recovery on the bond, "except for the first breach assigned, to wit, the failure of H. C. Moses to account for money received by him as clerk of the Court of Common Pleas for

Newberry county," though he permitted testimony to be offered as to the other alleged breaches, and as there was no exception to this ruling by either party, the case must be considered as resting alone upon that breach. At the close of the testimony, a motion for a

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non-suit was made because \*the money, alleged to have been received by H. C. Moses, as clerk, and not accounted for, was all received before the execution of the bond sued upon in this action, and there was nothing to submit to the jury. The motion was refused, and the jury rendered a verdict in the following form: "We find for plaintiffs forfeiture or penalty of bond, amount \$10,000. Jacob Sligh, Foreman. Bradley v. Rodelsperger, \$304.15; A. B. Boozer, Ex'r, v. Mary J. Boozer, \$188.48; Sally Ann Thompson v. Thomas A. Thompson, \$756.30; W. H. Harrington et al. v. H. O'Neill, \$1,280.22; Sarah F. Richardson v. Thomas H. Chappel, \$41.93; Catherine Boazman v. W. W. Boazman, \$118.34; Harriet Epting v. Thomas L. Epting, \$14.15; James A. Crowell v. Jane Boozer, \$14.80; Isabella Birge, Adm'x, v. W. S. Birge, \$217.45; F. W. A. Summers v. W. W. McMorris, \$135.89. We find for above plaintiffs amounts as specified, with interest from September 17th, 1877. Jacob Sligh, Foreman."

The grounds of appeal raise the following questions: 1. Was the action properly brought in the name of the State alone? 2. Could the action be maintained against Mrs. Moses, a married woman, without any allegation that she had a separate estate, and without apt and proper words to charge such estate? 3. Does the fact that the money, which it is alleged H. C. Moses has failed to account for, was received by him prior to the execution of the second bond, relieve the sureties on that bond from liability and throw it entirely upon the sureties on the first bond? 4. Was a demand necessary to the maintenance of this action? 5. Is the verdict so uncertain or so inconsistent with the complaint as not to warrant the entry of any judgment?

In reference to the first question it is only necessary to say that it could only be raised by a demurrer, and there was no demurrer in this case. Pom. Rem., § 207, p. 247. But even had it been properly raised, it would seem from the authorities that the action was properly brought in the name of the State. *Ibid.*, § 176, p. 214.

The second question is fully disposed of by the recent decisions of this court, in the cases of Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581 [40 Am. Rep. 705], and Clinkscales v. Hall, 15 S. C., 602.

We come now to the consideration of the

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third question raised \*by the grounds of appeal. In Gen. Stat. (1872) 166, §§ 46, 47, the following provisions are found: "Sec. 46.

All moneys which shall hereafter be paid into the Circuit or Probate Courts of the State, or received by the officers thereof in causes pending therein, shall be immediately deposited in some incorporated State bank or National bank, within the Circuit, of good credit and standing, or if there be no such bank within the Circuit, then in such bank nearest to the place of holding the court, in the name and to the credit of the court. Sec. 47. No money deposited as aforesaid shall be drawn from said bank, except by order of the judge of said courts respectively, in term-time or in vacation, to be signed by such judge, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or on account of, which it is drawn; provided, that money paid into court to be immediately paid out, need not be so deposited, but shall be paid upon order of the court."

When, therefore, money is received by the clerk of the Circuit Court, in causes pending therein, it is his official duty to deposit the same in some bank of good standing, to the credit of the court, of which he is the clerk, unless the money is to be immediately paid out, when it need not be deposited, but may be paid out upon the order of the court. If a clerk neglects or refuses to perform this duty, he commits a breach of his official bond, and becomes liable to an action for the penalty. The default consists, not in receiving the money, but in neglecting or refusing to deposit it in bank; or where it is to be immediately paid out, in not paying out according to the order of the court. This is a continuing duty, and the default continues as long as the performance of such duty is neglected.

The fact, therefore, that the money in this case was all received by Moses, as clerk, before the execution of the second bond, cannot relieve the sureties on the second bond from liability, if the default continued after the execution of that bond. It seems that Moses did continue to make default in this respect after the execution of the bond sued on in this case, and, therefore, the sureties on this bond, as well as those on the first bond, would be liable for any damages resulting from such default. *Treasurers v. Taylor*, 2 Bail. 524.

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\*Under this view of the case, it becomes unnecessary to consider the question whether there was any necessity for a demand, and if so, whether there was any evidence, in this case, of a demand before this action was commenced. It was abundantly proved, and in fact does not seem to have been denied, that the defendant Moses had failed to deposit in bank the money received by him as clerk, with the exception of a very inconsiderable sum, and this was such a breach of the condition of his bond as would warrant judg-

ment for the penalty. If the money had been deposited in bank to the credit of the court, as required by law, then it only could have been drawn out by order of the judge of the Circuit Court, and all that would have been necessary to enable the parties entitled to get their money would have been to obtain such an order, and there would have been no occasion for any demand upon the clerk.

Our next inquiry is as to the form of the verdict, whether it was so uncertain as not to warrant the entry of any judgment. The verdict for the penalty of the bond was, as we have seen, fully warranted by the testimony, and there would be no difficulty in entering judgment on such a verdict. All the rest of the verdict, or rather what is written below the regular and formal verdict for the penalty, may and should be rejected as surplusage, it being a futile attempt on the part of the jury to find damages in favor of persons not parties to the record, which of course must be regarded as a mere nullity. The proper practice in cases of this kind is to enter judgment for the penalty in favor of the obligee, which will stand as a security for those who may have sustained damages by reason of the breach of the condition of the bond, leaving it for those parties claiming to have sustained such damages to come in by proper proceedings and establish their claims; and with a view to avoid multiplicity of suits and secure equality amongst the several claimants, an order should be published requiring all such claimants to come in within a prescribed time, and establish such damages as they may have sustained by reason of the breach of the condition of the bond, and obtain execution on the judgment for the damages so established.

The eighth ground of appeal imputes error

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to the Circuit \*judge in charging the jury to allow interest, but as we are unable to discover any evidence in the record that the Circuit judge gave any such instruction to the jury, the question is not now properly before us. When the parties come in to establish their damages, the question as to interest may then be considered.

The judgment of this court is, that the judgment of the Circuit Court be modified in accordance with the views herein expressed, with leave to the parties interested to come in and establish their claims, according to the practice herein indicated.

18 S. C. 374

KOON v. MUNRO.

(April Term, 1882.)

1. The judgment of this court in *Koon v. Munro*, 11 S. C. 140, stated.

[2. *Appeal and Error* ⇨ 1195.]

The rule there prescribed for ascertaining the amount of confederate money rightfully in



the hands of the administrator held him responsible for the collection of ante bellum credits from himself and other solvent debtors, not available for the purposes of the administration, and it was error in the Circuit judge to apply to the case any other principle.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. ☞1195.]

[3. *Appeal and Error* ☞1022.]

The amount of such moneys improperly collected, as reported by the referee, is sustained by the evidence, and therefore affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. ☞1022.]

[4. *Executors and Administrators* ☞86.]

[As it is the duty of an administrator to collect the choses of his intestate, and as during the war there was no other circulating medium than Confederate money, an administrator is justified in receiving Confederate money in payment of debts due the estate, unless there was reason to believe that such currency could not be used for the purposes of administration or the payment of distributees.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 378; Dec. Dig. ☞86.]

Before Thomson, J., Union, December, 1879.

The opinion states the case.

[For subsequent opinion, see *Johnson v. Dawkins*, 20 S. C. 528.]

Messrs. Rion & McKissick, for distributees.

Messrs. J. B. Steedman, R. W. Shand, contra.

January 27th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Clinton Wilson died in 1860, and W. J. Keenan administered upon his estate. Keenan died in November, 1867, and William Munro administered upon his estate. In 1869 Henry Koon took out letters of administration de bonis non upon the estate of Clinton Wilson, and brought this action against the administra-

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tor of W. J. Keenan, for an account of his administration of the estate of C. Wilson. Most of the assets of the estate of Wilson consisted of ante bellum debts due the estate, and among them a large debt of the first administrator, Keenan himself, and the questions in the case arise out of the manner in which he dealt with these assets during confederate times. He collected most of the debts due the estate in confederate money during the war, and among them his own, and on December 31st, 1864, invested \$5,800 in confederate bonds, for which, though now worthless, credit is claimed for him.

The case was referred to John L. Young, Esq., as referee, who reported that there was due by the estate of Keenan \$8,745.55 in confederate money, and that there was due by the estate \$304.61 in United States currency. Both parties excepted, and Judge Northrop held that the investment in confederate bonds was not allowable, and that the

balance found by the referee was due in legal currency. The defendant appealed, and this court determined the principle which should govern the accounting, and remanded the case. See 11 S. C. 140.

This court held as follows: "It would follow, if the foregoing deductions are sound, that the test of the right of the administrator to receive in satisfaction of the debts of the estate, a currency in common use, but not having the quality of a legal tender, is the necessity of the administration; one element of this necessity being the existence of debts capable of affecting prejudicially the assets of the estate unless satisfied, and the other would be just ground to apprehend loss of assets by allowing unsecured debts to remain outstanding. \* \* \* It is clear that in either of these cases, as well as when money is needed to defray current or extraordinary expenses of the administration, the administrator would be authorized to receive such currency at the rate at which it passed from hand to hand in the community as money, unless there should be reason to conclude that it could not be advantageously employed at such valuation for the purposes of the administration. \* \* \* It is proper to add that in applying these principles the administrator ought not to be held to strict accountability as an insurer of such reasonably anticipated results, but so long as he brings

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a fair and honest judgment, resting on reasonable grounds, to guide his conduct in this respect, he should receive protection. This depends on the principle that one clothed with the exercise of discretion is only responsible for its abuse. \* \* \* As the statement of the accounts was not conformed to the principles that should have been applied to them, the intention of the parties, as may be assumed, not having been directed to such considerations, there should be a new inquiry directed, and confined, as regards the present question, to ascertaining how much, if any, of the account funded in bonds, consisted of confederate currency rightfully in the hands of the administrator as assets of the estate, not available for outlay to meet any other proper exigency of the estate, to the end that the administrator should receive credit for such amount upon the principle above stated," &c.

Accordingly, the case went back to the Circuit Court, and was referred to D. A. Townsend, Esq., as special referee to restate the account of W. J. Keenan, as administrator, in conformity with the principle announced in the judgment of this court, as above stated. He took the testimony and reported that on December 31st, 1864, the administrator, Keenan, had rightfully in his hands, as assets of his intestate's estate, \$1,143.80 in confederate money, not needed for the exigencies of the estate, for which the estate of

Keenan should have credit on the investment in confederate bonds, or, so to speak, that the investment to that extent should stand as allowed, and that all the remainder of the bonds should be stricken from the account as not allowed. And upon a re-adjustment of the accounts upon this basis he reported due by Keenan, the administrator, on September 27th, 1879, the sum of \$9,946.05.

To this report the defendant excepted, and the case came on again for trial before Judge Thomson, who recommitted the report with instructions "to take an account of the sums of money which were due the intestate in his life-time by Keenan individually, or by Keenan with others, and credited by Keenan, as received from himself in his returns; and also to take an account of the moneys received by Keenan, as administrator, from all other sources, from debtors according to his returns. And from these two sums, and from

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their amounts, ascertain the \*proportions of the money charged by Keenan, as received from himself, on one part, and received by Keenan from all other debtors, on the other part, which entered into the confederate bonds, and are credited by Keenan as of date December 31st, 1864."

From this decree both parties appealed to this court. The defendant upon the following grounds: "Because his Honor, for the purpose of ascertaining what proportion of the currency that went into the confederate bonds, purchased for the estate of Clinton Wilson, 'was derived from assets of the estate other than that paid by the administrator himself in discharge of his individual and joint debts,' should have ordered that an account be taken of the amount credited by Keenan in his returns, as received from himself on debts due the intestate by him at the date of his last payment of them, viz., on February 22d, 1863; and that from said amount should be deducted the sum then due to the administrator by the estate, as shown by his returns. And also an account of the moneys received by Keenan, as administrator, from all other sources after the date of his said last payment, according to his returns. And that from these two sums and from their amount, it be ascertained what proportion of the sum that went into said bonds was received from himself, and what proportion was received from other sources."

The plaintiff appealed upon these grounds:

1. "For that his Honor has laid down a different rule for ascertaining the liability of W. J. Keenan, as administrator, from that prescribed by the Supreme Court.

2. "For that his Honor did not confirm the finding of the referee upon the matter of fact submitted to him by the decree of the Supreme Court, to wit: 'That on December 31st, 1864. Keenan, as administrator of C. Wilson's estate, had rightfully in his

hands, as assets of said estate, \$1,143.80 in confederate currency, not available for the exigencies of said estate, and only this amount.'

3. "For that his Honor did not confirm the finding of the referee, 'that upon a re-adjustment of the administrator's accounts, after applying said credit, he is indebted to the estate of C. Wilson in the sum of \$9,946.05, September 27th, 1879.'"

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\*The former judgment of this court declared the principles which should govern the accounting. Until reversed, it is the law of the case. The principle upon which the account should be stated having been determined, the case was remanded simply to apply the principle to the facts which might be made to appear. The only questions which the Circuit Court could consider were, first, what was decided by the Supreme Court; and, second, after applying the facts, how did the account stand.

As to the first question, there does not seem to be any obscurity. The doctrine announced by the former judgment was, that as it is the duty of an administrator to collect the choses of his intestate, and considering the peculiar circumstances of the country at the time—that during the war there was no other circulating medium but confederate money—an administrator would be justified in receiving confederate money in payment of debts due the estate, unless there was reason to believe that such currency could not be used for the purposes of administration or the payment of distributees. As we understand the judgment, the administrator was not to be held liable for taking confederate money for debts contracted before the war, except under the circumstances set forth in the extract of the opinion given above.

It happened that in this case, among the debts received in confederate money, was a large one due the intestate by the administrator himself, and in discussing the principle announced some observations were thrown out, in the opinion of the court, as to the impropriety of the administrator discharging his own debt with confederate money, beyond the probable necessities of the administration, as in that case he would not be acting in the interest of the estate, but in his own. But the judgment does not proceed upon the view that the amount received by the administrator from himself should be the measure of the money wrongfully in his hands. The test was, not what he received from himself, but what he received from solvent debtors, including himself, over and above what might be reasonably considered as available for the exigencies of the estate. If the administrator had reasonable ground to suppose that the whole amount of the debt due by him could



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have been made available, \*then he might rightly receive from himself confederate money, and discharge his own debt.

According to this interpretation of the former judgment, it is manifest that the Circuit judge did not follow the principle laid down, but propounded a new rule of accountability, making the amount received by the administrator on his own debt, and not that received in excess of the amount available for the purposes of the estate, the measure of the amount which was wrongfully in his hands. As we understand the Circuit decree, it raised what was merely a subordinate point into the main question in the case, and as to the means of carrying out this view prescribed an arithmetical rule of proportion. We think this was error, and this disposes of the defendant's exception, which is based upon the new principle propounded by the Circuit judge.

The only other question is whether the account stated by the referee was in accordance with the principle announced in the former judgment. It seems that he gave the administrator credit for all payments, and as to the confederate bonds allowed \$1,143.80, upon the ground that to this extent the money which purchased them was rightfully in his possession, and struck the remainder of the bonds from the account. The report is not very full as to the precise manner in which he reached that conclusion, but he seems to have proceeded in accordance with the former judgment.

We have seen that the administrator was allowed to receive confederate money in the collection of bad debts, and from solvent ante bellum debtors, including himself, to the extent that he might honestly suppose could be made available for the purposes of administration. Now the investment itself in confederate bonds, without explanation, was substantially an admission that at least that much confederate money had been collected in excess of what was needed, for we are authorized to assume that if it had been needed for the purposes indicated, the administrator would not have invested it in confederate bonds. Did he have reasonable grounds to suppose that such a large sum would be needed for the purposes indicated? The distributees lived out of the State and we hear of no instructions upon their part to collect the money or that they would re-

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ceive the confederate money. The administrator must have known the debts of the estate, indeed he seems to have controlled one of the largest, and it does not appear that the necessities of the administration thus known to him, made it probable that the whole of his large debt would be needed.

When he made his second return, March 11th, 1863, covering the transactions of

1862, and up to that date of 1863, it appears that he was in advance for the estate only the sum of \$906.97, and does not state that at that time he had received any part of his own large debt. The next return was not made until January 10th, 1866, after the war was over, and confederate money had become worthless. In the latter return (1866) he went back into the time prior to his second return (March, 1863,) and charged himself with having received on February 22d, 1863, his own individual debt and that as partner, amounting to \$9,335.69, and this, with other debts received, aggregated a sum so large that after deducting all debts and expenses paid, he still had a large balance on hand, of which, by the same return, he claimed to discharge himself of \$5,800.00, as invested in confederate bonds on December 31st, 1864, when they were very nearly worthless.

If the alleged receipt of his own large debt had not been fixed at a date prior to the time when he expended the money in hand from other sources, the matter would have been perfectly plain. There was probably no actual payment to himself of his own debt, which would have been the merest form, but he simply charged himself as having received it on a particular day. When he made his return (1866) nearly three years after, he fixed that date back in February, 1863, which was manifestly theoretical merely. To say nothing as to the seeming conflict in the returns—that of 1866 claiming that the administrator had received the whole of his large debt on February 22d, 1863, while his second return, made after that time (March, 1863,) made no reference to such transaction, it is enough to state that the reasonable probability of his needing such a large sum for the purposes indicated does not appear. If it were necessary to use a part of his debt to re-imburse himself for money paid out for the estate, that necessity ceased as soon as the amount

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required \*was received. By the former judgment it was determined that he could not go beyond that, or, at most, beyond what he might reasonably suppose would meet the exigencies of the estate, but he did go beyond to the extent of the money invested in the confederate bonds.

It seems to be conceded that the administrator collected doubtful debts (which are exceptional) to the amount of \$1,328.61, and paid out to Macbeth and Otts \$184.00, leaving a balance rightfully in his hands at the close of the year 1863, of \$1,143.80, for which the report gives him credit.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the report of D. A. Townsend, referee, be made the judgment of the court.

18 S. C. 381

## EASON v. MILLER &amp; KELLY.

(April Term, 1882.)

[1. *New Trial* ⇨117; *Replevin* ⇨94.]

In action for recovery of blank patterns at a foundry, a verdict for plaintiff "for patterns the value of one hundred dollars" (which could not have included all the patterns at the foundry), does not identify the property, and is therefore void, and may be vacated on motion noticed at the third term, more than a year, after the trial. *Robbins v. Slattery* [30 S. C. 328, note, 9 S. E. 510], MS., Dec. No. 712, approved.

[Ed. Note.—Cited in *Thompson v. Lee*, 19 S. C. 492; *Richey & Miller v. Du Pre*, 20 S. C. 9; *Lockhart v. Little*, 30 S. C. 328, 9 S. E. 511; *Archer v. Long*, 32 S. C. 185, 11 S. E. 86; *Finley v. Cudd*, 42 S. C. 127, 20 S. E. 32.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 239; Dec. Dig. ⇨117; *Replevin*, Cent. Dig. § 369; Dec. Dig. ⇨94.]

[2. *Judgment* ⇨342.]

The motion, not being upon exceptions involving errors of law occurring at the trial, or for insufficient evidence, or for excessive damages, was not governed by sections 288 and 289 of the code of procedure.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 668-671; Dec. Dig. ⇨342.]

Before Kershaw, J., Charleston, June, 1881.

The opinion states the case. The Circuit decree, after a statement of facts and the former opinion of this court, continued as follows:

This decision limiting the recovery of the plaintiff to a portion only of the patterns claimed, makes it clear that the verdict is incapable of enforcement, because it is not possible for the sheriff to ascertain from any judgment and execution which could be entered upon it, the particular patterns

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which it was \*the purpose of the execution to require him to restore to the plaintiff's possession. The finding in this action must be specific as to the articles to be recovered, and as to their value. Code, § 285.

The plaintiff in this case demands the return of all the patterns on the premises on the day in question. The verdict as interpreted by the Supreme Court, finds for plaintiff only a portion, without indicating what portion. The judgment must conform to the verdict, and the execution to the judgment. It would not be possible under such an execution for the sheriff to distinguish what patterns he is required to return. This verdict construed as applicable only to a portion of the articles claimed, is a nullity, incapable of being the subject of a judgment. In that case it is the duty of the court to award a *venire facias de novo*. 5 Com. Dig. 521, 523; *Heyward v. Bennett*, 1 Treadw. 329; 3 Brev. 113; *Mooney v. Welsh*, 1 Mill. Con. R. 133.

It is ordered that the verdict in this case be set aside and vacated, and that a new trial be had herein.

Messrs. Bryan & Bryan, for appellants.  
Messrs. Lord & Inglesby, contra.

January 27th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff brought this action for the recovery of personal property, and claimed that he was the owner of ——— patterns of the value of \$5,000, which goods were stored on May 11th, 1879, on the premises known as Eason's foundry, Columbus street, Charleston, S. C. The defendants had purchased the property known as Eason's foundry, on April 24th, 1879, at a foreclosure sale, and entered into possession of the same on May 11th thereafter, and claimed that the patterns on the premises were embraced in the mortgage under which they had purchased.

It appeared from the testimony that patterns of the value of \$5,000 were on the premises when the defendants purchased the foundry; that a portion had been placed there at the time of the execution of the mortgage, and the remainder afterwards, but

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\*the evidence was conflicting as to what proportion was put there before the mortgage and what afterwards. One of the witnesses thought the greater proportion, both in number and value, was there at the time of the execution of the mortgage, and another thought the reverse. Under this testimony the judge, construing the mortgage, charged that it covered such patterns as were on the place at its execution, and that as to these the defendants had a good title. He further charged, that the plaintiff was the owner of such as had been put upon the premises after the execution of the mortgage, and as to these he was entitled to recover. And he left it to the jury, as a question of fact, to determine what proportion had been put upon the premises after the mortgage, with instructions to find their verdict accordingly.

The jury found the following verdict: "We find for plaintiff, patterns the value of \$100." Upon this verdict the clerk, having received no instructions from the court as to the form of the judgment, entered judgment for the recovery "of the personal property described in the complaint, to wit, the patterns which were on the premises on the north side of Columbus street, in the city of Charleston, and known as Eason's foundry, on May 11th, 1879, or \$100 in case a delivery of the said property cannot be had, and also that he recover \$40.45 for his costs."

This judgment was afterwards vacated because it was not in conformity with the verdict, this court holding upon appeal that the verdict could not be legally construed to mean that the plaintiff was entitled to recover all of the patterns on the place on May 11th, 1879, valued by the witnesses at



\$5,000, and which the judgment authorized him to recover. 15 S. C. 194.

The judgment having thus been vacated, the plaintiff, at the June term, 1881, of the court for Charleston county, which was the third term after the trial, moved to set aside the verdict on the ground that it was void for uncertainty. Upon the hearing of this motion, Judge Kershaw passed the following order: "It is ordered that the verdict in this case be set aside and vacated, and that a new trial be had herein."

From this order the defendants have appealed, founding their appeal upon several grounds, all of which, however, are embraced

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\*in the following: 1. "That no exception having been taken by the plaintiff to the charge of Judge Pressley, presiding at the trial, or to the form of the verdict at the term of the trial and within the time prescribed by law, his Honor Judge Kershaw, was without authority of law to set aside the verdict and order a new trial upon a motion made after the lapse of three terms, and especially this could not be done for uncertainty in the verdict, to which uncertainty the plaintiff had contributed and had not objected. 2. Because the verdict is not void or insufficient, either under the general law, or under the law laid down by Judge Pressley at the trial, under which a valid judgment can and should be entered for plaintiff for one hundred dollars and costs."

It is true, the code provides that in certain cases motions for new trials must be entered on the minutes by the judge who heard the case, which motion, if heard on the minutes, can only be heard at the same term at which the trial is had. Code, § 288. Or if the motion is made on exceptions, the judge trying the cause may at the trial direct them to be heard in the first instance at the next or special term, and the judgment in the meantime suspended, and in that case they must be there heard in the first instance and judgment there given. Code, § 289.

These sections of the code are applicable when the motion is to set aside the verdict and grant a new trial on exceptions, or for insufficient evidence or for excessive damages. Code, § 288. The term "exceptions" as here used has a technical meaning, and it implies that some error of law has been committed by the judge in the progress of the trial, either in some ruling during the trial, or in the charge to the jury. The other two grounds involve errors of fact, to wit, as matter of fact that the verdict is not supported by the evidence, or that the damages are excessive and beyond the testimony. And under these provisions of the code, it is true that when a party desires to move for a new trial upon the ground of an error of law in the judge, or upon either of the above grounds involving the facts, he must make the motion upon the minutes

at the term of the trial, or if upon exceptions as to the law, at least at the next term by permission of the judge who heard the case.

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\*Now the question here is, has this motion been made either upon exceptions involving errors of law occurring at the trial, or for insufficient evidence, or for excessive damages? If so, the argument of the appellants is conclusive, as it is apparent that the motion has not been made either upon the minutes at the term of the trial, or upon exceptions at the next succeeding term under an order of the trial judge made for that purpose. It is admitted that the motion below was made at the third term after the trial term and without any previous notice of such motion given at the trial term, either upon the minutes or otherwise.

We do not look upon the motion below as being made upon either of the grounds mentioned in section 288 of the code. The plaintiff did not complain of the charge of the judge, or of any ruling made by him during the progress of the trial. Nor does he complain that the verdict involves an error of fact. He complains that it is not such a verdict as can be enforced, that it is a void verdict as without meaning, that it is a nullity, in substance that there has been a mistrial; and his motion was not that a verdict which, if left standing, would be valid and could be enforced, shall be set aside and a new trial had, but that that which appears to be a verdict shall be declared no verdict, because without meaning, and be wiped out, expunged from the record, so that the case can be replaced upon the calendar for trial, there having been in fact no trial which has resulted in a real verdict. If this be the conclusion to be placed upon the verdict, then the sections of the code above referred to, could not apply, and they would interpose no obstacle in the way of the plaintiffs' motion.

The next question is: Is the verdict one of the character above described? Is it so vague and uncertain as on that account to be void? This court, on the previous appeal in this case, when the question was whether the judgment which had been entered, was in conformity with the verdict, did not undertake to interpret the exact meaning of the verdict. It only determined that the jury could not have intended to give to the plaintiff all of the patterns on the premises at Eason's Foundry on May 11th, 1879, and the

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judgment having been entered for \*all, the court held it did not conform to the verdict and was therefore erroneous. But the difficulty in the case is as to the identity of the patterns found for the plaintiffs, and whether, in the absence of identification by the verdict, any judgment can be entered.

In the case of *Robbins v. Slatterly, MS.*

Dec., No. 712, filed April 15th, 1879, which was an action of this kind, this court held that in such actions the verdict and judgment must be in the alternative: that is to say, for the possession of the property, or for its value in case such possession can not be had, and that if the property can not be had for want of identity, a verdict for the alternative in value cannot be sustained. Now in the case before the court the verdict has found no designated property in the plaintiff. There is a total want of identification as to the particular patterns found. There is nothing in the verdict by which it could be ascertained what patterns belonged to the plaintiffs, and consequently nothing by which the judgment for the recovery of possession could be entered. Such being the case, the verdict is in fact nothing more than a verdict for the value, which is in conflict with *Robbins v. Slatterly*, supra, and therefore a void verdict.

It is the judgment of this court, that the order below be affirmed.

### 18 S. C. 386

#### GRAVES v. SPOON.

(April Term, 1882.)

1. A decree different in its result from what the Circuit judge intended it to be, reversed. Cothran, A. A. J., dissenting.

[2. *Executors and Administrators* ⇨ 308.]

The claims of creditors of an estate are superior to the claims of distributees, and payments to the latter to the prejudice of the former are justifiable only where the administrator, after a close observance of his prescribed duty, makes such payments in ignorance of outstanding demands, and with assets then of sufficient value to pay all debts. Rules for proper administration stated.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1263; Dec. Dig. ⇨ 308.]

Before Aldrich, J., Laurens, September, 1881.

At the hearing of this appeal, the seats of the Chief Justice and Mr. Justice McGowan,

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who had been of counsel in the court \*below, were occupied by two of the Circuit judges, Hons. J. H. Hudson and J. S. Cothran.

This action was commenced in 1866 or 1867, in the Court of Equity for Laurens, for an account by the principal defendants of their administration of the estate of their intestate, Joseph F. Graves, who died intestate in 1859. The original pleadings having been lost and no copies preserved, substituted pleadings were served and filed in October, 1880.

The appeal was from the following decree:

This is an old case, commenced in the Court of Equity. The papers were lost, and the action was renewed by complaint and answer. The case was referred to the

master, Mr. Barksdale, who made an elaborate report, which was heard on exceptions by his Honor Judge Hudson. The report was very carefully reviewed by the presiding judge, who laid down explicit rules by which the master was to be governed in making up his amended report. This decision was not appealed from, and it is therefore the law of the case. The report of the master, as amended by the directions of Judge Hudson, is now before me on exceptions.

I have considered the opinion of Judge Hudson, and, in my view, the master has carefully followed his instructions. It is supposed by the plaintiff's exceptions that the master has erred in allowing the charge made by the administrator for board, clothing and tuition. I do not think the decree intends to exclude these charges. The children were minors, with a good estate, and were certainly entitled to a support and such educational advantages as became their station in life. When the judge speaks of a separate account with each of the distributees, he does not mean they are not to be supported while the estate is under course of administration. The family is entitled to a support, whether the estate is solvent or insolvent. If it be solvent, the amount paid out for each distributee will be charged to his distributive share in the final settlement; but should it prove insolvent, as did this estate, then the maintenance of the family and the education of the children became a charge on the estate while the same was in

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due course of administration. Any other rule would throw the family on the cold charity of the world immediately upon the death of the intestate.

I do not mean to say the administrator can keep the estate in hand to support the family, but while he is calling in the debts and collecting the assets, any moneys expended for the support of the family are a legitimate charge on the estate. I do not think it was the intention of Judge Hudson to mulct the administrator when he directed the master that the proper rule was to open a separate account with each distributee and charge upon his share the amounts advanced for his benefit. In this case there can be no such account, for the estate is insolvent, and there is nothing to distribute. Hence, the master was compelled to charge these amounts in the general account, and make the administrator bear them. This was not the intention of the judge who heard the cause.

Nor do I think the administrator intended the maintenance and education of the children as a gratuity. He was under no obligation to confer this benefit, and at the death of the intestate it was supposed the estate was ample to pay the debts and leave a surplus for distribution. This estate shar-



ed in the losses common to all as one of the consequences of the war. Creditors and distributees must alike submit to the disappointment of these expectations.

It is ordered, adjudged and decreed, that all the exceptions be overruled, the report of the master confirmed and made the judgment of the court. It is further ordered, that the administrator do pay over to the master the amount proved to be due in his report, and interest thereon from the date when the balance was struck. It is further ordered, that the administrator turn over to the master the assets in his hands, as set forth and described in the schedule annexed to the report, and that the costs be paid out of the estate.

Defendants appealed upon the following exceptions:

1. That his Honor erred in confirming the report of the master filed on August 31st, 1881.

2. That his Honor erred in not decreeing that the \$4,785.68 found by the master as due from the administrators should be credited with the amount paid out by the administra-

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tors for \*the board, clothing and tuition for the heirs-at-law, who were minors, in the course of administering the estate of their intestate.

Messrs. Ball & Watts, Ferguson & Young, for appellants.

Messrs. James Farrow, W. L. Wait, contra.

April 27th, 1883. The opinion of the court was delivered by

Mr. Justice HUDSON. This is an action by Jacob S. Graves, one of the heirs-at-law of Joseph F. Graves, against John H. Spoon, as administrator of Joseph F. Graves' estate; Ann M. Boyd, as administratrix of the estate of W. W. Graves, deceased, who was joint administrator with John H. Spoon, and the representatives of the sureties on their administration bond, and the other heirs-at-law of Joseph F. Graves. The object of the action is to compel the said administrators and their sureties to account, and to effect a settlement and distribution of the said estate. The appeal is brought up by the said surviving administrator, John H. Spoon, and the legal representatives of the deceased co-administrator and sureties.

After great delay the cause was heard on Circuit at the February term, 1881, of the Circuit Court for Laurens, and on the 28th day of that month a decree was filed, wherein is set forth certain principles upon which the master was directed to state the accounts of the said administrators. In accordance with what he conceived to be the rules therein laid down, the master, after references held, and much testimony taken, stated the accounts and filed his report, in which he finds the sum of \$4,785.68½ in the hands of the ad-

ministrators, and due and owing by them September 21st, 1881. This balance he reports insufficient to pay the outstanding debts of the deceased, Joseph F. Graves. In ascertaining this balance he allowed the administrators no credit for payments made to the heirs by way of partial distribution of the estate, nor for moneys expended by them in maintaining the family of the deceased. He did, however, open separate accounts with the distributees, in which he did allow to the administrators credit for all sums which it

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was \*proved they paid to or expended for them in their support and maintenance. But the estate being insolvent, and there being nothing for distribution, the result of this mode of stating the accounts is, that the administrators have really received no credit for these disbursements.

Upon exceptions to this report, the cause was again heard on the Circuit, and the presiding judge, evidently misapprehending the manner in which the master had stated the accounts, and being led, by inadvertence or otherwise, to believe that full credit for these outlays for the family, had been given to the administrators by the master in his report, and holding in his decree that such credits ought to be allowed under the circumstances of the case, confirmed the master's report. In so doing he reached a result just the opposite to what he intended. From this decree of October 12th, 1881, the appeal is brought up in behalf of the administrators, who seek to correct this unintentional error of the Circuit judge, and to have this court to award to the defendants' administrators the credits which the master refused and which the Circuit judge intended to allow, but inadvertently denied to them by confirming the master's report. On the contrary, the plaintiff, and those defendants who are identified with him in interest, seek to uphold the accounts as stated by the master and confirmed by the Circuit judge, contending that the decree is correct in its result, notwithstanding he may have intended a different conclusion.

It is very clear that the decree of the Circuit judge is different in its result from what he intended it should be, and for this reason must be reversed unless there is found enough in the brief to satisfy this court that the master has correctly stated the accounts, and that the decree confirming the same should stand. A careful examination of the brief in connection with the argument of counsel, satisfies us that the real issue in the case was not pressed either before the master or the Circuit judge in such a way as to secure a direct judgment on the point.

Before the master, the chief inquiry seems to have been as to the amounts to be allowed as credits, rather than the mode and manner of stating the accounts so as to secure the allowance of those amounts as credits to the

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administrators. The estate being \*clearly insolvent, and there being no fund for distribution, the only mode in which credits can be made available to the administrators, is by allowing them in the general account. To open separate accounts with the distributees for the purpose of allowing the credits there, is of no benefit to the administrators; and this is the mode adopted by the master. The master supposed he was following strictly the directions laid down in the decree of February 28th, 1881. But that decree did not contemplate the insolvency of the estate, and prescribed rather the method of adjusting the accounts of a solvent estate where a fund is left for distribution after the payment of debts.

The questions which should have been raised and carefully investigated before the master and the Circuit court are, first, whether the administrators of this insolvent estate are entitled to have credit allowed them at all for any partial distribution of the estate in their hands to the heirs-at-law of Joseph F. Graves, and for any sums expended by them in the support and maintenance of the family of the deceased; and second, if so, to what amount. The last of these inquiries has been made and passed upon, but the first, which is of great delicacy and importance, seems not to have been raised directly, and has not been passed upon except in the reasoning of the Circuit judge, which is at variance with his conclusion.

The doctrine of the decree of October 12th, 1881, is at variance with the authorities, and in its broad, liberal and unqualified terms, cannot be sanctioned by this court. The rights of the creditors of a deceased are superior to the claims of heirs and distributees. The administrator of an insolvent estate, with full knowledge of the insolvency, will never be upheld in bestowing the assets upon distributees, and leaving debts unpaid; nor will he be justified in distributing the assets nor in expending them in educating and maintaining the family, whilst ignorant of the existence of debts, provided, he ought to have known of such. His first duty is to the creditor. He is bound to take notice of the existence of debts, and is required to exhaust all efforts to discover the creditor, and to comply fully with the requirements of the law regulating and prescribing his duty in this respect.

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\*By all proper diligence the executor or administrator must acquaint himself with the real condition of the estate before he begins to administer the assets. His duty is to gather in the assets, and to ascertain the number of creditors and the amount and the rank of their claims, before he undertakes to pay them. The payment of debts out of their legal order, the payment of legacies before creditors, the payment of family expens-

es for education and maintenance, partial or full distribution to the heirs in the face of outstanding debts, are all acts of devastavit, if thereby creditors are prejudiced. In respect to creditors, the administrator is held to the rule of strict accountability, and the exercise of the greatest diligence and the best of faith.

A diversion of assets to any of these purposes will be sustained by the courts, only when the administrator shows that in so doing he acted in good faith, and with a due regard to the rights of creditors. This he may show by establishing the fact that he had fully complied with the requirements of the law and the rules of diligence, and good faith in his efforts to ascertain the existence of debts, and made the payments after such effort and in ignorance of the existence of the creditors thereby prejudiced, or he may relieve himself of personal liability, by showing that when these payments were made he was in receipt of assets amply sufficient to pay all creditors, which assets have, however, by some unforeseen and unavoidable calamity, been diminished in value or rendered worthless. His justification must be established by clear proof of the best of faith, such proof as will entirely negative the charge of mal-administration or devastavit.

The rule prescribed by the courts of England on this subject is to be found in 2 Wms. Ex., §§ 1158 et seq. and 1531 et seq. The stringency of this English rule is somewhat relaxed by the courts of the States of our country, but in no State to such an extent as to relieve an administrator from the observance of a strict line of duty and a strict regard for the superior claims of creditors. *Uberrima fides* must attend all his acts of administration in addition to a full compliance with the letter and spirit of the written law. This rule of the American courts is to be found in 1 Story's Eq. Jur., § 90.

Now, in order to afford the appellants an

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opportunity to justify their expenditures in educating and maintaining the family of the deceased, and in making partial distribution to them or any of them, of the assets of the estate in compliance with the rule of good faith, diligence and observance of law which we have indicated, the case must go back to the Circuit Court for further inquiry. If the appellants establish before the master their right to the credit claimed, or to any credits, the same must be entered in the general account. Being unable to foresee or anticipate the circumstances under which the administrators made the payments for which they claim credit, but which are alleged by the plaintiff to amount to a devastavit, we have avoided the citation of decided cases, deeming it proper and best only to lay down in general terms the rule of accountability enforced against executors and administrators, and to leave to the court below to



apply the authority of appropriate decisions to the facts as they may be developed.

It is the judgment of this court that the judgment of the Circuit Court be reversed; that the accounts as stated by the master be re-opened, and that the case be remanded to the Circuit Court for inquiry into the right of the appellants to the credits claimed by them in the statement of their accounts, and for inquiry into such other matters and things in connection with said accounts as are not concluded heretofore in the course of this litigation.

Mr. Justice COTHRAN, dissenting. Being unable to concur in the opinion of the majority of the court, in this case, I propose to state briefly the grounds of my dissent. Fortunately for the administration of justice the reversal of the Circuit judge's decision by a bare majority of the appellate tribunal, is not attended, in this case, with any unsatisfactory consequences, for the reason that there is no difference between my brethren and myself as to the true rule of stating the accounts of an administrator, the main question involved here. It is only as to the application of the rule to the case under consideration, that a difference of opinion exists.

Owing to the inevitable fate of all the living, the principles of accounting have long since become fixed, and the true statement of such in this case is as they are laid down in

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"the horn books" \*of the law. The well-established principle of stare decisis, which so commends the system of English jurisprudence to the admiration of mankind, has caused the English judges to adhere to a Procrustean rule upon this subject, from which they have been unwilling to depart, and which is reiterated by Mr. Williams in his great work on Executors, Vol. II., § 1158 et seq.

Our own courts, availing themselves doubtless of the opportunity and of the right afforded by the establishment of the independence of the colonies, have wisely relaxed the strictness of the inflexible English rule. Mr. Story, at section 90 of his work on Equity Jurisprudence, after referring to the harsh rule of the English courts, says: "If this be a true description of the actual state of the law upon this subject, it would become an intolerable grievance if courts of equity should not be able under any circumstances to interfere in favor of executors and administrators, in order to prevent gross injustice. \* \* \* But to found a good title to such relief, it seems indispensable that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets; for if there has been any negligence or misconduct, that, perhaps, may induce a court of equity to withhold its assistance."

Tried by the English rule, where neither upon the score of inevitable accident, destruction by fire, loss by robbery, or the like, nor of reasonable confidence disappointed, nor of loss by any of the other means which afford an excuse to ordinary agents, and besides, in cases of loss without any negligence on their part, these fiduciaries would be found without remedy. But conceding to them all the advantages of the more liberal doctrine of our courts, does the case, as made, entitle them to relief? This is the true question.

The office of administrator is purely voluntary upon the part of him who assumes it. It implies willingness to assume and ability to discharge the duties of the trust. Judge Story says there should be "no negligence or misconduct," and this, I apprehend, should be made by the fiduciary to appear affirmatively—that is to say, the burden is upon him to show that he has been both diligent and faithful. These qualities are "indispensa-

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ble" \*in establishing "a good title to relief," says the learned commentator. Examined in the misty and uncertain light of the principal administrator's own testimony (for he was necessarily almost the only witness), and by the confused state of the records in the ordinary's office, which ought to have been made plain by him, where is the evidence of the "indispensable" qualities of diligence and fidelity in the administration of this estate? and is not the absence of these the most conclusive evidence of "negligence and misconduct"?

The intestate died nearly twenty-five years ago. Administration of his estate was promptly taken out, the personal property was sold, and there, so far as the primary duty of ascertaining and paying of the debts was concerned, the business of the administration seemed to end. Eight or ten years afterwards an effort was made to call them to account. The pursuit of them under great difficulties has been steadily kept up ever since, and through every court that had (rightly) jurisdiction of the subject matter. Pomeroy, § 690; recognized in *Lupo v. True*, 16 S. C. 586. The administrators chose their line of defense then, and they should be held to it now.

It was a stubborn denial of everything charged against them by the plaintiff. They denied that there was even such a person as their intestate—that they had received and converted his estate—in short, that they owed the plaintiff anything. Through many doublings they have been finally unearthed and now ask to be allowed to adopt another and totally inconsistent line of defense, and thus the game is to be turned loose for the questionable pleasure of another chase. For twenty-five years they had possession of this estate; for more than fifteen years, by means of a false and deceitful answer, have

they avoided accountability to those who are entitled to it, nor have they asked anywhere in the pleadings the privilege of resorting to another line of defense. They stated their defense upon a denial of all liability, and it has served them well, but to that should they be held.

It may be said, however, that this general denial is but the observation of counsel. To this it may well be replied, that parties to a cause speak only through their counsel, and that it was upon this observation, now

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found to be untrue, that the \*issue was made up which has been so long upon trial. Ordinary truthfulness, to say nothing of *uberima fides*, such as induces a court of justice to overlook the shortcomings of fiduciaries should have caused these defendants to come into court when requested so to do in 1866 or 1867, and to have said in substance at least: "We knew the intestate Joseph F. Graves; he had an estate; we sold it and are indebted. We attempted to administer it according to law; his orphan children were hungry and we fed them; they were naked and we clothed them. The assets of the estate were more than sufficient to pay all the debts as was ascertained by us in the manner prescribed by law, but a great revolution has swept over the country, destroying values and wrecking this in common with other estates, and we pray you have us excused."

If they had done this, which I understand to be the requirement of the law as liberalized, I would most cheerfully concur in the main opinion in this case; but in the absence of this, and in the face of the negligence and misconduct of these fiduciaries, I am at a loss to perceive how any distinction can hereafter be made between trustees who act in good faith and those in whose conduct this "indispensable" quality is so conspicuously absent.

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# WITHERSPOON v. WATTS.

(April Term, 1882.)

## [1. *Executors and Administrators* ⚭125.]

Circuit decree charging only one of two executors with funds of the estate received by the executor charged, sustained.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 508-522; Dec. Dig. ⚭125.]

## [2. *Executors and Administrators* ⚭35.]

Executors will not be removed from office, except where guilty of willful misconduct, waste or improper disposition of the assets.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 245; Dec. Dig. ⚭35.]

## [3. *Dower* ⚭91; *Wills* ⚭802.]

A widow having renounced all interest under her husband's will and elected to take dower,

the dower is not primarily chargeable upon the property given to the widow by the will, but must be laid off in each of the several tracts of land; or if money be assessed in lieu of dower, the assessment must be paid by the devisees of the land, or out of the proceeds of their sale.

[Ed. Note.—Cited in *Williamson v. Gasque*, 24 S. C. 104; *Elder v. McIntosh*, 88 S. C. 290, 70 S. E. 807.

For other cases, see *Dower*, Cent. Dig. § 332; Dec. Dig. ⚭91; *Wills*, Cent. Dig. § 2097; Dec. Dig. ⚭802.]

## [4. *Wills* ⚭821.]

Funds of the residuum used by the executors in paying off the assessment for such dower, must be replaced by the devisees of the land or out of the proceeds of sale of their land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2114-2119; Dec. Dig. ⚭821.]

## [5. *Wills* ⚭750.]

A bequest of money afterwards described by the testator as property "specifically disposed of," is a specific legacy.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1936; Dec. Dig. ⚭750.]

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## [6. *Adverse Possession* ⚭114.]

\*A finding of fact by the Circuit judge as to a claim of land by adverse possession, sustained.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ⚭114.]

## [7. *Adverse Possession* ⚭50.]

Where a testator disposed of a tract of land to be held in trust for A., for life, and by the same clause forgave A. a large indebtedness, where A. accepted this release and was a party to two actions in which this tract was claimed to be the property of testator, and the dower claim of the widow therein was provided for out of other property of the testator, A. will be held to an election and cannot afterwards claim this land by adverse possession under a parol gift from testator.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 255-261; Dec. Dig. ⚭50.]

## [8. *Wills* ⚭802.]

Where a widow renounces her interest in an estate under a will, property left to her for life with remainder over, vests instantly and absolutely in the remaindermen, and property given absolutely to the widow becomes assets in the hands of the executors undisposed of by the will.

[Ed. Note.—Cited in *Key v. Weathersbee*, 43 S. C. 425, 21 S. E. 324, 49 Am. St. Rep. 846.

For other cases, see *Wills*, Cent. Dig. §§ 2091-2098; Dec. Dig. ⚭802.]

## [9. *Wills* ⚭820.]

Where land is purchased with the proceeds of property specifically devised and is then turned over to a legatee in payment of his specific legacy, the amount so used must be refunded out of the estate if sufficient, or else out of the purchased land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2114-2119, 2121; Dec. Dig. ⚭820.]

Before Kershaw, J., Laurens, November, 1880.

Hon. A. P. Aldrich, of the Second Judicial Circuit, sat at the hearing of this appeal in the stead of the Chief Justice, who had been of counsel in the cause.

Action v. J. H. Witherspoon and Phoebe



G., his wife, against James W. Watts and William Anderson, as executors of the will of John D. Williams, deceased, John G. Williams, John D. Garlington, W. A. W. Anderson and J. D. Watts, commenced December 27th, 1879.

The case was referred to a referee, who took the testimony, and reported the same, together with a statement of the accounts of the executors, to the Circuit Court. The exceptions to this report sufficiently indicate the items and omissions objected to. They were as follows:

Plaintiff's exceptions: 1. Because said referee should have reported that the \$2,-192.00 paid out on December 29th, 1879, by executors for land, was from funds really belonging to Mrs. Phoebe Y. Witherspoon and John D. Garlington; that the land should have been transferred to said devisees, or charged for their benefit with the repayment to them of said amount and interest, and that said referee should have put said amount in Schedule B. as a payment made by said executors to said devisees.

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\*2. In overruling each or any of plaintiff's exceptions which were overruled to introduction of testimony.

3. In allowing each or any of defendant's exceptions, which were allowed, to the introduction of testimony offered by plaintiffs.

4. In allowing each or any of the following contested items of executors' accounts as mentioned in report of referee, to wit, the third item of \$506.61; the fourth item of \$1,323.45, and the seventh item of \$500.00.

5. In allowing commissions to the executors on the amounts received by them for rents of real estate.

6. In not reporting that the accounting herein was not final, but that a large amount of choses in action and personal property of the estate were still on hand, and should be accounted for hereafter, and that the accounting of the executors on the copartnership with the estate as to Homestead Mill place and White Plains place was still open for a further accounting.

Executors' exceptions: 1. Because the referee fails to report that there was a balance against J. Y. Watts, as surviving partner of the testator, John D. Williams, in a farming contract on the White Plains place, of \$1,176.74, for the year 1874, together with the items of balance on the same contract, for 1873, of \$1,776.50, all of which counsel for executors claimed should have been excluded from their general account as executors.

2. Because the referee omitted to report the testimony upon which he reported vouchers for payment on the John G. Williams' note, \$172.20, or to give the law by which he was led to his conclusions.

3. Because the referee, in his statement of account, erred in not stating his findings

of fact and conclusions of law therein separately.

4. Because the referee erred in charging the items of \$1,776.50 and \$1,176.74, the balance for the years 1873 and 1874 respectively, against J. W. Watts, the surviving partner of the testator, John D. Williams, against the executors, when, it is respectfully submitted, these items, amounting to \$2,953.24, constitute simply an indebtedness against J. W. Watts individually, but that this amount should, under no circumstances, have been

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charged \*against William Anderson, as executor, either jointly with J. W. Watts or otherwise.

5. Because the referee erred in charging the defendants, the executors, with interest per annual balance, either simple or compound, in his statement of accounts against them.

6. Because the referee erred in not continuing the reference until the creditors of John D. Williams could be called in to establish their claims.

#### Circuit Decree.

On June 25th, 1870, John D. Williams, of Laurens county, died, leaving in force his last will and testament, in which James W. Watts and William Anderson, the defendants, were named as executors, and afterwards proved the will and qualified, as will appear by reference to a copy of said will annexed to the complaint in this action, the date whereof is April 25th, 1870.

The first clause of the will directs that the debts be paid as soon as practicable.

The second clause is in these words: "I will and bequeath to my beloved Wife, Anna C. Williams, for her sole and separate use and benefit during her natural life, the house and lot in the Village of Laurens, on which I now reside, containing one hundred and twenty-two and one-half acres; also a small wood-land tract of land, on the right side of the Greenville road, adjoining lands of John M. Franks and containing about forty-eight acres; also all my silver plate, dining-room furniture and household and kitchen furniture; all three of my carriages and a pair of horses, two good mules and my riding Mare Fannie, with such other stock as she may desire to keep on the place, and such other provisions as she and the family may need, and provender for the stock on hand, as may be sufficient for their necessities for the time, and hereby give her the power and privilege of disposing at her death, of any of the plate or furniture above mentioned, to either of my daughters or grandson John D. Garlington as she may see fit, they accounting to my estate for the same as an advancement, the balance of the above Estate hereby given to her, at her death to revert to my estate for distribution as hereinafter described."

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\*In the third clause testator recites that "having heretofore made large advancements to my son John G. Williams, which with the portion of my Estate which I now give to him in this clause, I consider to be a fair proportion thereof: I give and bequeath to my Executors hereinafter named, for his use and benefit during his natural life, my Spring Grove tract of land, including the land which I have added thereto, all lying on the west side of Mudlick Creek and supposed to contain about fifteen hundred acres, together with all the property which was on the said place when he took charge of the same; to remain in his possession and enjoyment unless efforts be made to subject the same to the payment of his debts and liabilities, and in this event to be taken charge of by my Executors to prevent and protect the same from such liabilities, and at his death to be equally divided between such child or children as he may leave surviving him at his death, or should all his children die before obtaining the age of twenty-one years, then to revert to my Estate for division as the residue of my Estate is hereafter directed, and with the provision that no more of the wood land is to be cleared up for cultivation, hereby directing my Executors hereafter named, immediately after my death to deliver and hand over to my said Son all the notes I hold on him and also all the accounts I have against him previous to 1st January, 1869, amounting to several thousand dollars in lieu of his interest in the balance of my Estate."

By the fourth clause of the will testator gave his daughters, Lucy and Phoebe, and to his grandson, John D. Garlington, his White Plains place (reserving the burial ground) and all the property belonging to said place at his death, to be kept together and managed for their maintenance, support and education, until the said grandson came of age, or if he should die before that time, until either of his said daughters should marry; then if either his grandson or either of his daughters desired it, a division of the property bequeathed in that clause might be made by sale or otherwise, as may be most desirable. And should either of his said daughters or grandson die, leaving no children or child living at his or her death, then the share of such decedent should go to the survivor or survivors.

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\*In the fifth clause of the will testator gave to his grandson, John D. Garlington, all the books that belonged to his father.

In the sixth clause he gave to Dr. Wm. Anderson (the defendant), in trust for the use and benefit of his son, Washington A. Williams Anderson, fifteen hundred dollars, and in case of his death before attaining the age of twenty-one years, then to his mother,

Elizabeth L. Anderson, and her children then surviving.

In the seventh clause of his will he gave to J. Washington Watts (the defendant), in trust for testator's namesake, the youngest son of said Watts, fifteen hundred dollars, but if he should die before reaching the age of twenty-one years, then the same to his said father, if he be then living, and if he be then dead, the same to be divided among the other children of the said J. Washington Watts.

The eighth clause of the will is in these words in part: "It is my desire to keep my Homestead in the Village of Laurens in my family; it is therefore my will and desire, after the death of my kind wife, that either of my daughters or my grandson John D. Garlington, take the same at a fair valuation, and if neither of these desire it, then it, together with all the other part of her said life-estate, be sold and divided among my said daughters and said grandson; the child or children of my said daughters or said grandson to represent their parent if the parent be dead."

By the ninth clause testator directs that the plantation which he purchased from the Simpsons, and his interest in the lot upon which he had erected a mill, be held by the executors for the benefit of his wife and daughters and grandson John D. Garlington, to assist in their maintenance and support, and that the arrangement he had made with his friend and relative, Dr. William Anderson, being similar to the one which he had entered into with his nephew, James W. Watts, in reference to the White Plains place, be continued in force until the first day of January, 1875, and as long after as might be desirable or thought best by his executors; and when thought best to make a change, he gave to his daughters and grandson the same privilege to take the same at a valuation as in the case of the homestead; and should neither of them desire it, then that

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it be sold and \*divided as in case of the residue of his estate in the eleventh clause of the will.

In the tenth clause, testator directed the Milton mill to be sold and that the proceeds of the sale be applied to the satisfaction of a note held by him on one Thomas Crowder, deceased, and Thomas H. Crowder, after first crediting the same with one thousand dollars. The balance of said proceeds to be paid, three-fourths thereof to the children of Thomas Crowder, and the remainder to Thomas H. Crowder.

The eleventh clause is in these words (as far as necessary to transcribe the same), to wit: "Having specifically disposed as I desire, I will and bequeath all the rest and residue of my estate such part thereof as I have not otherwise directed, to be sold by my executors at their discretion and the pro-



ceeds thereof to be divided as follows: One-fourth part to Col. James W. Watts, and Dr. William Anderson, in trust for the sole and separate use of my said wife during her natural life, with the power on her part of disposing of the same at her death to such persons as she may see fit; and the remaining three-fourths to be equally divided between my two daughters and grandson in equal portions." Then follow limitations over in case of the death of either of them, without leaving issue surviving, first to the survivors with limitations over, in case of the death of the last survivor without leaving issue.

In the twelfth clause of the will, testator expresses the desire that his daughters and grandson remain with his wife as long as they should see fit, and while so remaining to contribute out of their several estates their proportion of the necessary expenses of the household, and, should it become necessary to repair or rebuild any of the houses on the home place or to supply the same with stock necessary for the use of the family, the same was directed to be done by the executors out of the estate.

The thirteenth clause referred to the agreement with James W. Watts, with regard to the cultivation and management of White Plains, which testator desired to be continued until its expiration and longer if agreeable to the parties. The fourteenth clause directs how his estate should be disposed, in case of the failure of all the previous limitations.

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The fifteenth clause \*directs that the shares of his estate which he has given to his daughters, should be held by his executors in trust for their sole and separate use and benefit. The sixteenth clause is practically revoked by the codicil. The last clause names his executors, and desires them to be well compensated for their services, if their legal commissions are not sufficient; desires his friends, J. Wister and William D. Simpson, as his counsel in all matters pertaining to his estate.

Testator also left of force a codicil to said will, dated June 11th, 1870, wherein he refers to the twelfth clause of his will directing his daughters and grandson to contribute out of their estates for the necessary expenditures of the household and the other directions therein in respect of the same, and directs as follows: "Now in order to make some ample provision for the maintenance of the home place and for the support and comfort of my said wife, daughters and grandson, I further will and desire my executors to supply my said home place during the life of my said wife from my estate, with all necessary provisions, to be taken from any of my plantations or my mill, and likewise to furnish all necessary stock for the place; to keep the roads, fences and houses in good order, rebuilding the same if at any time it may become necessary."

He proceeds to make the directions contained in the sixteenth clause of the will and directs that the mill be disposed of as directed in the ninth clause of the will, and that Dr. William Anderson take control of and manage the mill and be allowed whatever is right for his services. Lastly, he directs the disinterment and removal of the remains of the members of the family, from the family grave-yard at White Plains, and their reinterment at Laurens Village Cemetery, and requests his friend Dr. John W. Simpson to take charge of, superintend and direct the same; charging the estate with all the expenses attending it, including proper compensation for himself, and directing the executors to pay the same.

Testator left surviving him a widow, Anna E. Williams; three children, Phœbe, wife of James H. Witherspoon (the plaintiff), Lucy Williams and John G. Williams, and a grandson, John D. Garlington, who were his heirs-

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at-law. Some time in 1871 \*Lucy Williams died unmarried and intestate and John G. Williams, the defendant herein, administered on her estate.

Some time prior to April 25th, 1873, Anna E. Williams, the widow, renounced her interests under the will of her husband, and elected to take dower in the lands of the estate, and instituted proceedings to recover the same in the Probate Court of Laurens county. Under these proceedings the sum of twelve thousand four hundred dollars was assessed as the value of her dower in all the lands of her said husband, whereof he died seized, and a decree of the court in said cause directed the executors to pay her the said sum in lieu and bar of her said dower.

September 26th, 1873, the said executors commenced an action in this court against the said Anna E. Williams, John G. Williams, Phœbe Y. Witherspoon and John D. Garlington, setting forth the facts herein before stated; that the election of the widow to take dower, and the death of the daughter Lucy, had introduced important changes into the estate, giving rise to important questions as to the construction of the will and their duties thereunder, among which were, as to what portion of the estate should be sold to meet the dower assessment? To what extent Spring Grove should be subjected to the payment of dower? And what disposition should be made of the interests under the will renounced by the widow, upon which points they desired the instructions of the court.

In that action a decree was rendered by consent, bearing date October 27th, 1873, directing an appraisement of such portion of the personal property which had been bequeathed to his widow by said testator, as Phœbe Y. Witherspoon and John D. Garlington desired to take at a valuation, and the delivery of the same to them respectively upon their several receipts. That the execu-

tors have leave to sell at their discretion the balance of said personal property and also the homestead, the small woodland lot devised with it, and the mill tract near the village of Laurens, "for the purpose of meeting the dower of the said Anna E. Williams, the debts and pecuniary legacies, &c., prayed for in the complaint." It was further ordered "that the questions in the pleadings as

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to the proper construction of the will, as to the rights of the parties growing out of the change in scheme, on account of the election of said Anna E. Williams to take dower, and the renunciation of her interest under said will, be reserved for the further adjudication and determination of this court, and all other equities reserved."

It does not appear that any further order was made in that cause. Under this decree the executors have sold all the lands, &c., therein authorized to be sold, except two tracts, collectively called the Mill tract, containing six hundred and forty acres, which remain unsold. They have paid the money decreed to be paid for the dower. They have had possession of the real estate described in the will, except Spring Grove, which has been in the possession of John G. Williams, and have received the rents and profits arising therefrom, or occupied them as directed by the will; but in regard to White Plains, which was rented by Phoebe Y. Witherspoon under an agreement with the executors, with the personal property thereon, from January 1st, 1876, to December, 25th, 1879, the condition is peculiar. The rent for the year 1876 was fixed at twenty-five bales of cotton, weighing four hundred pounds each; twelve and a half bales to be delivered on or before December 25th, 1876, at Clinton or Chappels depot as the executors might prefer, and the other twelve and a half bales to be receipted for by Mrs. Witherspoon as her interest under the will in the proceeds of the crop of said plantation. The said agreement was to continue after 1876, to December 25th, 1879, at the election of Mrs. Witherspoon. She has continued in possession up to the present time.

There are demands still outstanding against the estate, two in number, one of which is a suit upon a sheriff's bond upon which the testator was surety, and both are in litigation. The amount of these demands is claimed to be large, but as yet unknown.

John D. Garlington became of age October 25th, 1879.

On September 1st, 1875, John G. Williams commenced an action against the executors, setting up a claim to Spring Grove under an alleged parol gift from his father, John D. Williams, and praying that he be decreed entitled to the same, free from the trust and limitations of the will, but said action has never been brought to a hearing.

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\*The present action alleges many derelictions

and claims many liabilities against the executors, and prays that they may be required to account, and to pay the plaintiff, Phoebe, the amount due her; that the property remaining be divided under the will or sold under the direction of the court, and the proceeds distributed; that if, for the payment of debts, it be necessary that legacies and devises abate, that all abate ratably; that the executors be enjoined from further disposing of the property of the estate or receiving money due the same (alleging their insolvency), and that they pay the same into court and turn over to the custody of the court the amounts to be disbursed under the order thereof; that the legatees and devisees account for what they have each received; that all the defendants be enjoined, during the pendency of this suit, from receiving or disbursing moneys of the estate, or disposing of the property thereof, or interfering with or bringing action, or taking any proceeding against the plaintiffs, to oust them of the possession of the White Plains plantation, or the personal property received by them under their lease thereof, and for further relief.

The executors, in their answer, take issue with the plaintiffs in regard to all allegations affecting their liability, or allege circumstances in avoidance of the same. John G. Williams sets up his title to Spring Grove, as obtained under a parol gift from the testator, and adverse possession thereunder for more than ten years before his death, and claims the protection of the statute of limitations as to the personalty upon the place and the legacy of his indebtedness to his father. He also claims, as administrator of Lucy Williams, whatever may be found to be due him in that capacity. The answer of John D. Garlington raises no question with the executors and needs not to be further recited.

An order was entered in the cause at February term, 1880, enjoining the executors from selling any portion of the estate and directing the status of the estate to be maintained until the further order of the court, and directing a reference "to take testimony upon all issues in this case" and to report the same, and to state the accounts of the executors and the sums received by each legatee or devisee, with leave to report any special matter, and granting plaintiffs leave to

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amend by making the infant legatees, Washington A. Williams Anderson and John D. Williams Watts, parties defendant. The referee has stated the accounts and reported the testimony on the other branches of the case. There were many exceptions to the report, and a number of exceptions to testimony admitted or rejected. In this condition the cause is before me for determination.

The exceptions to the accounts of the executors will first be considered. The referee has given no reason in his report for his



decisions upon the questionable points, and this is made the ground of one of the exceptions. Certainly the law requires a judicial officer to give his reasons for his decisions, and the court can obtain but little aid from a referee upon such points unless this is done, but the report will not in this case be returned on this account.

The first and fourth exceptions, on the part of the executors, object that they were jointly charged with balances found due by J. W. Watts on the copartnership between him and the estate, which was continued, in pursuance of the provisions of the will, for some years after the death of the testator. I can see no propriety in charging Dr. Anderson, the co-executor, with this liability. The rule is, "that the actual possession and use by one of two executors, is not in law the possession and use of both, so as to attach any liability upon both." 1 Wms. Ex. "And an executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor." Id. 1292. These principles are fully recognized in our own cases. O'Neill v. Herbert, Dudley Eq. 30; Clarke v. Jenkins, 3 Rich. Eq. 319, &c. There are in this case no special circumstances to vary the rule. The decision of the referee in regard to the balance due by J. W. Watts, on the contract in relation to White Plains, for the year 1873, amounting to \$1,776.50, and that for the year 1874, amounting to \$1,176.74, whereby these balances were charged as a liability against both executors, is reversed, and it is adjudged that the same are chargeable only against J. W. Watts.

The second exception of the executors objects to the rejection by the referee, without reasons assigned, of a due bill paid by the executors to Hugh Leaman. It was given

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by John D. \*Williams to John G. Williams, dated February 13th, 1861, and is not negotiable upon its face. It was entered in the returns as a payment to John G. Williams on a note. The payment to Leaman, or his authority to receive the money, is not questioned by John G. Williams. It should, therefore, have been allowed, unless the payment to John G. Williams would have been an error.

Testator bequeathed that all John G. Williams' notes and accounts be given up to him, "in lieu of all his interest" in the estate. No reference is made in the will to this note or any indebtedness from testator to John G. Williams, and nothing is said therein, whence it might be supposed to be the intention that this legacy should operate as a satisfaction of any demand of this nature held against the testator by John G. Williams. When the testator takes no notice of the debt or leaves the intention doubtful, the legacy will not be held to extinguish the debt. 2 Story Eq. 1123. Slight circumstances will be laid hold of to avoid the construction, that

a legacy is to operate as satisfaction of a debt. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529. It is said to be "an absurd rule" that a legacy shall be intended as satisfaction of a debt. *Barclay v. Wainwright*, 3 Ves. 466. A negotiable note will not be held satisfied by a legacy. *Carr v. Eastbrooke*, 3 Ves. 561. In *Chancey's Case*, 1 P. Wms. 408, the testator had directed that "all his debts and legacies be paid," and it was held this took the case out of the rule.

So, when the legacy is given *diverso intuitu*, some particular reason being expressed as the ground of the bequest. 2 Wms. Ex. 932. As in this case, where the reason for the legacy is stated evidently a gratuity in lieu of his interest in the estate as heir-at-law, distributee, &c., because he had been advanced and would be made equal with his co-heirs, &c., by the provision made for him in the will. That assumed equality would be destroyed if his rights as a creditor were taken away. These principles are also sustained by our own cases. It is held in *Owens v. Simpson*, 5 Rich. Eq. 420, that an express provision to pay debts would take the case out of the rule. Here there is an express direction to pay debts.

This exception is, therefore, sustained, and

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it is adjudged that the executors be allowed credit in their accounts for said payment.

3. The exceptions of plaintiffs, as to the items named in their fourth exception, is overruled. The testimony fully sustains the propriety of allowing these as credits to the executors.

4. The first exception of the plaintiffs claims that the funds used by the executors (\$2,191) to purchase a tract of land, which was conveyed by Mrs. Crews to J. W. Watts, as trustee for John D. W. Watts, as an investment of the legacy bequeathed to him in the seventh clause of the will, belonged to Mrs. Witherspoon and John D. Garlington, and that the land so purchased should be held for them, or at least charged in their favor to that amount, and that the referee should have so reported. The testimony established that \$800 of that sum was derived from a sale of a portion of the lands, which are collectively termed the Mill tract, disposed of by the ninth clause of the will, and also in part referred to in the codicil, and in the sixteenth clause of the will, revoked by the codicil.

In order to determine the question here presented, it is necessary to settle the order in which the legacies and devises stand towards each other, and from what sources the debts and pecuniary legacies are to be paid, and out of what property or fund the widow's dower should have been paid, and, indeed all other questions respecting the administration and settlement of the estate. This decree is growing to such length that these important questions must be briefly

determined. In the first place, it is adjudged that the dower is to be charged against the several parcels of land according to their respective values, and to be borne by devisees of lands devised, or paid out of the purchase-money of those parcels sold or to be sold, so far as such parcels may be chargeable with the same.

In *Cunningham v. Shannon*, 4 Rich. Eq. 140, Chancellor Dargan says: "Dower is a right which, inchoate during coverture, becomes absolutely vested in the wife, as an estate, on the death of her husband, and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land, upon which the right of dower attaches, is presumed to be given

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subject to \*the legal estate, unless the contrary appears on the face of the will in express words or by the strongest kind of implication." This is the principle—that the land is devised subject to the dower. The assessment for dower must, therefore, be paid by the devisees of the land or their proceeds, when sold. Whatever funds may have been actually employed in paying off this assessment, must be placed by the devisees, or by the executors, out of the proceeds of land sold or to be sold, to the extent that they are liable to dower.

5. "In South Carolina, the whole estate is charged, by law, with the payment of debts; but in the absence of any special direction by the testator, certain rules have been adopted in the marshaling of assets, \* \* \* but a testator has the right to prescribe a law for the disposition of his estate, which is obligatory upon all claiming as volunteers. The inquiry always is, Has the testator expressed an intention to have his assets marshaled in a different manner from that prescribed by law? Does there appear from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant, not merely to charge the estate secondarily liable, but so to charge it as to exempt the estate primarily liable?"

This is the language of the late eminent Chancellor Dunkin, delivering the opinion of the Court of Equity Appeals in *Brown v. James*, 3 Strobb. Eq. 29. I have transcribed it here because in my opinion the testator has in this case clearly expressed an intention, and has prescribed a law, which will control the question as to what legacies are first to be resorted to for the payment of debts, upon the failure of assets undisposed of specifically, and otherwise primarily liable. Of course the general rule is that personal property not specifically bequeathed, is to be resorted to in the payment of debts, before specific legacies; and specific legacies, before real estate, devised.

ed under a general residuary clause are liable before a specific legacy. *Warley v. Warley*, Bailey Eq. 397; [*McMullin v. Brown*] 2 Hill Eq. 457.

In the first ten clauses of his will the testator here has devised and bequeathed the great bulk of his estate. I presume there will be no question that all those devises

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and bequests are specific, \*except the pecuniary legacies bequeathed in the sixth clause to Washington A. Williams Anderson, and in the seventh clause to John D. Williams Watts, or, more accurately, in trust for them respectively. Standing alone, they would certainly not be specific. But in the eleventh clause of the will, testator evidently classed them with the other legacies and bequests, and considered them all together as a specific portion of his estate, carried out and set apart for the persons and uses therein declared. It seems to me clear that the law of this will is that the property and assets, passing under the eleventh or residuary clause, is liable for the payment of debts before any resort is had to the legacies and devises set forth and contained in the previous clauses of the will, and it is so adjudged.

In the ninth clause of the will it said in regard to the property therein devised, that in case neither Mrs. Witherspoon nor John D. Garlington desired to take it at a valuation, "then to be sold, and in either case, the proceeds to be divided as in the case of the residue of my estate in the eleventh clause of this my last will and testament." This disposition is to be considered still as specific, though to be divided as directed in regard to the general residue.

It has occurred to me that some question might be raised as to whether the property given to the widow for life reverts directly to the remaindermen when she renounced the same, or reverted to the estate until the termination of her natural life. In *Avelyn v. Ward*, 1 Ves. 420, Lord Hardwicke decided the principle when he said, he knew of no case "of a remainder or conditional termination over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before conditional termination; but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place." In the *Touchstone* (452) it is said: "If one devise his land to another in fee-simple, fee-tail, for life or years, and the devisee after the death of the testator doth refuse and waive the estate devised to him, in this case, and by this means the devise is (as to him) void, and by the refusal of a particular estate, the remainder will be accelerated, and an intended remainder may be converted into an executory devise."

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\*So it is said by Mr. Jarman (in his treatise



tise on Wills, p. 702,) that "Where real or personal estate is given to a person for life with an ulterior gift to B., the gift to B. is absolutely vested, and takes effect in possession, whenever the prior gift ceases or fail." So in our own case of *Lesly v. Collier*, 3 Rich. Eq. 128, it is said, "If there be a legacy to one for life, with remainder to another, which remainder, on the death of the testator would be direct and vested and not contingent, and the person intended to be the tenant for life, dies in the life-time of the testator, \* \* \* it cannot be doubted that in such case, the legacy does not lapse, but on the death of the testator goes at once to him who, in the scheme of the legacy, was intended to be only a remainderman." According to these principles, the remaindermen, Mrs. Witherspoon and John D. Garlington, were entitled to the property devised and bequeathed to the widow for life, with remainder to them, from the time of her election to take dower, as if the devise had been directly to them; and it is so adjudged.

It will follow from what has been said, that the legacy to John D. W. Watts was not payable out of the proceeds of the lands devised to Mrs. Williams for life, and that to the extent to which that fund was so employed, compensation must be made to Mrs. Witherspoon and to John D. Garlington to the extent that their interests were affected by such payment. As already said, the property whose proceeds were applied in this manner was portion of that described and disposed of by the ninth clause of the will, and mentioned also in the codicil and in the sixteenth clause of the will. In the contingency that after the termination of the arrangement with Dr. Anderson, neither Mrs. Witherspoon nor John D. Garlington should desire to take the land at a valuation, the same was directed to be sold and the proceeds to be divided as in the case of the residue of the estate under the eleventh clause of the will.

By that clause it was directed that the rest and residue of the estate should be sold by the executors and the proceeds divided as follows: "One-fourth part to Col. James W. Watts and Dr. William Anderson, in trust for the sole and separate use of my said wife during her natural life, with the power on her part of disposing of the same to such persons as she may see fit, and the

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\*remaining three-fourths to be equally divided between my two daughters, Lucy and Phœbe, and grandson, John D. Garlington, so as to give my said daughters and grandson equal portions," &c., with a provision that on the death of either without leaving issue, the share of the party so dying to be divided among the survivors. There is here no disposition of the one-fourth bequeathed to the executors, in trust for Mrs. Williams, for

life, with the power in her of disposing of the same at her death. Upon her renunciation of the bequest this provision for her benefit was no longer operative, and the fund which was the subject of it became assets in the hands of the executors, undisposed of by the will, as in the case of a lapsed legacy. *Coffin v. Elliott*, 9 Rich. Eq. 244.

As to three-fourths of the sum paid by the executors, from the proceeds of the land sold, which were distributed under the ninth clause of the will, "as in case of the residue," the plaintiff, Mrs. Witherspoon, and the defendant, John D. Garlington, are entitled to be re-imbursed out of the estate, and if that be not sufficient, then out of the land purchased by the executors with that fund, in part, for John D. W. Watts. The payment was authorized by the decree which authorized the sale for that purpose, but the rights of the parties were reserved.

The proceeds of the Milton Mills tract, the legacy in favor of the Crowders having failed, fall into the residue.

The devisees are entitled to rents and profits, as to the property devised to her for life, from Mrs. Williams' renunciation. As to the Simpson lands, from the termination of the arrangement made by the testator with Dr. Wm. Anderson, directed by him to be continued until January 1st, 1875, and as long after as should be desirable. As to White Plains, from the termination of the like arrangement with James W. Watts, as provided in the thirteenth clause of the will. As to Spring Grove, from January 1st, 1871. The personal property on these two last named places having been blended with them, and specifically devised with them as a whole, are to be considered as a part thereof.

The pecuniary legatees are entitled to interest from the expiration of one year from the death of the testator.

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\*Mrs. Phœbe Y. Witherspoon and John D. Garlington are to be severally charged with the sums expended on their maintenance and education.

This brings me to the questions made by the answer of John G. Williams, involving the title to the Spring Grove plantation. I am unable to conclude that the claim is established. Testator placed his son John G. Williams in possession of Spring Grove in 1858, and he has remained continuously in possession ever since. Some time after he went into possession, and before the war of secession, testator proposed to his said son, to substitute White Plains, a more valuable place, for Spring Grove. Testator was desirous of getting his son away from Spring Grove on account of certain associations in that neighborhood which he deemed injurious to him. This proposition, though evidently advantageous to him, was rejected by John G.

On another occasion, about the year 1858, John G. Williams was about erecting a building for a residence on Spring Grove, and he and his father differed at to the site of the house. Testator closed the dispute by saying to his son, "It is your place and you can do as you please about it," and accordingly John's location was adopted. These buildings and other improvements were made, in part, by the assistance of the testator, who furnished workmen and some material. Fencing and other improvements were made on the place by John G., who used and cultivated it as if it were his own, from the time he entered into possession. In 1859 or 1860 testator said to J. F. Leak, a witness, who went to him to rent a portion of the land: "I have given all on the other side of Mudlick creek to my son John, and have nothing to do with it." On other occasions he spoke of Spring Grove as John's place, and said he had given it to him. John G. Williams also has in his possession the title-deeds and original grant of the Spring Grove lands, but it does not clearly appear when or how they came into his possession.

On the other hand, there is no evidence of the distinct assertion, by John G. Williams, of an independent and adverse title contrary to the will, until he filed his complaint, setting up his claim to such title, in September, 1875. He returned no real estate for taxation, and paid no taxes on Spring Grove un-

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til after \*testator's death. Neither of the executors, nor the members of the family, ever heard of such a claim on the part of John G. Williams, until after testator's death. The place was appraised as part of the estate of testator without objection. John G. Williams was a party to the two suits hereinbefore mentioned, that for dower, and the other for the sale of property to pay the dower, and in neither case did he deny that he held Spring Grove under the will, or assert any independent title thereto.

Considering all these circumstances in connection with the devise of Spring Grove by the testator, I find evidence that satisfies me that the possession of John G. Williams of the Spring Grove plantation, and other property connected with it, during the life-time of his father, was not adverse, but permissive, and understood to be in subordination to testator's title and his right to devise the same, and to define the intent and nature of the estate which it was the intention of both that he should take in the same.

Furthermore, I am satisfied that if the title had been such as now claimed by John G. Williams, the circumstances were such as to require him to elect between accepting the benefits of the will and claiming against it, renouncing those benefits. This election he made when he accepted the surrender and cancellation of his indebtedness to the estate under the provisions of the will,

which, with the other benefits derived from the estate, and the advancements previously made to him, his father considered, made him equal with the other children of the testator. The remaindermen under the devise of Spring Grove would be entirely disappointed, if he held that place by an independent title. "It has been holden for an established principle of equity, that when a testator, by his will, confers a bounty on one person, and makes a disposition in favor of another, prejudicial to the former, the person thus prejudiced shall not insist upon his old right, and at the same time enjoy the benefits conferred by the will." *Melchor v. Burger*, 1 Dev. & B. Eq. 634.

John G. Williams accepted the provision made for him in the will, with a full knowledge of the facts. He was a party to the proceedings for dower, and allowed the amount assessed for the same on Spring Grove to be paid or provided for out of the

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estate, \*and as a portion of the lands whereof testator died seized, and which he devised by his will. He was party to a suit, under which, with his consent, other lands devised by testator were sold to pay this dower, he having no interest whatever in such lands. I am compelled, under the circumstances, to conclude, that if this were a case of election, his conduct amounts to a deliberate choice to accept the provisions of the will as absolute and to abide by them. Having done this he cannot recant. *Buist v. Dawes*, 3 Rich. Eq. 301. It is there said that whenever an election has been made, either at law or in equity, it is a satisfaction of the alternative right, and that the party will not be allowed to retract, unless upon grounds of equity shown to exist, inherent in the circumstances. There are none such here.

The conclusions which have been announced, require that the dower be paid out of the specific lands upon which it was assessed, or out of their proceeds, if sold; that to the extent that other funds have been employed for that purpose, compensation be made by the owners of the land, or the persons entitled to the proceeds of land sold. That, if required for the payment of debts, the legacies and devises abate, after the exhaustion of property and assets not disposed of by the will in consequence of lapse or renunciation of the widow, resort shall first be had to the property and assets which fell into the residue of the estate and passed under the eleventh clause of the will. That, if necessary that the other devises and legacies abate, they contribute equally, pro rata, without any preference between them according to their value at the time when the right of possession or of payment accrued. That, if necessary, the residuary legatees contribute to the payment of the pecuniary legacies. That in all cases compensation shall be made according to the principles herein declared,



when funds have been applied contrary to these principles.

As to the demands of the plaintiffs that the executors be suspended from their office and the estate taken out of their hands, no case has been made which would authorize the court to interfere with the wishes of the testator in this respect.

I do not perceive the propriety of withholding the enjoyment of the property devised and bequeathed to the plaintiffs, Mrs.

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\*Witherspoon and John D. Garlington on account of the outstanding debts. There has been sufficient time to ascertain and discharge them.

It is therefore ordered and adjudged that the lands of the testator, John D. Williams, remaining unsold, which were directed to be sold by the decree of the court heretofore made for the purpose of paying the dower and the pecuniary legacies, be sold by the master on the first Monday in February next, or some convenient salesday thereafter, at public auction, after first duly advertising them on the terms following, to wit, one-third cash, the balance on a credit of one and two years, to be secured by the bond of the purchaser and a mortgage of the property, and that the same be sold in such convenient parcels as may best promote the interests of the estate. That the proceeds of said sale be held by the master subject to the provisions of the will and the provisions of this decree, to be paid out under the order of this court. That a writ of partition do issue to commissioners to be named therein, directing them to divide the White Plains plantation, with the personal property of the estate thereon belonging to the estate, into two equal parts, respect being had to the value thereof, and to assign and allot in severalty to the plaintiff, Phoebe Y. Witherspoon, and to John D. Garlington one equal share or moiety thereof, according to law and the usage and practice of this court. That the said property, notwithstanding such partition, stand charged in the hands of the said parties with the payment of the debts of the estate, to the extent to which the same may be liable to contribute according to the principle herein adjudged, and also liable for and charged with the payment of such sums as may be adjudged against the parties to whom the same is allotted, in order to adjust the accounts between the parties to this action. That it be referred to the master to restate the accounts of the executors, and between the parties, according to the requirements of this decree and the principles herein announced. That it be referred to the master to take testimony and report a scheme for the payment of the debts of the estate, ascertaining what funds are available therefor, and how much thereof is necessary to be set

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aside for \*that purpose, and that he report a

scheme for the final settlement of the estate in accordance with this decree.

It is ordered and adjudged that the exceptions to the rulings of the referee as to the admissibility of the testimony of A. Y. Miller and of C. M. Miller, and also as to the admissibility of the record marked Exhibit A., be sustained. The other exceptions to the evidence are overruled. It is to be remarked here that those exceptions were not specific, but so general as to throw upon the presiding judge the labor of searching through the whole case to ascertain what objections were included in the general terms employed. Nor were they made more specific in the argument; under these circumstances they might have been disregarded by the court.

It is ordered that the costs of this suit be paid by the executors out of the estate of the testator.

It is not intended that the executors should await further proceedings under this judgment before proceeding with their duties, but they are ordered to proceed to realize and collect the assets of the estate and to settle the debts and the legacies as far as they may have assets for that purpose, observing the order of such payments and the proper application of funds as adjudged herein. And all restraining orders heretofore issued, prohibiting such collections and payments, are hereby revoked and overruled, or to that extent modified.

From this decree all parties gave notice of appeal to the Supreme Court. The plaintiffs and John D. Garlington appealed upon exceptions alleging error:

1. In decreeing that the defendant executor, William Anderson, was not jointly with his co-executor chargeable with the items of \$1,776.50 and \$1,176.74 charged against him in the report of the referee.

2. In overruling plaintiffs' exceptions to the report of the referee as to allowance to executors of commissions on the rents received by them.

3. In not sustaining plaintiffs' exceptions to the referee's report, that the referee should have reported that the accounting herein was not final, but that a large amount of choses in action, as well as other property of the

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estate, were still in executors' hands, and should be accounted for hereafter, and that the accounting of the executors on their co-partnership with the estate as to the White Plains and Mill places was still open for a future accounting.

4. In not requiring the executors to give bond for the faithful discharge of their duties, or failing in that, in not putting the assets of said estate in the hands of a receiver.

5. In holding that by renunciation of devise by testator's widow, there was a lapse in the devise of one-fourth of the land mentioned in the ninth clause of the will; where-

as, it is respectfully submitted that his Honor should have held that by said renunciation, the whole thereof went to Phoebe Y. Witherspoon and John D. Garlington.

6. In not holding that the land purchased for John D. Williams Watts, was charged in favor of Phoebe Y. Witherspoon and John D. Garlington, with the sum of \$2,192 with interest from the 29th December, 1879.

7. In holding that, if necessary, the other devises and legacies abate, and that they contribute equally pro rata without any preference between them, according to their value at the time when the right of possession or of payment accrued.

8. In not holding that the specific devises and legacies in favor of Mrs. Phoebe Y. Witherspoon and John D. Garlington should first be paid in full before any payment could be made towards the pecuniary legacy in favor of Washington A. Williams Anderson and John D. Williams Watts.

9. In directing a sale of the mill tract of land before it was ascertained that any debts were owing by the estate, or that the funds in the hands of the executors were insufficient to pay the same.

10. In not decreeing that the value of the dower of testator's widow in the Spring Grove tract of land, together with the interest thereon from the time of testator's death, should be paid by John G. Williams to Phoebe Y. Witherspoon and John D. Garlington, and that the same was a lien or charge upon the life-estate of the said John G. Williams in said tract of land.

11. In not holding that the plaintiffs and John D. Garlington are entitled to all the

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rents in their hands specifically devised \*to them, and also of at least three-fourths of the rents of the real estate specifically devised to them under the will from the death of testator until the election by the widow to take dower in the real estate of testator.

12. In not holding that Phoebe Y. Witherspoon and John D. Garlington were entitled to rents of all the real estate not specifically devised until the actual sale of said real estate.

13. In not holding that Lucy has no estate under the testator's will as claimed by John G. Williams.

14. In not holding that the plaintiffs, Phoebe Witherspoon and John D. Garlington, were entitled to the ——— bales of cotton rents in hand of the executors at time of said decree.

John G. Williams' exceptions are as follows:

1. Because the evidence shows that this defendant had held Spring Grove adversely under parol gift from his father, John D. Williams, for more than two years prior to his death, and that defendant had not estopped himself from setting up this title. His Honor erred in not so finding.

2. Because this defendant is not bound to pay the assessment in lieu of dower in Spring Grove, but it should be paid by executors out of the estate devised and bequeathed to the widow, in lieu of which she elected to take dower. His Honor erred in not so finding.

3. Because the defendant, as administrator of the personal estate of Lucy Williams, deceased, is entitled to an account by the executors of the rents and profits from the estate of John D. Williams, deceased, from his death to hers, and to receive one-third thereof, after deducting the amount expended for her support. His Honor erred in not so finding.

4. Because this defendant is entitled, as administrator as aforesaid, to one-third of the proceeds of sale, and assignment of the homestead and personal property thereon, under the provisions of the second and eighth clauses of John D. Williams' will. His Honor erred in not so finding.

5. Because said decree is in other respects contrary to the law and evidence.

The infant defendants, by their guardian ad litem, and the executors, excepted to said decree:

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\*1. Because his Honor erred in holding that the sum of \$800 paid for the purchase of a tract of land for J. D. W. Watts, was derived from the proceeds of the sale of a portion of the lands of the testator known as the Mill tract, and sold to William Mills.

2. The defendant executors, and B. W. Ball, guardian ad litem, respectfully submit that his Honor erred in not holding that, the property devised to the life tenants, and conditionally to certain devisees, as referred to the residuary clause to pass thereunder, should abate with the property passing under the residuary clause.

Messrs. J. S. R. Thomson, James Farrow, for plaintiffs.

Mr. J. W. Ferguson, for J. D. Garlington.

Mr. J. J. Norton, for J. G. Williams.

Messrs. Holmes & Simpson, for executors.

Messrs. Ball & Watts, for executors, J. G. Williams, and the infant legatees.

May 12th, 1883. The opinion of the court was delivered by

Mr. Justice ALDRICH. I have been so continuously engaged since the hearing of this case and *Pope v. Mathews* [18 S. C. 444], that I have not had time to prepare the opinions. My circuits last year were the Eighth, First and Second, which are three of the largest in the State; the business had accumulated and the chambers business on my own circuit was more than usually pressing. As I think my first care is to my circuit duties, I have not had the time to devote to the extra call of the Supreme Court, before now.

The appeal from the exhaustive decree of Judge Kershaw, who heard the cause, pre-



sents several interesting questions, which he has so clearly stated and discussed that it will not be necessary to encumber this opinion by a statement of the same.

The first question to which the learned judge addresses himself, is the balance due

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by J. W. Watts, which is charged by the \*referee to both executors, Watts and Anderson. Undoubtedly the rule is, that one executor shall not be responsible for the assets which came into the hands of his co-executor. This is a question of fact, and the Circuit judge, after a full hearing and a mature consideration of the evidence and argument, has decided that it is properly chargeable only to the executor J. W. Watts. I see no reason to dissent from his conclusion of law and fact. See Circuit decree and authorities there cited.

From the evidence, it does appear that there are assets still in the hands of the executors, and there should be an accounting for the balance yet to be administered. It is so ordered.

Next, as to the appointment of a receiver. When a testator, in the most solemn act of his life, deliberately selects two of his friends to act as his executors, his wish is to be regarded, and the appointment he thus makes is not lightly to be set aside. He does not select them because of their ability to respond, but for their integrity and the trust and confidence he has in their friendship and honor. In this case, the testator well knew that these gentlemen were in moderate circumstances, if not insolvent; that the ample estate he was entrusting to their charge, if wasted, would be irrevocably lost and his bounty to his wife and children defeated. With these facts before him, he trusts them with his all, in full faith and confidence that these objects of his love and bounty will not be defrauded by his life-long, trusted friends. Are we to close our ears to this voice from the grave, and say, "You have made a mistake; your friends are not to be trusted," and thus condemn the judgment of the dead and cast a reproach upon the living? An executor may commit errors in his accounts, make mistakes in his construction of the will; these the court will correct, but will not remove the executor unless there is willful misconduct, waste, or improper disposition of the assets, as is said in *Wms. Ex.*, and approved in our own court, in *Stairley v. Rabe* [McMul. Eq. 22]. The decree of the presiding judge is sustained.

Testator died in 1870. In April, 1873, two years and ten months after, the widow, Mrs. Anna E. Williams, renounced her interest under the will, and elected to take her dower. The proceedings in dower were had in the Probate Court, and the executors directed to pay her \$12,400, the assessed value of the

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\*dower. The only question here is, How is

this dower to be assessed? Dower being that estate which the wife has in the lands of which her husband was seized during coverture, it seems to me there can be no question she is entitled to have it assessed in each particular tract of land of which the testator was seized. And if, instead of assigning her the land, one-sixth of the value thereof is admeasured to her, as in this case, it follows that each tract must contribute its proportion of value. For as, if the land be assigned, she takes one-third, for life, in land, that is the land from which it is admeasured, so, when money is assigned the land which the money represents is the land out of which the money is to be raised.

The moment the widow renounced her interest under the will she stood as much a stranger thereto as if she had not been mentioned in that instrument. She was entitled to her legal estate and entitled to it out of the land, no matter who is in possession, or how long and for what consideration, before his death, the husband had aliened it. It makes no difference what disposition the testator has made, he could not divest her of her legal estate, favored by the law, by giving her a legacy, and, when she renounced the legacy, the only way in which she could receive her dower was out of each separate tract of which he had been seized; or, if the admeasurement be in money, then the land representing the money is liable therefor. The Circuit judge is right in ordering, "the assessment for dower must, therefore, be paid by the devisees of the land or their proceeds, when sold. Whatever funds may have been actually employed in paying off this assessment, must be replaced by the devisees, or by the executors, out of the proceeds of land sold or to be sold, to the extent that they are liable to dower." And this is manifestly the rule, for if the dower be paid out of the general estate, it may absorb the assets and thus defeat creditors and specific legatees.

The next question is, Are the legacies in trust for Washington A. Williams Anderson and John D. Williams Watts general or specific? If the clause in the will in which these legacies are made stood alone, undoubtedly they would be general. But the will is the law of the case. Now, what did the tes-

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tator \*intend? There was no doubt in his mind that each of these boys would receive every cent of the bounty he intended for them, as evidence of his affection for the sons of his trusted friends, who had named them after his deceased son and himself. He was a man of ample means, had an estate that far exceeded his pecuniary liabilities. In disposing of it, he bequeathed the great bulk of all he possessed in the first ten clauses of his will. Then, to show the nature of these bequests, how he regarded and intended them, he calls them specific legacies, by using

this emphatic language, "having specifically disposed."

It is the province and the rule of the courts to give effect to every clause of a will, and always to carry out the intent of a testator, when that intent can be ascertained. That he intended them to have this pecuniary legacy, is clear; that he knew there was ample property to pay, is equally clear; but, to make his bounty and his meaning certain and unailing, he uses the significant expression, "specifically disposed." The testator was a man of large business capacity, an educated gentleman, a "pretty good lawyer," as he is described. Is it to be supposed that such a man used the expressive words, "specifically disposed," at random, without a purpose? I think not. He intended to make those legacies specific, and that the youths should be the recipients of his bounty, beyond a peradventure. The Circuit judge is herein sustained.

The last important question is as to the Spring Grove place. Did John G. Williams have title to this tract of land? The testimony is so full and the reasoning of the decree so conclusive, that it is unnecessary to enlarge on this topic. It is very clear the testator never regarded the land as the property of his son, and never intended it to be subject to his creditors. His wish to induce his son to remove from the place, his disposition of it in his will, is conclusive that he did not suppose he had given the land to John G., or that he had acquired title thereto. And John G. knew that as well as his father.

These are the main points in the case. The other questions are satisfactorily disposed of in the Circuit decree.

The appeal is dismissed.

#### 18 S. C. \*425

#### \*STATE SAVINGS BANK OF ANDERSON v. HARBIN.

(April Term, 1882.)

[*Homestead* ⚡175; *Marshaling Assets and Securities* ⚡3.]

Where a debtor mortgages his entire real estate, and subsequently a judgment is recovered against him, the judgment creditor has the equitable right to compel the mortgagor [mortgagee] to first exhaust so much of the debtor's land as embraces the homestead. *Fraser, A. A. J.*, dissenting.

[*Ed. Note.*—Cited in *Ex parte Carraway*, 28 S. C. 233, 235, 5 S. E. 597; *Bowen v. Barksdale*, 33 S. C. 142, 151, 11 S. E. 640; *Leake v. Anderson*, 43 S. C. 457, 21 S. E. 439; *People's Bank v. Brice*, 47 S. C. 137, 24 S. E. 1038; *M. S. Bailey & Sons v. Wood*, 71 S. C. 48, 30 S. E. 631.

For other cases, see *Homestead*, Cent. Dig. § 343; Dec. Dig. ⚡175; *Marshaling Assets and Securities*, Cent. Dig. § 3; Dec. Dig. ⚡3.]

[This case is also cited in *Ex parte Kurz*, 24 S. C. 468, 472, and in *Shell v. Young*, 32 S. C. 462, 470, 472, 11 S. E. 299, and distinguished therefrom.]

Before Hudson, J., Anderson, July, 1881.

In this case Honorable THOMAS B. FRASER, of the Third Judicial Circuit, sat in the place of Mr. Justice MCGOWAN, who had been of counsel in the cause.

The Circuit decree thus states the case:

On July 22d, 1880, the plaintiff, a corporation, filed the aforesaid complaint to foreclose a mortgage on the real estate of Morgan Harbin, and to this action made the other defendants parties, as claiming an interest in said property by virtue of liens held thereon by mortgage and judgment. The parties defendant holding liens answered and claimed, by way of affirmative relief, that their respective liens be foreclosed or enforced, and the same satisfied out of the proceeds of the sale of defendant's land in the order of priority and legal right.

In his answer, the defendant, Harbin, interposes a claim of homestead, which claim is resisted by the defendants, or some of them. Morgan Harbin is the head of a family, and owns no real estate except that described in the complaint, and is thus fully qualified constitutionally to claim a homestead out of the land described in the complaint. The question is whether he has not deprived himself of the right of homestead as against the aforesaid creditors.

The following are the facts found, and about which there seems to be no dispute: On January 23d, 1875, the defendant, Morgan Harbin, executed and delivered to his co-defendant, D. Arrington, his note, and, to secure its payment, a mortgage on all his lands, including the tract whereon he lived

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—the note \*being for \$300, with interest at the rate of one per cent. per month. On January 29th, 1877, he gave to the plaintiff, the Savings Bank, his note for \$1,535 at the legal rate of interest, and, to secure its payment, he executed and delivered to the bank a mortgage on that part of his land known as the Bolt tract, and furthermore, as collateral security for the note, he delivered to the bank a note due by W. F. Parker for the sum of about \$800. This Bolt tract contains 324 acres, and lies adjacent to the Home tract of 276 acres, and the two really form one body of land, though consisting originally of two tracts, and still retaining different names. On March 1st, 1878, Joseph N. Brown, as administrator of the estate of E. M. Brown, deceased, recovered judgment against Morgan Harbin for \$59.46, and \$6.15 of costs. On February 19th, 1879, Harbin gave his two promissory notes for the aggregate sum of \$167.98 to M. W. Coleman & Co., with interest at the rate of twelve per cent. per annum, and, to secure the same, executed and delivered to them a mortgage on all the lands aforesaid. On March 17th, 1879, the defendants, G. W. Maret and P. S. Mahaffey, as executors of the last will of



John Coates, recovered judgment against Morgan Harbin for \$798 and costs.

All the aforesaid mortgages are free from objection as to form and date of recording, the first and last constituting a lien on all Harbin's land, and the second only on the 324 acres or Bolt tract. The judgments are likewise free from objection as to form, were duly entered up, and constitute a general lien on the real estate of Harbin, and the cause of action in each judgment as well as mortgage arose subsequent to the adoption of our present constitution. The judgment in favor of the executors of Coates is the junior lien of all, but the cause of action is perhaps of older date, being in 1872. The tract of land mortgaged to the plaintiff, the 324 acres Bolt tract, has already been sold under a former decree of foreclosure and sale in this cause, all equities being reserved, and brought \$1,410.

The questions raised in the pleadings and argument for the determination of the court involve conflicting equities between the creditors by judgment and mortgage as against each other, and Harbin. In behalf of the

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judgment creditors, it is contended \*that they, having a right to enforce their liens only against so much of the land as is in excess of Harbin's homestead, have an equity to compel the mortgage creditors first to exhaust that homestead over which they have a lien and right of enforcing it, before, they can be permitted to receive any part of the proceeds of the sale of the land in excess of the homestead.

It is needless to cite authority for the proposition that when one creditor has two funds to which he can resort for payment, whilst another creditor can resort to but one of them, equity will force the first creditor to exhaust in the first instance that fund to which the latter cannot resort, before he is suffered to share in the fund common to both. This well-established rule settles the equities in this case as between the judgment creditors and those holding mortgages. As between these two classes of creditors the mortgagees are in equity bound to exhaust the homestead before resorting to the excess. This applies specially to the first and third mortgagees, who hold liens on all the land.

As to the plaintiffs, the second mortgagees, they are compellable first to exhaust the note against Parker, and for any balance then due and unpaid, they have an equity to be first paid out of the Bolt tract, except as to what the homestead and home place want in paying Arrington. Should the home place of 276 acres fail to pay Arrington, for the deficiency he will have precedence of the plaintiff on the Bolt tract, and for that deficiency alone.

But the claim raised by the defendant Harbin, is the most perplexing. He claims an

equity to have his homestead admeasured as against all the creditors; that the mortgagees cannot resort for payment to this homestead until they have exhausted the excess, and that judgment creditors can in no event sell his homestead nor force others to do so. So far as we know or remember this interesting question has not been decided by our Supreme Court. It has, however, been raised and determined by the courts of last resort in several of the States, but with a conflict of opinion—the courts of some States maintaining the equity of the homestead claimants and others denying it. These conflicting decisions will be found collated in Thompson on Homesteads and Exemptions, §§ 656-666.

The leading case cited by the learned au-

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thor, and the one \*which he seems to found the rule upon, is the case of Searle v. Chapman, 121 Mass. 19. In a note to section 656 will be found a full extract from the opinion of the supreme judicial tribunal of Massachusetts, delivered by Chief Justice Gray. In that case, in an action by a mortgagee to foreclose his mortgage, the mortgagor claimed the equity to compel the mortgagee to exhaust all the excess of land before selling that which should be admeasured as a homestead to defendant. The court below denied the equity, and the supreme judicial tribunal sustained the judgment in the aforesaid learned opinion, holding in substance that the homestead claimant is bound by his conditional sale of the homestead; and that "as against him, the mortgagee has the right to enforce the contract according to its terms and is not bound to elect between different remedies or securities."

Mr. Thompson says that the same doctrine prevails in Kansas; but that in some of the other States this equity of the mortgagor is recognized and enforced. In section 657 the author says: "If this is a sound rule where the only parties affected by it are the mortgagor and mortgagee, it becomes more imperative where to deny it would prejudice the rights of third parties, such as judgment creditors of the mortgagor. It then becomes a rule for the application of the familiar rule of equity, that when a creditor has a claim upon two funds, upon one of which another creditor has also a claim, and such other person will be prejudiced by allowing such creditors to satisfy his debt out of the fund subject to both claims, a court of equity will compel the creditor to take satisfaction out of the fund to which he alone has a claim, in the first instance. He must exhaust that fund before resorting to the other. He must foreclose his mortgage on the homestead before he can claim the right to share with general creditors, as to any unsatisfied balance, in the proceeds of the sale of his mortgagee's estate." In support of this position he cites *White v. Polleys*, 20

Wis. 530, a leading case which induced the legislature of Wisconsin to pass a special act to meet such an emergency, and to protect the equity of the homestead claimant.

We think that in the absence of a statute of like character in our State, the doctrine of *Searle v. Chapman*, and *White v. Polleys*, is the true rule, and in perfect ac-

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cord with fairness and good \*faith. Were a different rule to be applied to the case now under consideration, its hardship and unfairness would be manifest. It would authorize a man owning real estate largely in excess of a homestead to obtain credit upon the faith of that excess, perhaps to the full extent of its value. After these claims have been sued, but before judgment, additional credit of an equal amount is obtained on the faith of a mortgage of the same land. In an action to foreclose the mortgage to which the judgment creditors are parties, it would be in violation of all ideas of justice and equity to hold that the mortgagee could be compelled to shift the lien of his mortgage off the homestead, and first exhaust the excess and thus entirely defeat the judgment debts on contracts senior to the mortgage debt.

In our opinion the debtor, Harbin, having several times conveyed away his homestead by way of mortgage, has no equity now to compel the mortgagees to refrain from selling his homestead, especially since it would work injustice and hardship to the judgment creditors who are co-defendants in this action. It is therefore ordered, adjudged and decreed—

1. That it be referred to the master of this court to ascertain and report the amount of principal, interest and costs due upon the judgments and mortgages afore-said respectively.

2. That the defendant, Morgan Harbin, have until the first Monday of November next in which to pay the said mortgage debts, and that, in case of his failure so to do, the master of this court, having first duly advertised the same, according to law, for sale, &c.

3. That by said sale the said Harbin and all persons claiming under, by or through him any interest in said premises, shall be forever barred and foreclosed of any equity of redemption in and to said land, and the same shall likewise be by said sale free and discharged of any and all lien of said judgment creditors thereon.

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5. That before sharing in the proceeds of the said sale herein ordered and that already made, the plaintiff, the Savings Bank of Anderson, must first exhaust its remedy on the note of W. F. Parker and apply the proceeds thereof to the payment pro tanto of its debts against Harbin, and only for any

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balance remaining \*thereafter shall said

plaintiff share in the proceeds of the mortgaged premises.

6. That out of the gross sale made and to be made, shall first be paid the costs of said sale and of this action.

7. Subject to the above restrictions, the net proceeds of the sale of said land sold and to be sold, shall be distributed as follows, viz.: 1. To the payment in full of the senior mortgage debt. 2. To the mortgage debt next in seniority in full, if the Bolt tract will pay so much. 3. To the Brown judgment in full. 4. To the mortgage debt of M. W. Coleman & Co. in full. 5. To the judgment of the executors of Coates in full. 6. That should a balance be left, it be applied to any balance of the plaintiff's demand remaining unpaid from proceeds of said note and the Bolt tract, and for any such balance an execution may be issued. 7. Should a surplus still be left, the same must be paid to the defendant Harbin, his agent or attorney.

8. That the parties are at liberty to apply for any further administration order, at the foot of this decree, to carry the same into effect and in furtherance of the cause.

From this decree the defendant, Harbin, appealed in words following:

The defendant, Morgan Harbin, admitting the right of every party to this action who is a lien creditor, to have his homestead sold, if necessary for the payment of their respective liens, except the judgment of the defendants, Maret and Mahaffey, as executors of the will of John Coates, deceased, appeals from the decree of his Honor, Judge Hudson, filed in this action on July 5th, 1881, on the following ground, to wit:

Because his Honor erred in adjudging that the defendant, Morgan Harbin, was not entitled to have his homestead set off as against the judgment of Maret and Mahaffey, executors, because he had created a prior lien thereon by mortgage to other persons of that and other surplus land, enough to pay off such prior liens, adjudging the equity of said judgment creditors to compel the prior mortgagees to go upon the homestead for the collection of their mortgage debts, so as to leave the surplus liable to sale for the payment of said judgment, superior to the equity of the debtor, Morgan

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Harbin, to require the mortgagees \*to exhaust the surplus in the payment of their debts, so as to leave him in the enjoyment of his homestead.

Mr. J. J. Norton, for appellant.

The appellant is entitled to his homestead as against the judgment of Maret and Mahaffey. Const. of S. C., Art. II., § 32; 15 Stat. 369. The land must be sold in parcels, and only so much as is necessary to pay the mortgage debts, leaving out the homestead. Fifty-third Rule Circuit Court; Smyth Exemp., § 276. If the parcels out-



side of Harbin's homestead pay the prior liens, then it cannot be sold to pay Maret and Mahaffey's judgment.

Messrs. R. A. Thompson, Wells & Orr, contra.

April 17th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case are so fully and clearly stated by the Circuit judge, that it seems unnecessary to repeat them here.

It is conceded that the question raised by this appeal is novel in this State, and that the authorities elsewhere are conflicting. It is necessary, therefore, to consider the general principles applicable, and from them to deduce the proper conclusion. There is no dispute as to the general rule, that where there are two creditors of a common debtor, one of whom has a claim or lien upon two funds, and the other upon only one of these funds, that the latter has an equity to require the former first to exhaust the fund upon which he has no claim or lien. The only qualification of this rule, laid down in the elementary writers, is that it will not apply where the creditor having the lien upon the two funds will be injured or delayed by its application. 1 Story Eq. Jur., § 633 et seq. This rule is for the benefit of the creditor only, and cannot be invoked in behalf of the debtor unless some peculiar equity springs up from other circumstances, as, for example, where the debtor occupies the position of a surety.

I am unable to perceive any reason why this well settled and universally acknowledged rule should not be applied to the present case. There is no suggestion that its

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application would \*tend to injure or delay the creditors having liens on the two funds. All the parties are before the court, and the only objection proceeds from the common debtor, who does not occupy the position of a surety, and I do not see any equity on his part to interpose an objection to the application of the rule. His right of homestead is not an estate, but is a mere right to have a certain portion of his property "exempt from attachment, levy or sale, on any mesne or final process issued from any court."

If he has voluntarily stripped himself of this protection which the law has thrown around him, by twice mortgaging the land, out of which he would otherwise have been entitled to claim a homestead, he cannot complain at a result brought about by his own act, and he certainly has no such equity as would protect him from the operation of the rule above stated. The only creditor who would be likely to suffer under a different conclusion, is one who seems to have extended credit to the appellant before there were any liens upon any of his property, and

it would seem to be manifestly inequitable that this creditor should suffer from an indulgence extended to the appellant, perhaps, in reliance upon a well settled and universally acknowledged rule.

All the authorities seem to concede the proposition that, as between the debtor and his mortgagee, the former has no equity to require the latter first to exhaust the other property embraced in the mortgage before he can go upon that out of which homestead is claimed, and, as Mr. Thompson, in his work on homesteads, section 657, well remarks: "If this is a sound rule where the only parties affected by it are the mortgagor and mortgagee, it becomes more imperative where to deny it would prejudice the rights of third parties, such as judgment creditors of the mortgagor." It would, indeed, be a strange perversion to deny the equity claimed by the debtor in a case where its application would injure no one, and yet allow it in cases where innocent third persons would be the sufferers.

The analogy drawn from the case of a devise of lands to charitable uses, does not seem to me to be complete. Creditors stand upon much higher ground than devisees or legatees, and the reason given by Lord Hard-

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wicke, in *Mogg v. Hodges*, 2 Ves. \*53, for not applying the rule in a case of a devise to charitable uses is, "that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court, merely to support a bequest which is contrary to law." In the case now under consideration, it is not proposed to set up the rule of equity as to a creditor having a lien upon two funds for the purpose of securing the payment of an illegal debt, or "to support a bequest which is contrary to law," but simply to provide for the payment of a just debt, subject to no legal exception whatsoever, not out of property exempt by law, but out of property liable for its payment, by throwing another debt upon the homestead property, which the debtor has voluntarily subjected to its payment by giving a mortgage on it.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice FRASER, dissenting. I am unable to concur in the judgment of the majority of the court in this case. The single question presented by this appeal is whether Maret and Mahaffey, executors, judgment creditors of Morgan Harbin, have the right to compel the mortgagees, Arrington and Coleman & Co., who have prior mortgages of the Home tract of land, the homestead of Morgan Harbin, as well as of the Bolt tract of land, to sell the homestead and apply the proceeds to their mortgage debts, so as

to leave the Bolt tract for the payment of their judgment. It is not a question here whether these mortgagees have a right, as between themselves and the mortgagor, to demand that the homestead shall be sold before the surplus land, but it is whether the mortgagees, against their will, can be compelled, at the suit of the judgment creditor and for his benefit, to sell the land in that order.

The application of the doctrine of marshaling assets forms one of the most useful, and at the same time most delicate, branches of equity jurisdiction. It depends on this principle: "That a person having two funds

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to satisfy his demands, he \*shall not, by his election, disappoint a party who has only one fund. If, therefore, a person having a claim upon two funds chooses to resort to the only fund upon which the other has a claim, that other person shall stand in his place for so much against the fund to which otherwise he could not have access." 2 Lead. Cas. Eq., H. & W., Pt. I., p. 151; Aldrich v. Cooper, 8 Ves. 382. The doctrine is not confined to claims of creditors, and it is no peculiar equity to which they are entitled. It extends to the widow's paraphernalia (Id., p. 156), to purchasers (Id., p. 171), to legatees and devisees (Id., p. 180), and sureties who are no more than debtors as between themselves and those to whom they are bound as such, will be subrogated to all the rights of the creditor on payment of the debt. Id. 166.

In cases of devises of land to charitable uses, Lord Hardwicke, in *Mogg v. Hodges*, 2 Ves. 53, says: "That a court is not warranted in setting up a rule of equity, contrary to the common rules of the court, merely to support a bequest which is contrary to law," and he refused to throw the payment of debts and ordinary legacies on the real estate, so as to leave the pure personality for the charity. Id. 157, 191, 192; 2 Story Eq. Jur., § 1180. In the note at pages 191 and 192, in *Leading Cases in Equity*, it is said to be "well settled that where a devise of lands to charitable uses is prohibited by law, equity will not sustain a bequest to a charity by marshaling the assets, so as to throw the burden of the testator's debts on the land, for this would be contrary to the spirit of the legal prohibition."

Article I, section 20, of the constitution of this State, provides that "a reasonable amount of property, as a homestead, shall be exempted from seizure and sale for the payment of any debts or liabilities." Article II., section 32, defines the homestead, and provides that "it shall be the duty of the General Assembly, at its first session, to enforce the provisions of this section by suitable legislation." In pursuance of this injunction, an act was passed at the first session, and from time to time it was amend-

ed. The act of 1873, § 5 (15 Stat. 371): "No waiver of the right of homestead, however solemnly executed, shall be binding upon the head of the family, or in case of his or her death, his or her heirs, so as to de-

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feat the homestead herein pro\*vided for." By section 10 of the same act, it was made a misdemeanor in any officer to sell any property in violation of said act, and article II., section 32, of the constitution.

Thus stood the law at the time the liens in this case were acquired. The creditor or other claimant having only one fund is simply subrogated to the rights of a creditor who has two funds, as to the fund to which he is allowed to resort for payment. When, as in this case, the judgment creditor is put by the court in the place of the mortgagee as to the homestead, it is clearly against the spirit of the constitution and the statutes in reference to the homestead, that he shall be allowed to subject the homestead to his claim. The mortgagee certainly had a right to mortgage, and even convey in fee-simple, to whom he pleased, his homestead. But in this case he may well say, I have made no such agreement and I have not even waived my right to the homestead in favor of the judgment creditor.

If the Court of Equity will refuse to marshal assets so as to make a charity indirectly a charge on real estate by throwing creditors on the land and leaving the personality for the charity, because it would be against the policy of the law, the same reason should induce this court, it seems to me, to refuse to marshal the funds in this case so as to make a judgment indirectly chargeable on the homestead, when such homestead is not only exempt by law, but the head of the family is not allowed to waive the right thereto, and the officer forbidden, under heavy penalties, to sell the same.

If the principle on which the judgment of the Circuit Court rests is properly applicable to such cases, then there can be no case in which a homestead could not be sold to pay all outstanding debts, as soon as the head of the family who happens to own other property, ventures to mortgage the homestead and other property, to secure any one of them, or to raise money to meet the exigencies of the family.

It is a new question in this State, and in other States where a homestead law has been longer in existence, the decisions are conflicting. In *Searle v. Chapman*, 121 Mass. 19, the mortgagee brought his action against the mortgagor for foreclosure, and the mortgagor set up a claim as against the

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mortgagee to \*compel him to sell the surplus first, so as to save the homestead. In this case there was a release by the husband and wife of all claim of homestead and dower. The court refused to sustain the defense.



In Massachusetts, "as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee," which "gives the mortgagee a remedy in the form of a legal action." Shaw, C. J., in *Ewer v. Hobbs*, 5 Metc. 1-3, and *Howard v. Robinson*, 5 Cush. 119-123. It is true that in Massachusetts as to all other partes, as in this State, a mortgage is a mere security for the payment of money, but this difference of view as to the nature of a mortgage, ought to induce this court to hesitate to adopt the conclusions in that case, and to regard it as not sufficient authority for the inference for which it is quoted at the bar as authority in this case—that a judgment creditor has the right to compel the mortgagee to sell the homestead before the surplus. In *Searle v. Chapman*, the court simply declined to interfere with the rights of the mortgagee.

This distinction has been recognized in Kansas. In the case of *Chapman v. Lester*, 12 Kan. 592, it was held, "that when a person mortgages his homestead, together with other realty, there is no such implied obligation on the mortgagee first to exhaust his remedy on the realty other than the homestead, as will prevent him from releasing such other realty other than the homestead, and still retaining his lien on the homestead." And in a later case of *Colly v. Crocker*, 17 Kan. 527, it was held that the grant of a specific lien upon the homestead to secure a specific debt, does not amount to such a waiver of the homestead right, that an unsecured creditor can procure it to be sold in a proceeding for the marshaling of assets. In this case of *Colly v. Crocker*, a husband and wife mortgaged the homestead and other real estate to A. B. obtained a judgment upon the other property excepting the homestead, and then the husband sold a piece of property covered by the judgment and mortgage lien to C. The court held that the unsecured creditor had no such superior equity over the occupants of the homestead and the purchaser C., that he could compel a marshaling of the assets on the death of the husband.

In Illinois, it was held, in *Brown v. Cozard*,

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68 Ill. 180, that "when a mortgagee, not by his own voluntary action and for his own benefit, but at the instance and for the benefit of a judgment creditor for the purpose of having his judgment satisfied, is compelled to resort first, for the satisfaction of his mortgage, to the tract subject to the homestead exemption, as respects the judgment, the mortgagor would then seem to have just cause for complaint that his homestead had been taken away from him in a mode not contemplated by the statute, and whereto he had never given his consent."

In Minnesota, in *McArthur v. Martin*, 23 Minn. 80, it was said that "homestead ex-

emptions are favored by the courts, and as the application of the rule contended for in reference to the marshaling of assets, would be but an indirect method of subjecting the homestead to the payment of debts, a court of equity would not permit it to be applied in favor of judgment creditors in this case."

In Alabama, in *Ray v. Adams*, 45 Ala. 168, it was held that "the right of the debtor to his exemption, though inferior to that of his mortgagees, was superior to that of his judgment creditors. The prior mortgage did not enlarge his rights." In *Ray v. Adams*, there had been a sale under the judgment, and the debtor having been put to his election, had chosen what was set off as a homestead, and the balance of the real estate was sold. Upon a cross-bill by the judgment creditor and purchaser to compel the mortgagee first to exhaust the homestead, for their benefit, the court refused to give the relief sought.

A contrary doctrine was distinctly laid down in *White v. Polleys*, 20 Wis. 530, in which the court applied the general rule of equity that where one person has only one fund to which he can resort, and another person has two funds, the latter will be compelled to resort to that fund which will leave the means of payment for the person who has only one fund out of which he can be paid. Subsequently to the rendering of this decree a statute was passed in Wisconsin, "the object of which was to repeal the rule laid down in *White v. Polleys* and other cases." *Thomp. Homest. and Exempt.*, § 660. The cases on this subject will be found well collected in the valuable book last quoted.

The weight of authority, I think, is against

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the ruling of the \*Circuit judge, and leans to the opinion that while a mortgagee may have the right to select to sell the homestead first, and the surplus afterwards, if necessary, or vice versa, as to him may seem best, other creditors have no right to compel their choice one way or the other. I have already shown that the Court of Equity has never, as in the case of charities, applied the doctrine of marshaling, so as to bring about indirectly a payment out of a fund which cannot, by law, be made out of it directly on account of some positive prohibition.

The provisions in the constitution of 1868 in favor of the homestead, reserved it from attachment, levy or sale under mesne and final process to the head of the family, and the acts of the General Assembly in pursuance of the constitution to enforce the same are remedial in their nature, intended to establish a great public policy, and in doubtful cases it is the duty of the court in every fair and legitimate way to extend the remedy. In this State a mortgage is nothing more than a security for the payment of money, and cannot be extended beyond the contract of the parties. It is no part of the contract in an ordinary mortgage that the

property shall be liable to the claims of creditors not contemplated in its terms, and it is difficult to see how any rule of equity for marshaling assets can be allowed to work a benefit in favor of creditors which the head of the family cannot create, by "any waiver, however solemn." It is not necessary to say judgment creditors, because all creditors can put their claims into judgments, and if judgment creditors have any rights, then all creditors may sooner or later obtain them.

The judgment creditor, under the constitution and the acts of the General Assembly, has no right to sell the homestead under his judgment in the usual way, and is even forbidden to do so under heavy penalties against the officer executing the process, and the court, I think, has no right to extend the terms of the mortgage, so as to enable creditors not contemplated in it to obtain indirectly an advantage which they could not do directly, because of a positive prohibition of the statute.

Judgment affirmed.

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\*NOBLE v. COTHIRAN.

(April Term, 1882.)

[1. *Sheriffs and Constables* ⚡88.]

A sheriff cannot refuse to enforce an execution in his office for a balance due by sureties, although after such judgment a former judgment for a less sum against the principal debtor on the same debt had been satisfied.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 120-125, 195; Dec. Dig. ⚡88.]

[2. *Judgment* ⚡614.]

An unsatisfied judgment against the principal debtor cannot be pleaded in bar of an action on the same debt against the sureties; and judgment may be had against the sureties for the sum then due upon the note sued on.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1128; Dec. Dig. ⚡614.]

[3. *Principal and Surety* ⚡73.]

Judgment obtained against a principal debtor on a note bearing twelve per cent. interest (a judgment bearing only seven per cent.) was paid after a subsequent judgment had been entered against the sureties for a greater sum, resulting from the difference in interest; execution was then issued against the sureties for such difference as an unpaid balance. *Held*, that the execution against the sureties was not satisfied, and that they were liable for its payment.

[Ed. Note.—Cited in *Caldwell v. Martin*, 29 S. C. 24, 6 S. E. 857.

For other cases, see *Principal and Surety*, Cent. Dig. § 114; Dec. Dig. ⚡73.]

Before Fraser, J., Abbeville, November, 1881.

The opinion states the case.

Mr. Armistead Burt, for appellant.

Mr. E. Noble, contra.

April 24th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was a rule upon the sheriff, Du Pre, for not collecting and paying over a balance alleged to be due the plaintiff on the execution issued in the case of Andrew A. Noble, Executor, v. James S. Cothran and William H. Parker.

It appeared that April 30th, 1872, Miller & Robertson, with the defendants, Cothran and Parker, as sureties, executed a note for \$600 to William P. Noble. The terms of the note were "we, or either of us, promise to pay;" and the interest at twelve per cent. per annum was made "payable annually." The plaintiff, as executor of the payee, sued the principal debtors, Miller & Robertson, and on May 19th, 1876, obtained judgment against them for the sum of \$785.69, counting the interest at twelve per cent. up to the time of the rendition of the judgment, which, of

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\*course, afterwards bore interest only at the legal rate of seven per cent. per annum.

The executor also sued in a separate action the defendants, sureties, who, upon some ground, filed a demurrer, which was overruled, and, on February 17th, 1879, judgment was rendered against them for \$938.45, the difference in the amount of the judgment and that rendered against the principal debtors, arising from the addition of the interest at twelve per cent. which had accumulated against the sureties in the meantime. Execution was issued on this judgment January 26th, 1881, not for the whole amount recovered, but for the sum of \$238.22, balance.

Before the last judgment was obtained against the sureties, an amount sufficient to satisfy the judgment against the principal debtors, and costs, had been paid to plaintiff's attorney, except a balance of \$146.70, which was tendered by the sheriff to the plaintiff's attorney on January 22d, 1881, after the judgment had been obtained against the sureties, February 17th, 1879, but before the execution was lodged against them, January 26th, 1881. The plaintiff refused to receive the balance due on the execution in the first case against the principals, in which, after judgment, the interest was running at seven per cent., and ruled the sheriff, Du Pre, for not collecting and paying over to him the whole amount of the execution issued upon the second judgment against the sureties, viz., the sum of \$238.22, which was larger than the judgment against the principal debtors, by the additional five per cent. interest which was calculated on the note against the sureties, during the period intervening between the first judgment against the principals and the second against the sureties.

The sheriff in his return stated the facts as above given and concluded as follows:



"The respondent has been advised, and has in good faith acted upon the advice, that as the judgment against Miller & Robertson and that against Cothran and Parker were upon the same note, in which the former were principals and the latter were sureties; the payment of the judgment against the principals was satisfaction of the judgment against Cothran and Parker, the sureties to

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the same debt, and that he, \*consequently, could not levy the property of the latter for a debt which has been paid."

The return came up before Judge Fraser, who held that the late case of *Hellams v. Abercrombie*, 15 S. C. 110 [40 Am. Rep. 684], covered the point, and was conclusive against the defendants. He ordered that the rule against the sheriff should be made absolute, and from this order the defendants appeal to this court upon the following grounds: "1. Because a creditor cannot recover or collect from a surety a greater sum than he can from the principal debtor. 2. Because the payment and satisfaction of the judgment against Miller & Robertson, the principal debtors, was an extinguishment of the several judgment against J. S. Cothran and W. H. Parker, their sureties. 3. Because payment or satisfaction of the debt of the principal debtor, is the performance and satisfaction of the contract of the surety and his discharge from all liability for his promise. 4. Because the relation of a surety to his principal is the same after judgment as before, and his liability is only secondary, and it was error in the presiding judge to hold that the liability of the sureties was not ended as soon as the debt of their principals was paid and satisfied and they discharged from their liability to the creditor."

The exceptions seem to charge error in the order of the Circuit judge making the rule absolute against the sheriff, upon two grounds, which, for the sake of clearness, we will consider separately. They allege first that a creditor cannot legally recover a larger sum against a surety than he has recovered against the principal on the same debt—that as a rule the liability of the surety is measured by that of the principal; and, second, that even after a larger sum has gone into judgment against the sureties, the creditor cannot collect anything on the judgment against the sureties, in excess of what would pay and discharge the judgment for a less sum against the principal.

In reference to the first branch of the inquiry, as to whether a larger sum may be recovered against the surety than was recovered against the principal debtors, it might in this case be enough to say that the proper time to make that question was when the second judgment was recovered against the sureties; and that after such judgment

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had been recovered and the lodg\*ment of an

execution thereon, it was not for the sheriff, a ministerial officer, to suggest that he ought not to be required to enforce the process in his hands for the reason that the recovery was erroneous. But as this question was not raised in the case, we will consider whether the rendition of the second judgment for an amount larger than the first judgment, was error. It seems that the surety defendants did not make the question at the trial. They demurred upon some ground which does not appear, and the demurrer being overruled, there was judgment by default, February 17th, 1879, and the assessment at twelve per cent. was made on the note up to that time and entered into the judgment, which made it to that extent larger than the judgment which had been previously rendered against the principal debtors.

Suppose the sureties had then made the defense that judgment had previously been rendered against the principal debtors for a less sum, could it have been sustained? Although the defendants, Cothran and Parker, were only sureties on the note so far as their principal debtors were concerned, their obligation was in terms "we, or either of us, promise to pay," and in regard to the creditor they were original obligors as well as the principal debtors, and might have been sued alone independent of any action against them, and if they had been so sued, can there be any doubt that the interest on the note at twelve per cent. per annum would have been calculated and added in the judgment? Probably, as springing out of this direct relation of the sureties as debtors of the creditor, it seems to have been settled in this State long before the case of *Hellams v. Abercrombie*, 15 S. C. 110 [40 Am. Rep. 684], that a former judgment against the principal debtor, still remaining unsatisfied, could not be pleaded in bar of a subsequent action on the same note against the sureties. *Treasurers v. Bates*, 2 Bail. 362; *McDonald v. Pickett*, Id. 618; *Peters v. Barnhill*, 1 Hill 234; *Stinson v. Brennan*, Cheves 16.

In the case of *McDonald v. Pickett*, supra, it was held that to "an action on a promissory note brought against the surety in the name of the original payee, it is no defense that the latter had obtained judgment on the same note against the principal." In delivering the judgment of the court, Judge

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O'Neill said: "The force of the objection can be tested by a single question, Can the former recovery by the plaintiffs against the principal, Beckham, be pleaded in bar to a recovery in this case without averring satisfaction of it? It is clear that it cannot; and it is equally clear, from the facts already stated, that the judgment is not satisfied." So we may say here, at the time the judgment was rendered against the sureties, the first judgment against the principal debtors was not paid in full. If it had been, it

might have been pleaded in bar. It is true that the balance on that case was tendered on January 22d, 1881, before execution was entered, but after the judgment was rendered on the same debt. But that tender of payment could not operate retrospectively and affect the judgment which had already been rendered, and it was necessary for the execution to issue in conformity to the judgment rendered.

But, accepting this view, it is still further insisted that, although the first judgment was not paid until after the second judgment was rendered, the sureties have since paid enough to satisfy the first judgment, principal, interest and costs, and that should operate as satisfaction of the first judgment, and the sheriff should not be required to collect so much of the execution against the sureties as is in excess of the first judgment, arising from the note running for a longer time against them at twelve per cent. interest. Without undertaking now to consider the rights which may exist between the sureties and the principal debtors, but looking to their rights in reference to their creditor and his two judgments, one against the principal and the other against the sureties, we know of no principle which would authorize the court to declare the larger judgment against the sureties satisfied, simply upon it being shown that both judgments were on the same note, and that the first against the principal debtors had been paid in full, principal, interest and costs. One judgment is certainly satisfaction of the other, but only pro tanto. *Day v. Hill*, 2 Speers 629 [42 Am. Dec. 390]; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Lumpkin v. Ferguson*, 10 Rich. 424.

In the case of *Jones v. Kilgore*, it was distinctly held that "where judgments on the same cause of action are identical in amount, satisfaction of one is satisfaction

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of all. Where, however, they are not for the same amount, satisfaction of the one for the smaller sum is only satisfaction pro tanto of the others;" or, in the language of Judge Munro, in *Lumpkin v. Ferguson*, supra, "That the plaintiff is entitled to but one satisfaction of several judgments rendered against the parties, both having been rendered for the same debt, does not admit of a doubt, upon the well recognized principle, that where there are distinct judgments against different defendants for the same debt, all are extinguished, except as to costs, by the satisfaction of any one of them, without regard to the ultimate liabilities of the defendants to each other. *Davis v. Barkley*, 1 Bailey 140; *Noonan v. Gray*, Id. 437. But it is manifest that the rule can only apply where all the judgments are founded on the same cause of action, and are identical in amount, for, were the rule

otherwise, the most flagrant injustice would often result from its operation," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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POPE v. MATHEWS.

(April Term, 1882.)

[1. *Executors and Administrators* ⇨ 106.]

A testator directed his executor to invest the proceeds of certain sales, and his cash and choses in action "in bank stock or otherwise." At his death, testator held note of long standing against A., one against B. with A. as surety, and another against C. The executor permitted A. to renew his own note, and also with his own note to take up the notes of B. and C., neither of these new notes of A. having any surety or other security. The executor lent other of this fund to D. in April, 1860, under D.'s promise to furnish good security, which was never done. A. and D. were perfectly solvent when their notes were taken, but after the ward were insolvent, and the fund was lost in part to the estate. Held, that the executor was not liable for the losses on these notes. Mr. Justice McIVER, dissenting, except as to the renewal of A.'s individual note.

[Ed. Note.—Cited in *Orr v. Orr*, 34 S. C. 279, 13 S. E. 467.

For other cases, see *Executors and Administrators*, Cent. Dig. § 433; Dec. Dig. ⇨ 106.]

2. *Nance v. Nance*, 1 S. C. 218, modified. Mr. Justice Aldrich, dissenting.

Before Kershaw, J., Newberry, November, 1880.

This was a bill in equity filed in 1867, by Frances M. Pope, V. J. Tobias and Josephine M., his wife, against Bird C. Mathews, as executor of the will of Jacob Pope, deceased.

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\*Jacob Pope died in August, 1849, leaving of force a will, whereby he gave his entire estate to his wife for life, and certain personality absolutely. The last two clauses were as follows:

4. I give all the rest, residue and remainder of my estate to my grandson, Jacob Pope Rutherford, in fee-simple, after the death of my wife; and I direct my executors to take charge of the property and manage the same for his benefit until he shall attain the age of twenty-one years, selling such portions of the property as they shall see fit (excepting the land and negroes, which are not to be sold), and to invest the proceeds of the sale, and the cash and choses in action, in bank stock or otherwise.

5. I nominate and appoint Thomas H. Pope and Bud C. Matthews executors of this, my last will and testament.

There was a codicil to this will in the words following:

"If my grandson, Jacob Pope Rutherford, should die without leaving issue then living, all the property and estate given to him by my said will shall go to the children then living, of my son, Mark F. Pope, deceased,



to be equally divided among them; but neither of the children of my said son shall receive his or her share until he or she shall attain the age of twenty-five years. This codicil is to go into effective operation if my said grandson, Jacob Pope Rutherford, shall die without leaving issue then living, whether it shall so happen in my lifetime or after my death, and at whatever age he may so die without leaving issue then living."

The defendant, Bud C. Mathews, alone qualified as executor. The widow of testator died in 1858, and Jacob Pope Rutherford, without issue, in 1859. The children of Mark F. Pope, living at the death of Rutherford in 1859, were the present plaintiffs, F. M. Pope and V. J. Tobias, who respectively attained the age of twenty-five years in 1865 and 1867.

Many of the issues in this cause were settled by the referee and the Circuit judge. The questions brought to this court were based upon the following facts: At the time of his death, testator held a note on John Belton O'Neill, who was then a judge of our Law Courts, and afterwards Chief Justice of the Appeal Court. This note, dated September 15th, 1840, was for \$688.76, and was unsecured. It was renewed to the executor December 31st, 1853, for \$1,329.54, without any security. There was another note against George Pope and Judge O'Neill, dated in 1839 or 1840, for \$3,594.30, with

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credits. George \*Pope died soon after testator, and Judge O'Neill was his executor. In September, 1855, Mathews, executor, allowed Judge O'Neill to give his own unsecured note for \$4,275.57, and thereby to take up the George Pope note, including, says the executor in his testimony, "a debt of \$1,000, which Thomas H. Pope took out of Jacob Pope's estate and used."

In April, 1860, Mathews let one Ramage have \$600 of the estate money, under Ramage's promise to furnish security to the note then given, which, however, was never done. Mathews testified that Ramage was to "give security, but war came on and he did not." Ramage testified to the same effect.

It was fully proved by the testimony of many witnesses that before the war Judge O'Neill was a man of large estate, and that both he and Ramage were abundantly solvent and in good credit; that it was not customary for solvent men to secure their notes by mortgage, and that to ask a solvent man for a mortgage was considered an insult. Both Judge O'Neill's estate and Ramage were insolvent after the war. From the former nothing was collected during his lifetime (he died during the war), and only a small amount since; from the latter, nothing has been received, and it is doubtful whether any amount can be collected.

The plaintiffs claim that the defendant is liable for these three notes, with interest

from the death of Jacob Pope Rutherford. The referee so reported, and ordered the defendant to pay the costs of the action. Upon exceptions to this report, the cause came on to be heard before Judge Kershaw, who filed the following decree:

This case was heard upon exceptions to the report of J. F. J. Caldwell, Esq., referee.

The first question I will consider is, whether the executor is accountable for the loss which has ensued in consequence of the insolvency of the O'Neill notes, and his failure to collect them when they were collectible.

I do not regard the case as the same with that of a trustee, who, having funds in his hands to invest, puts them out upon personal securities without surety or collateral. These notes were never collected by the executor.

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They were simply renewed; the \*debt remained the same. It is true the note of Judge O'Neill alone was taken as a renewal of the joint and several notes of Pope and himself, but there is nothing in the case to show that the renewal note was not as good as the original. If the executor is to be held liable at all, it must be for not having called in the debt in order to re-invest it, "in bank stock or otherwise," as prescribed by the will. If he had done so, and invested in "bank stock" (the security which seemed to be preferred by the testator, and therefore to be preferred by the executor), it would have been wholly lost to the estate, and in that aspect of what might have been, it was best for the cestuis que trust that that course was not pursued. But if the trustee had any discretion to invest otherwise than in bank stock, why should he not leave the money where it was, in the hands of a man of great wealth and spotless integrity? Where would he have found a better investment, or one more likely to prove good under all circumstances? It remained perfectly good until the conquest of the State by the Northern armies and the destruction of property and values consequent thereupon.

If anything has been lost to the plaintiffs, therefore, it is attributable, not to the omission or failure of the executor, but to the disasters of war. What justice or equity is to be promoted by holding a trustee liable under such circumstances? On the contrary, does it not shock the sense of natural justice to hold one thus liable? If, however, the principles of equity as administered in this State from motives of general policy, require this sacrifice of natural equity, then, however subversive of our sense of right, the executor here must be made the victim.

England, the country from which we derive our laws and system of jurisprudence, has never passed through a crisis like that which destroyed this State and swept away nearly all securities, public and private, and the enlightened judges of that noble com-

monwealth were therefore never called upon to consider how far such circumstances might modify the rules regarding the liability of trustees, laid down by them for an ordinary and normal condition of affairs.

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In this State, however, we have precedents almost identical, arising out of the destruction of values here during the Revolutionary war.

[The learned judge here cites and considers the following cases: *Morton v. Smith*, 1 Desaus. 123; *Webb v. Bellinger*, 2 Id. 508; *Thompson v. Wagner*, 3 Id. 103; *Stukes v. Collins*, 4 Id. 207; *Edmonds v. Crenshaw*, Harp. Eq. 224; *Doud v. Sanders*, Id. 277; *Massey v. Cureton*, Cheves Eq. 187; *Clark v. West*, 1 Strobb. Eq. 185; *Monk v. Pinckney*, 9 Rich. Eq. 293; *Martin v. Jefcoat*, 10 Id. 118; *Taveau v. Ball*, 1 McCord Eq. 464; *Bryan v. Mulligan*, 2 Hill Eq. 364; *Glover v. Glover*, McMull. Eq. 154; *Hext v. Porcher*, 1 Strobb. Eq. 171; *Boggs v. Adger*, 4 Rich. Eq. 410.]

These cases were decided before or during the continuance in office of this executor. If he consulted the law for his guidance, these are the cases to which he was referred by his counsel. He found in them all the same enlightened, reasonable and humane principles which pervaded the old case of *Morton v. Smith*. He found that he was only required to act with the same care, circumspection and diligence which a prudent man would exercise under the same circumstances, honestly and "for the best." That if he did not violate any of the provisions of the law, or of the will of the testator, and fairly and honestly performed his duty, as he deemed best for the estate, he would not be answerable for consequences which he could not foresee or provide against.

It may be supposed that the view here presented is not the proper one; that the renewing of these notes was, in effect, the same as a collection of the money and its re-investment in the new notes; that this was a violation of duty on the part of the executor, inasmuch as he was directed by the will to invest in "bank stock or otherwise." An investment in bank stock would not, perhaps, have yielded as much profit to the estate as did these notes; for, since the war, the executor has realized on them a considerable sum of money, whereas the bank stock would, at most, certainly have been a total loss.

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\*But, although bank stocks appear to have been preferred by the testator, the direction was not positive to invest in them. But a discretion was allowed the executor to invest either in bank stock "or otherwise." What, then, was the alternative presented by this word "otherwise"?

In England it would have been held to imply an investment in such securities as the court would approve, to wit, consols. But here we had at that time no rule prescribing

what kind of investment should be made by executors or trustees. This is admitted by the late Chief Justice, in *Nance v. Nance* (1 S. C. 218). "In this State," says he, "while the principles of equity from which the English rule was deduced are recognized and enforced, the rule itself has undergone modification to suit the circumstances of the country. No case is found localizing the English rules on the subject of personal securities in this State." The nearest approach to it is in *Spear v. Spear*, 9 Rich. Eq. 184, where a guardian, engaged in trade, had employed the funds of his ward in the hazards of mercantile enterprise. The court was "of opinion that the guardian should change, as soon as practicable, the investment of the funds of his ward into public securities, or bonds secured by a lien on real estate, or, at least, bonds of third persons with proper securities."

But this laid down no rule for other cases. Executors were left to their discretion as to the character of their investments, subject only to the rule found in all our cases, that they should use proper diligence, and act in good faith and "for the best." There was good reason for not laying down any arbitrary rules of that sort. Public securities were here very few, and little known to our people. They were a rural population, engaged almost wholly in agriculture, and the great bulk of their wealth was invested in slaves. No investments were so much sought after, and few were so readily available as those based upon property of this character. Our people were often characterized by a very high sense of honor in regard to the obligations of debtors, as may be seen from the evidence in this case. Some of the witnesses state that it would have been regarded as an insult to ask of a debtor the security

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of a mortgage on lands, \*and that such securities were very unusual. The fact is, that the note of a man of large estate in land and slaves, a man of position and high character, and not embarrassed with debt—such a man as Judge O'Neill appears from the testimony to have been—was based upon the security of the lands and negroes which he owned, and there is little doubt that, if this executor had applied to the Court at that time, to sanction his transactions with that distinguished gentleman, he would readily have obtained it.

Be this as it may, there was no arbitrary rule by which he was bound, and hence, when the executor was left to his discretion, to invest in bank stock "or otherwise," he was at liberty to invest in personal securities which were undoubtedly good at the time, and likely to remain so, and did remain so until destroyed by war. But the referee (to whose learning and industry I am much indebted in this case), says that he is unable to find any case where the executor was ex-



operated where he failed to take security on a note. On the other hand, we have not been referred to any case in this State, where an executor has been held liable for such a failure, before that of *Nance v. Nance*. It is not here intended to impugn the authority of the case of *Nance v. Nance*, but it certainly did lay down a rule which, however right and proper in the present condition of our affairs, had never before been recognized in this State. To hold this executor bound by the law, as pronounced in that case, would be to violate the principles laid down in all the cases which preceded it, as understood and applied by our most eminent judges.

This, however, is not the case of a trustee, who, having funds in his hands which it is his duty to invest, does invest them in securities not recognized as proper. I distinguish the case thus: This executor merely failed to call in these debts, leaving the money out on such securities and in the hands of such persons as testator himself had considered worthy of trust and confidence. In so far as he changed these securities, they were not materially altered; that he exercised a discretion allowed him by the will; that he acted in good faith, with proper prudence, and for the best; that the security remained

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perfectly \*good until affected by the war, which the executor could neither have foreseen nor provided against; and lastly, that any other investment which he might have made, and especially of the sort preferred by the testator, would in all probability have resulted in equal or greater loss to the estate.

The case of the Ramage note is not exactly the same. That was a loan of money of the estate by the executor, in 1860, upon a note without security. He did require security, and Ramage agreed to give it, but the war came on and it was not given. Ramage was in good credit, and solvent at the time, but was ruined by the war. In this case, the negligence imputed to the executor was, that he parted with the money before the surety signed the note. I do not think this sufficient to charge him. It was an unfinished transaction, and the question is whether, if, in the progress of a negotiation of this sort, an executor entrust a man in good circumstances and credit with the funds of the estate, upon an assurance that the contract will be completed, would he be guilty of such negligence as to charge him. If that were so, then he would be liable if he gave up a note or other security to a debtor in good credit, who gave him for it a check on the bank, which was not paid.

In Lord Hardwicke's time, it was held that "where a receiver pays money to a tradesman, and takes bills for the same, in order to remit to London, if he was in credit at the time, though he fail soon after, it shall

not affect the receiver." *Knight v. Lord Plymouth*, 3 Atk. 480; *Dick*, 140.

There must be some trust somewhere, and the business of life could not get on without it. If Ramage was a man to be trusted in this way (and from the testimony it must be inferred that he was), I do not think the executor was guilty of such negligence as to charge him. Moreover, if the money had not been let out as it was, it would in some form have shared the general wreck of all things brought on by the war; and it is very difficult to say that the estate lost anything by the transaction.

The estate should pay the costs of this litigation. It was scarcely possible that the estate could have been settled without litigation, and the executor is not responsible

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for the condition \*of the business. He was not responsible for the various delays attending the references.

The referee was the judge of the propriety of granting the continuances, and, having granted them without imposing terms at the time, they are not now to be imposed. Furthermore, no question is made of the fidelity and honesty of purpose of the executor. \* \* \*

It is ordered, adjudged and decreed, that the report be confirmed and made the judgment of this court, except as herein modified; that as to those points wherein the exceptions have been sustained, it be referred to the master to correct the said report and to modify the same, so as to make it conform to the principles of this decree.

From this decree the plaintiffs appealed, alleging error in discharging the executor from liability for the O'Neill and Ramage notes, and in requiring the costs to be paid out of the estate.

Messrs. James Y. Culbreath and J. S. R. Thomson, for appellants, cited the cases referred to in the Circuit decree and also the following: 1 S. C. 279, 458; 3 Id. 451; 4 Id. 366; 7 Id. 324; 8 Id. 244; 9 Id. 490; 14 Rich. Eq. 300.

Messrs. L. J. Jones, G. S. Mower and Ernest Gary, contra.

June 29th, 1883. The opinion of the court was delivered by

Mr. Justice ALDRICH. In *Witherspoon and Wife v. Watts et al.*, Ex'rs, I stated why I have been delayed in filing the opinion assigned me in that case, which also applies to this. Ante p. 396.

This is an appeal from the decree of his Honor, Judge Kershaw, which is so full and convincing, so well sustained by reason and authority, that it is hardly necessary to enlarge on what he has so strongly enforced. The decree collates the authorities on which the judgment of the court is based. The prop-

osition is that a trustee is not liable if he discharges his trust with the same care and prudence that a prudent man will use in the transaction of his own affairs. As was said

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in *Doud v. Sanders*, Harp. Eq. 277, executors "are always protected by the court when they have acted conscientiously and for the best." Also in *Glover v. Glover*, McMull. Eq. 154, "When an executor acts upon a rule established by the habits of society, and in some degree from necessity, it ought not to be imputed to him for negligence." And so, in *Hext v. Porcher*, 1 Strobb. Eq. 171, "A trustee here is required to act faithfully in the interests committed to him, but the general management is left to his discretion."

This court has not the slightest inclination to interfere with the rule laid down in *Nance v. Nance*, 1 S. C. 218. But the question now presented is, Does the rule apply to a transaction completed before that case was decided? The testator, Jacob Pope, by his will, made Bud C. Mathews, his brother-in-law and trusted friend, his executor. In the will he gave the executor power to sell a portion of the estate, "and to invest the proceeds of the sale and the cash and choses in action, in bank stock or otherwise." He died in 1849. Among the assets were two notes, one of the late Chief Justice O'Neill and of Pope and O'Neill, the latter being the surety of Pope. Pope died, and O'Neill was appointed his administrator. There was also a note of Ramage. The executors allowed O'Neill to renew his notes, but took no sureties. He also permitted Ramage to renew his note, but required him to give security. Ramage failed to add a surety to his note; the war coming on it seems to have been overlooked in the excitement.

The special objects of the testator's bounty were his widow and his grandson, Rutherford, the sister and nephew of the executor. These plaintiffs only take an interest in the estate of the testator in case of the death of these special objects of his love. The widow, after the payment of some legacies, was to receive the whole estate for life—Rutherford, after her death, when he arrived at the age of twenty-one years. The plaintiffs, in case of the death of Rutherford, without leaving issue then living, to take the estate when they arrived at the age of twenty-five years, which would be in 1865 and 1867.

The referee, Mr. Caldwell, in his report, charged the executor with the notes of O'Neill and Ramage. The case was heard on

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\*exceptions to that report. Judge Kershaw, in a very carefully considered decree, overruled the referee, and decided that the executor is not liable. The question submitted by the appeal is to reverse this decision.

As I have said, the rule in *Nance v. Nance*, is approved, but is it just and equitable to apply that rule to this case? It has always

been the law in this State, "that the trustee is answerable for those losses only which are occasioned by such acts or omissions as a prudent man could not do or omit in his own affairs." So it is said in *Nance v. Nance*, "The rule as laid down was intended to define the responsibility of trustees while acting within the limits of their discretion, and not to give support to the ideas that the discretion was unlimited as to the character of investments, and their responsibility measured solely by the purity of their motives and the degree of care exercised in the control of the trust fund."

It appears, from the evidence, that the O'Neill and Ramage notes were perfectly good up to the close of the war; that the executor was advised by the judge not to put money in bank stock, but to put it out at interest in notes on individuals. The referee, in his report, says: "The parties executing the notes appear to have been good at the time, and it is not the executor's fault that they are not so now. He has kept the funds separate from his; he has been diligent; he appears to have been perfectly honest; and he thus seems to have acted with that fidelity and sagacity which the great current of decisions in this State pronounce sufficient for a fiduciary's exoneration." He absolves him from all liability for funds and property held by him before and during the war, except the O'Neill and Ramage notes.

At first, I was disposed to think the learned judge was in error; but after carefully considering his decree and reviewing the authorities he has adduced in support of it, I have come to the deliberate conclusion, that it will not only be a hard case to charge this executor with the O'Neill notes, but that it will violate every principle of equity by which this court has heretofore been governed. Undoubtedly, up to the close of the war, the note of Judge O'Neill was a perfectly safe investment; not a shadow of suspicion could

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be cast on his paper; in addition to his exalted character and large estate, it was not the custom of the community to require mortgages, and it was common to lend money to solvent men without taking a surety. If we add to this the fact that the testator himself had invested in Judge O'Neill's paper, without additional security, how can it be said that this trustee did not act as a prudent man would with his own, especially, too, when he was acting under the counsel and advice of one of the highest legal authorities in the land? That he did not collect the note, is not worthy of consideration. Why collect money, directed to be invested, to lend it out again immediately? Why call in what was then considered as good an investment as the country afforded, to re-invest it in another note, not better, if so good?

The Ramage note is somewhat on a different footing. As regards this investment, the



executor did require a surety; but he let Ramage have the money before the surety was given, thus showing that he was entirely satisfied that the note with only Ramage's signature was perfectly good, in which judgment he is fully sustained by all the evidence. The excitement and confusion of the war prevented the completion of the arrangement. It may be said, that he did require a surety showed he was not satisfied with the safety of the investment; but this idea is negatived from the fact that he let Ramage have the money without the surety, and by the abundant testimony as to his solvency and ability to meet his engagements at any time before the disaster of defeat. In addition, the learned judge who heard the cause, was satisfied the executor acted as a prudent man would in the management of his own affairs. I think so, too, for it is more than probable that any surety Ramage may have offered would not have been better than himself, and would, like him, at the close of the war, been broken up and ruined. Would it be equity to say now, because the executor, in the exercise of his discretion, or, if you will, by accident, and occasioned by the confusion and excitement of the war, did not do that which, at first, he intended to do, and which, if he had done, would not have made the fund any more secure, or benefited the estate, shall now be liable for an investment that, under any circumstances, would be worthless? I think not. Besides, this is a ques-

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tion of fact which the Circuit judge, after full hearing and careful deliberation, has decided in favor of the executor; and as no principle of law has been violated, and the will committed the general management of the estate to his discretion, this court will not depart from its practice and overrule the decree on a question of fact, supported by the evidence.

Costs follow the judgment, and there is no error here. The appeal is dismissed.

Mr. Justice McIVER. As I am unable to concur in all of the conclusions reached by his Honor, Judge ALDRICH, to whom was assigned the duty of preparing the leading opinion in this case, I propose to state, as briefly as practicable, my views of the questions involved. [Here follows a statement of the case.]

These notes, so far as the question of the liability of the executor for the amounts thereof is concerned, seem to me to stand upon different grounds. The individual note of Judge O'Neill, given for the amount of his own note to the testator, is manifestly nothing but a renewal of a note in which the testator had seen fit to allow a portion of his funds to remain invested for a considerable length of time before his death, and as the executor was charged with the duty of investing the funds of the estate until the period arrived for turning it over to the par-

ties entitled under the will, I am unable to see any breach of trust on the part of the executor in allowing this amount of the fund to remain in the same way in which the testator had for a long period kept it invested. I agree, therefore, that the executor is not chargeable with the amount of this note.

The other note of Judge O'Neill stands upon a different footing. There is no distinct finding of fact as to what was the intention of the parties in the transaction out of which this note arose; whether the note of Judge O'Neill was taken in satisfaction or payment of the note of George Pope, and the debt of Thomas H. Pope, or whether it was taken as a simple renewal of those debts. The referee, in speaking of the transaction, says that the defendant "allowed Judge O'Neill to take up this note with his own note, for the sum then due," &c., while the Circuit judge, in speaking of the O'Neill

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notes, uses this language: "These notes were never collected by the executor. They were simply renewed; the debt remained the same. It is true the note of Judge O'Neill alone was taken as a renewal of the joint and several notes of Pope and himself, but there is nothing in the case to show that the renewal note was not as good as the original."

The most natural inference is that the object of the transaction was, as the referee says, "to take up" or extinguish the original note, thereby releasing the estate of George Pope from any further liability thereon, so as to enable his executor to proceed with the settlement of his estate; and when to this is added the undisputed fact that to the amount of that note was added another debt due by another person—the sum of \$1,000 due the estate of Jacob Pope by Thomas H. Pope, with which Geo. Pope does not seem to have had any connection—the inference seems irresistible that the object was, not simply to renew the original note, but to extinguish the debt secured thereby, as well as the independent indebtedness of Thomas H. Pope, which, for some reason not disclosed in the testimony, Judge O'Neill was willing to assume, and create a new debt on the part of Judge O'Neill to the executor.

If this be so, then the practical effect of the transaction was that the defendant, as executor of Jacob Pope, collected both of these debts, as well the one due by Thomas H. Pope as the one due by George Pope, and re-invested the amount thereof in the individual note of Judge O'Neill, without any security of any kind. The legal question presented then, is whether an executor charged with the duty of investing the funds of his testator's estate, as this executor was, is at liberty to invest such funds in the note of a private individual without security of any kind. I am not aware of any case in which such an investment of trust funds has ever received the sanction of any

court, and, on the contrary, there are at least two cases in which such an investment has been condemned. *Spear v. Spear*, 3 Rich. Eq. 184; *Nance v. Nance*, 1 S. C. 209.

In citing the last-mentioned case, I desire to say that while I have no fault to find with the judgment of the Court in that case, I have never been able to approve that por-

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tion of the \*opinion which undertakes to prescribe the limits within which a trustee is at liberty to exercise his discretion. It does not seem to me that the authorities in this State warrant the use of the following language in the opinion, where, in speaking of the character of the securities in which a trustee may properly invest trust funds, it is said: "Such securities should primarily consist of mortgages of unencumbered real estate, of a value sufficient to guaranty the debt against all contingencies liable to occur or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investments appear, upon an accounting with the cestui que trust."

On the contrary, my understanding of the matter is that we have no rule here prescribing the classes of securities in which trust funds shall be invested, or the preference which is to be given to one class over another; but all that is required is that a trustee shall invest the funds committed to his care upon good and sufficient security. This is the limit of his discretion, and if, within this limit, he manages the funds entrusted to him with the same care and diligence that a prudent and cautious man bestows upon his own affairs, he will not be liable, even though loss may ensue. But where a trustee goes beyond this limit and invests trust funds without any security at all, he cannot escape liability for any loss that may ensue, even though he may be able to show that he has acted in good faith; for, by failing to take security, he substitutes himself as such, and must account accordingly.

It seems to me, therefore, that the executor is chargeable with the larger note of Judge O'Neill, given to take up the note of George Pope, as well as for the \$1,000 due by Thomas H. Pope. But, as I understand that the executor has already been charged with such amounts as he has received on this note since the termination of the war, from the assets of Judge O'Neill's estate, the amounts so received should either be stricken from the account already taken, or

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be allowed as credits to the executor \*on the

amount of this note, so as to avoid charging the executor twice with the same.

For a similar reason, it seems to me that the executor should be charged with the Ramage note. This was a clear investment of trust funds, without any security whatever, and the fact that the executor intended to take security and failed to do so, only makes the case stronger against him. The excuse suggested for such failure, that the war came on, and, in the excitement and confusion incident to the times, it was overlooked, does not appear to me to be a sufficient reason for such neglect. The note bears date April 6th, 1860, more than eight months before the State seceded, and more than twelve months before hostilities actually commenced. There was, therefore, ample time before these stirring events occurred, for the executor to have arranged this matter, even if he could be excused for letting out trust funds without taking security at the time. It seems to me that the investment of trust funds stands upon a very different footing from accepting payment of a debt in a check upon a bank which proves to be worthless. A trustee might well be excused for doing the latter, as that would be in accordance with the usual course of business, but I do not think it a usual or proper practice for a lender to advance the money to a borrower before the required security has been given.

The question of costs is a matter peculiarly within the discretion of the Circuit Court, and in my opinion the Circuit judge, under all the circumstances of this case, wisely and properly exercised his discretion in requiring the costs to be paid out of the estate.

I think, therefore, that the judgment of the Circuit Court should be modified in accordance with the views herein announced, and that the case should be remanded to that court for such further proceedings as may be necessary to carry out these views.

Mr. Chief Justice SIMPSON. There being no testimony in this case showing either bad faith or negligence on the part of the trustee, on the contrary it appearing that the loss complained of occurred from causes which could not have been foreseen by

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\*him, I think under the circumstances he should be held harmless, especially as under the terms of the will he was invested with large discretion in the management of the estate entrusted to his care. I do not agree, however, with the remarks of Judge ALDRICH, in reference to the case of *Nance v. Nance*. On this subject I concur with Judge MEIVER in the dissenting opinion, but this does not affect the result. I therefore concur in the general results herein.†

Judgment affirmed.

† This completes the cases of April Term, 1882.—REPORTER.



## 18 S. C. 460

STATE, ex rel. ANDERSON, v. SIMS.

(November Term, 1882.)

[1. *Mandamus* ⚡74.]

Query. Can the board of State canvassers be required by mandamus to declare an election?

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 150–157; Dec. Dig. ⚡74.]

[2. *Clerks of Courts* ⚡3.]

No clerk of court could be lawfully elected on November 7th, 1882, as there was no authority for such an election on that day. The statute (Gen. Stat. 1882, § 160,) authorized an election for clerk of court only at every alternate general election, reckoning from the year 1880; and if the clerk be a State officer, as has been held, then the constitution required the election to be had at every alternate general election, beginning with the year 1868. Const., Art. XIV., § 10.†

[Ed. Note.—Cited in *Pettigrew v. Bell*, 34 S. C. 106, 12 S. E. 1023; *Smith v. McConnell*, 44 S. C. 499, 22 S. E. 721.

For other cases, see *Clerks of Courts*, Cent. Dig. § 7; Dec. Dig. ⚡3.]

This was an original application to this court made in behalf of Julius H. Anderson, the relator, for a writ of mandamus to compel R. M. Sims, the secretary of State, and other members of the board of State canvassers, to declare the relator elected to the office of clerk of court for Horry county, in accordance with the returns in their possession made to them by the board of county canvassers for that county.

Mr. F. W. McMaster, for relator.

Messrs. Youmans, attorney-general, and W. W. Sellers, contra.

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\*December 2d, 1882. The following order was passed:

PER CURIAM. On hearing the petition and return in the case above stated, it is ordered that the petition be dismissed for reasons which will be stated in an opinion hereafter to be filed.

January 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This is an application to this court, in the exercise of its original jurisdiction, for a mandamus to compel the board of State canvassers "to ascertain from the managers' returns and statements forwarded to them by the board of county canvassers of Horry county, that Julius H. Anderson, at the general election held on the said seventh day of November instant, received the highest number of votes for the office of clerk of the court, in said county, and to declare the same and certify such declaration, and none other, to the secretary of State." The board of State canvassers made return, saying "that they declined to canvass any vote for clerk of the Court of Common

Pleas for Horry county, at the general election for 1882, in consequence of section 160, of the Revised Statutes of this State. [Edit. 1882.] That section reads as follows: "There shall be a general election for the election of the following county officers, to wit: judge of probate, county commissioners and school commissioner, held in each county at every general election for members of the house of representatives; and for the election of sheriff, coroner and clerk of the Court of Common Pleas, at every alternate general election, reckoning from the year one thousand eight hundred and eighty," so that the sole question made by the pleadings is, whether there was any legal authority for holding an election for clerk at the general election held on the seventh day of November, 1882.

Another question was suggested in the argument, and that is, whether the writ of mandamus, as prayed for, can be issued to the board of State canvassers. This depends upon the result of an inquiry, whether the duty sought to be enforced is such a ministerial duty as that its performance can be enforced by a writ of mandamus, or whether it is judicial. This, however, is a very important question, and inasmuch as it was not

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raised by the pleadings, and was not fully argued at the bar, we prefer not to enter upon its consideration at this time. Waiving this question, therefore, for the present, and assuming, for the purposes of this case, that the performance of the duty demanded of the board may be enforced by mandamus, we will proceed to inquire whether the relator has stated such a case as would entitle him to the writ of mandamus as prayed for.

If there was no law providing for the holding of an election for the clerk of the Court of Common Pleas for Horry county on the day of the general election in 1882, then clearly there was no valid election for that office, and there was no obligation resting upon the board of State canvassers to declare the result of an election held without legal authority; and if they had done so their action would have been unauthorized and a mere nullity, and, of course, a writ of mandamus would not be issued to compel the performance of an unauthorized and illegal act. In the absence of any provision in the constitution designating the time for holding the election for clerk, the General Assembly could fix the time; and this they have undertaken to do by section 160 of the General Statutes of 1882 above quoted, to wit: "At every alternate general election, reckoning from the year one thousand eight hundred and eighty."

This necessarily fixes the day of the general election in 1884, and not the day for the general election in 1882, as the time for holding the election for clerk. In fact there is no act of the General Assembly, so far as

† See post, Notes of Causes, No. 1310.

we are informed, and none such has been cited to us, designating the day of the general election in 1882, as the day for holding an election for clerk in the county of Horry, and hence, in the absence of such an act, there was no more authority for holding an election for that office on the 7th day of November, 1882, than there would have been for holding an election on any other day that might have been suggested.

But, in addition to this, it appears to us that the constitution does fix a day for holding all such elections. Article II., section 11, as amended, is in the following language: "The first election for senators and representatives, under the provisions of this constitution, shall be held on the 14th, 15th and 16th days of April, of the present year

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[1868], and the second election \*shall be held on the third Wednesday in October, 1870; and forever thereafter on the first Tuesday following the first Monday in November, every second year, in such manner and in such place as the legislature may provide." And in article XIV., section 10, it is provided that: "The election for all State officers shall take place at the same time as is provided for that of members of the General Assembly, and the election for those officers whose terms of service are for four years, shall be held at the time of each alternate general election." If, therefore, the clerk of the Court of Common Pleas is a State officer, as has been held by this court in the case of *Williman v. Ostendorf*, MS. decision filed February 12th, 1877, then it follows that the election for clerk is required by the constitution to be held at each alternate general election, for he is one of the officers whose term of service is four years, (Const. Art. IV, § 27.) and inasmuch as the first general election under the present constitution was held in 1868, all subsequent elections for clerk were required to be held at each alternate general election, reckoning from 1868, to wit: at the general elections in 1872, 1876 and 1880, and, consequently, the next election for clerk cannot be held until the day fixed for the general election in 1884. Thus it appears that section 160 of the General Statutes of 1882, prescribing the day of the general election in 1884, as the time for holding the election for clerk, is not only not in conflict with constitution, as was argued in this case, but is in direct conformity thereto.

We are therefore of opinion that there was no legal authority for holding an election for clerk of the Court of Common Pleas for Horry county on the seventh day of November, 1882, and hence that the board of State canvassers could not have been required to declare the result of an election held without such authority. The judgment of this court, in conformity with these views dismissing the petition, has heretofore been rendered.

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\*THE STATE OF SOUTH CAROLINA, Ex  
Relatione COLEMAN, v. TOWN  
COUNCIL OF CHESTER.

(November Term, 1882.)

[1. *Statutes* ⇨120.]

An act entitled, "An act to provide a local option law for the incorporated cities, towns and villages of this State" (17 Stat. 893), declared in its fourth section, that the act should not apply to any city, town or village in which the sale of liquors is now, or shall hereafter be, prohibited by legislative enactment. *Held*, that the act related to but one subject—local option—which was expressed in its title.

[Ed. Note.—Cited in *Floyd v. Perrin*, 30 S. C. 9, 8 S. E. 14, 2 L. R. A. 242; *State v. O'Day*, 74 S. C. 450, 54 S. E. 607; *Aycock-Little Co. v. Southern Ry.*, 76 S. C. 332, 57 S. E. 27.

For other cases, see *Statutes*, Cent. Dig. § 171; *Dec. Dig.* ⇨120.]

[2. *Constitutional Law* ⇨87, 208.]

An act to prohibit the sale of intoxicating liquors in the town of Chester (17 Stat. 1059), does not violate article I., section 12, of the constitution, which declares that "no person shall be subjected in law to any other restraints or disqualifications, in regard to any personal rights, than such as are laid upon others under like circumstances."

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 167, 649; *Dec. Dig.* ⇨87, 208.]

Original application for writ of mandamus.

This was a petition entitled the State of South Carolina, ex relatione John K. Coleman and others, against the town council of Chester. The opinion states the case.

Mr. S. P. Hamilton, for relators.

The clauses of the constitution violated are article II., section 20, and article I., section 12. An act violating article II., section 20, is unconstitutional. 13 Mich. 482; 12 Geo. 36. The title of the local option law is general and sweeping, and in it can be found no intimation that it was intended to prohibit local option in certain cases. This section is also violated by the act to prohibit the sale of liquor in Chester, the title of which makes no allusion whatever to the local option law. But there is a broader and more important provision violated, article I, section 12. This section prohibits discrimination. Under its charter, the citizens of Chester have a right to vote—under the local option law they have a right to vote—but the fourth section of the local option law, and the act to prohibit the sale of liquors in Chester, take away the

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right accorded in a general \*law, to citizens of other towns, and is thus a disqualification of electors of Chester. Cool. Cons. Lim. 391. A case most apposite to ours is *Kelly v. The State*, 6 Ohio St. 269. The local option law must not be confounded with acts controlling municipal corporations in the matter of police regulations, for it divests municipalities of the power to determine the question of license or no license, and gives it to the



people. Even the exercise of police power by the legislature may be unconstitutional.

Messrs. E. C. McLure, A. G. Brice, contra.

December 7th, 1882. The following order was passed:

PER CURIAM. On hearing the petition and return, with the agreement of counsel, it is ordered that the petition be dismissed for reasons which will be stated in an opinion hereafter to be filed.

March 19th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was an application for the writ of mandamus, heard by this court under and by virtue of its original jurisdiction in such cases. The character of the case and the questions involved will appear from the statement which follows.

An act of the General Assembly of this State, approved February 9th, 1882, and known as the local option law, provided that upon the petition of one-third of the number of citizens who voted at the next preceding municipal election of any incorporated city, town or village in this State, the council of such city, town or village was authorized and required to submit the question of license or no license, to the qualified electors of such city, town or village, at a special election to be holden, &c. By the fourth section of this act it was further provided, that it should not apply to any city, town or village in which the sale of ardent spirits is now, or shall hereafter be prohibited by legislative enactment. On the same day that this act was approved, another act, known as "An act to prevent

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the \*sale of spirituous liquors in the town of Chester, in Chester county," was also approved.

On November 11th, certain citizens of the town of Chester, equal and exceeding in number the one-third of the votes cast in the preceding municipal election in said town, petitioned the town council of Chester to hold a special election under the local option law, at which the question of license or no license should be submitted to the qualified electors as provided for in said act. This petition was refused on the ground that the act to prevent the sale of spirituous liquors in the town of Chester being of force, the council was prohibited from entertaining the petition by virtue of the fourth section of the local option law itself. Thereupon the petitioners instituted this proceeding for mandamus to require the town council to grant their prayer.

The questions involved do not demand of this court any extended discussion of the principles upon which the writ of mandamus depends. It may be admitted, so far as

this case is concerned, that if the positions taken by the petitioners are sound, the writ should be ordered. We will therefore confine our examination to these positions.

The petitioners claim that the fourth section of the local option law, as well as the act to prevent the sale of spirituous liquors in the town of Chester, are unconstitutional, and consequently that the local option law stands unaffected thereby, which law thus unaffected being applicable to all the towns, cities and villages in the State, entitles the petitioners to the relief which they seek, and this is the question in the case.

It is urged that the fourth section of the local option law is unconstitutional because in conflict with section 20 of article II., of the constitution, which provides that "every act or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title." This section no doubt contains a wise provision, and if properly observed would tend greatly to prevent confusion and doubt as to the exact meaning and intent of legislative enactments, and to this end it should be enforced by the courts in all proper cases, due care being exercised lest a too strict construction might defeat its very object and purpose by clogging legislation and loading down our

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\*statute books, with numberless separate acts wholly unnecessary to the end designed. By such a construction few matters could become the subject of legislation in a single act. Every qualification and condition imposed would have to be embraced in a separate act, which would make it difficult and tedious to ascertain the statute law in any matter, as all the acts scattered through the statutes would have to be examined before any conclusion could be reached.

Take, for example, the general appropriation act. Every section, in fact almost every line in a strict sense, refers to a different subject as different appropriations and for different purposes are certainly made, and if each of these had to be in a separate act it would entail infinite confusion in a matter of the highest importance to the State. It can not be that the framers of the constitution ever intended that such a construction should be placed upon this section. On the contrary, while enforcing it when necessary, it should be at least so construed as to prevent the results indicated above.

Now can it be said that the fourth section of the local option law under consideration is in violation of section 20, article II., of the constitution, when construed under the light of the principle announced above? The title of the local option law is as follows: "An act to provide a local option law for the incorporated cities, towns and villages of this State." The subject express-

ed in this title is "local option." Does the fourth section relate to a different subject? That section simply provides that the act of which it is a section "shall not apply to any city, town or village in which the sale of ardent spirits is now or shall hereafter be prohibited by legislative enactment." This is the whole of the fourth section. It is apparent that it does not relate to a different subject from that expressed in the title of the act; on the contrary, it has direct reference to that subject and to no other, to wit, local option.

It is true, under the operation of the third section, the privilege of local option may be allowed to some towns, cities and villages, which is denied to others under the fourth section, yet this is not the incorporation of a new subject into the act different from that expressed in the title, but it is simply

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limiting and \*qualifying that subject in its application to the towns, cities and villages of the State in the nature of a proviso, an exception to the act. If the relators' construction be the correct one, no exceptions could be made in the application of acts by provisos. A separate act would always be necessary.

Next as to the act to prevent the sale of spirituous liquors in the town of Chester. The relators contend that this act violates section 12, article I., of the constitution. That section is as follows: "No person shall be disqualified as a witness or be prevented from acquiring, holding and transmitting property or be hindered from acquiring education, or be liable to any other punishment for any offense or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances."

It is urged that this section was intended to prevent discrimination in legislation as to personal rights. There can be no doubt but that such was its intention, and no one can fail to appreciate the importance and the wisdom of such a restriction upon legislative power. It underlies our constitution and is a fundamental principle in republican governments, and should not be invaded.

But we do not see its application to this case. We do not see that any citizen of Chester is deprived of any right which any other citizen of that town is allowed. It is true that the provisions of the charter of Chester may be different from those which appear in some of the other towns in the State, but it certainly can not be urged seriously that the section of the constitution referred to, is violated by such difference. And yet, upon the relators' construction, such would be the result. Not only so, but when that construction is pressed to its legitimate result it would neces-

sitate exact uniformity in all charters, both public and private. No distinction could be made. The condition and circumstances requiring in one place a different municipal government, from another demanding the exercise of different powers and duties, would have to be disregarded, and a dead sea of exact uniformity established. This could not have been the purpose of this section.

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\*The judgment of this court has already been pronounced dismissing the petition of the relators; and it is ordered that this opinion be filed as containing the principles upon which said judgment is based.

18 S. C. 469

CHALMERS v. GLENN.

(November Term, 1882.)

[1. *Pleading* ⇨193.]

A cause of action exists when the legal rights of one party have been invaded by another, and unless facts to show the existence and the invasion of such rights are stated in the complaint, it will be held bad on demurrer.

[Ed. Note.—Cited in *Central R. & Banking Co. v. Georgia Const. & Inv. Co.*, 32 S. C. 344, 11 S. E. 192; *Nance v. Georgia, etc., Ry. Co.*, 35 S. C. 309, 14 S. E. 629; *Holman v. Ashley*, 40 S. C. 422, 19 S. E. 13; *Heath v. Haile*, 45 S. C. 649, 24 S. E. 300.

For other cases, see *Pleading*, Cent. Dig. §§ 425, 428-435, 437-443; *Dec. Dig.* ⇨193.]

[2. *Bonds* ⇨124.]

A complaint which stated that money belonging to an estate had by order of court been lent to defendant under his bond to account "upon a final settlement of the estate" for the sum received, but which did not allege that any settlement had yet been had or attempted, or that defendant had failed to account, does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 172; *Dec. Dig.* ⇨124.]

[3. *Reformation of Instruments* ⇨26.]

A clerk of court in accordance with the terms of an order of court, lent money in his hands to A. upon A.'s bond to account for it upon final settlement of the estate. *Held*, that a complaint against A. by a succeeding clerk stating these facts and asking to have the bond reformed so as to provide for the payment of interest, did not show any cause of action in the plaintiff.

[Ed. Note.—Cited in *Kinard v. Glenn*, 29 S. C. 596, 8 S. E. 203.

For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 91-100; *Dec. Dig.* ⇨26.]

Before Pressley, J., Newberry, February, 1882.

The opinion states the case.

[For subsequent opinion, see *Kinard v. Glenn*, 29 S. C. 590, 8 S. E. 203.]

Mr. W. H. Lyles, for appellant.

Messrs. Jones & Jones, George S. Mower, contra.

February 15th, 1883. The opinion of the court was delivered by



Mr. Chief Justice SIMPSON. In 1866 a bill was filed in the Court of Equity for the partition of the real estate of G. W. Glenn, late of Newberry county, to which his heirs-at-law were parties, plaintiffs and defendants. A decree was made therein, directing a sale of certain portions of said real estate

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\*partly for cash and partly on a credit, and the proceeds ordered to be distributed according to the rights of the parties. In pursuance of this decree, Silas Johnstone, Esq., the then commissioner in equity for said county, sold the lands embraced in the order, and distributed the cash proceeds. The Court of Equity having been abolished, the case was transferred to the Court of Common Pleas under the act for that purpose, and Jesse C. Smith the clerk of the Court of Common Pleas, from time to time collected a part of the credit portion of the sales.

Afterwards to wit: in January, 1875, an order was made in the cause in the Court of Common Pleas to "loan" out to Dr. George W. Glenn, a son of the deceased and one of his heirs-at-law, such portion of the credit sales as Smith had collected, or that might be paid to him upon Glenn securing the payment either by personal security, or collaterals, or both, upon final settlement of the estate of the deceased. Pursuant to this order Smith, the clerk, loaned to George W. Glenn the funds in his hands amounting to \$1,088.31, securing the same by the bond of Glenn, with Mattie S. Glenn and Thomas W. Weir as his sureties, the condition of the bond being "that Glenn should well and truly account for the sum of one thousand and eighty-eight dollars and thirty one cents, upon a final settlement of the estate of George W. Glenn deceased."

The bond was joint and several and made payable to Jesse C. Smith, clerk of said court, his successors in office and assigns in the penal sum of \$2,200. The term of office of Smith expired, and E. P. Chalmers, the plaintiff, is the present clerk, or was when this action began. The prayer of the complaint is, first, to have the bond reformed so as to provide for the payment of interest to be paid annually on the amount lent to Glenn, alleging that this stipulation was left out by mistake in drawing the bond; second, for judgment for said sum of \$1,088.31 with interest thereon, computed with annual rests, and, third, for such other and further relief as to the court may seem just, with costs.

The defendants demurred to the complaint (which stated only the above facts), upon the ground that it did not state facts sufficient to constitute a cause of action. Upon the hearing Judge Pressley sustained the de-

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murrer, with leave to the plaintiff to \*amend his complaint by adding thereto such allegations as he might be advised, on payment of costs of the demurrer. From this order the

plaintiff has appealed, alleging error in that the judge sustained the demurrer.

The question for us to consider is, does the complaint allege a cause of action? This involves the preliminary questions, what is a cause of action? and, to what extent shall it appear in the complaint so as to be sufficiently stated? There is but one form of action under the code, and at law, this action must be for one of three purposes, to wit: the recovery of money, the recovery of real estate, or the recovery of personal property. The cause of action must be that which gives the plaintiff the right as against the defendant to institute the action for the recovery which he seeks, and it depends upon the nature of that recovery. If he seeks money from the defendant, it must be on account of the fact that defendant is under legal obligation to pay him money, and has neglected or refused to do so, his cause of action in such case would be his right to the money and the neglect or refusal of the defendant to pay it. So, if he seeks the recovery of real or personal property, his cause of action would consist of his right to it and the withholding it by defendant. Thus, generally, it may be said that a cause of action exists where the legal rights of one party have been invaded by another.

Now as to the statement in the complaint. It is a general rule, in fact, invariable, that to entitle a plaintiff to recover, he must prove all the facts constituting his case or cause of action; he must prove the facts constituting his right, and its invasion by the defendant. It is another general rule, that the plaintiff can offer no testimony except to such facts as he has alleged in his complaint. It follows, therefore, that he must allege in his complaint all the facts showing his right, and also those showing its invasion by the defendant, and the facts thus alleged must in law upon their face, on the one side entitle him to the right which he claims, and on the other amount to an invasion by the defendant. If his complaint is defective in either of these particulars, he will not only be denied the privilege of supplementing the facts by testimony, but his complaint will fail on

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\*demurrer, for the want of stating facts sufficient to constitute a cause of action.

In this action the plaintiff seeks to recover money, and he founds his right thereto upon the bond already mentioned. Has he stated facts showing his right to the bond, that the defendants are under obligation to pay him money on account of it, and that they neglect and refuse to do so? Waiving the question as to his right to the bond, does the statement of facts show the two latter requirements? The condition of the bond is that George W. Glenn shall account on final settlement of the estate of George W. Glenn, deceased, for the sum of \$1,088.31. No rights accrue to the plaintiff under the bond, there-

fore until there is failure on the part of Glenn thus to account on the final settlement mentioned, and no obligation or liability rests upon the defendants until said failure, and there can be no invasion of the right of the plaintiff by the defendants until that right accrues, and then the obligation attaches. All these are suspended until, and depend upon, the failure of Glenn to account according to the terms of the bond.

The failure to account, then, is not only a necessary fact in the plaintiff's cause of action, but a most essential one. It is the central fact in the case, and without which the plaintiff's cause of action vanishes, whatever else may be found in the complaint. Upon an examination of the complaint, it will be found that this essential fact is not stated. There is no allegation that the estate of George W. Glenn has been settled or attempted to be settled. There is no allegation that this has resulted from the acts of Glenn, the borrower, or his sureties.† The matters in the estate, so far as appear in the brief, stand precisely as they stood when the bond was given. At that time a subsequent settlement was thought necessary, and contemplated, as appears in the order of the court authorizing the clerk to lend the money in his hands to Dr. Glenn. This order directed that it

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should \*be accounted for on final settlement. It was borrowed on those terms, and cannot be demanded sooner.

It is not for this court to speculate as to the reasons which influenced the Court of Common Pleas to grant the order to lend the money. It may have been because the estate was not ready for a settlement, and it was thought best that one of the parties in interest should have the use of it, rather than it should lie idle in the clerk's office; or it may have been that it was known or supposed that Dr. Glenn, as an heir, would ultimately be entitled to it, or the most of it, and it was better that he should have it at once, to be accounted for on final settlement. But this makes no difference. He obtained it under an order of the court, and he can only be made answerable upon the terms by which he obtained it, and which appear in his bond. The failure of the plaintiff to allege this material fact upon which his right, as well as the obligation of the defendants depended, is fatal.

As to the prayer to have the bond reformed. The bond seems to have been given in accordance with the terms of the order of the

† The only allegation in the complaint upon the subject is contained in the ninth paragraph, and is as follows: "That the persons entitled to the distribution of said fund as ascertained by the decree and orders of said Court of Equity hereinbefore alleged are now demanding the same of this plaintiff, and it is necessary to collect said fund in order that it may be distributed."—REPORTER.

court, authorizing Glenn to get the money. The clerk would have had no right to impose other terms than those imposed by the court. These facts appear in the complaint, and are sufficient to show that the plaintiff has no cause of action on that ground.

It is the judgment of this court that the order of the Circuit Court be affirmed, with the right to the defendants to answer should the plaintiff avail himself of the privilege to amend, which Judge Pressley's order, sustaining the demurrer, allowed him.

## 18 S. C. 473

NICHOLS v. BRIGGS.

(November Term, 1882.)

[1. *Pleading* ⚡364.]

So much of an answer as stated the reasons which actuated the defendant in interposing a plea of the statute of limitations, was, on motion, stricken out by the Circuit judge as irrelevant. *Held*, that in this there was no error.

[Ed. Note.—Cited in *Lenhardt v. French*, 68 S. C. 302, 47 S. E. 382; *Alexander v. Du Rose*, 73 S. C. 29, 52 S. E. 786.

For other cases, see *Pleading*, Cent. Dig. § 1156; Dec. Dig. ⚡364.]

[2. *Limitation of Actions* ⚡6.]

The act of 1880 (17 Stat. 415), amending the code, so as to make twenty years the period of limitation of actions on contracts se-

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cured by mortgage, \*had no retroactive force, and did not apply to a sealed note, which fell due in 1875.

[Ed. Note.—Cited in *McFadden v. Tant*, 20 S. C. 585; *Lipscomb v. Seegers*, 22 S. C. 411; *Hardin v. Trimmier*, 27 S. C. 123, 3 S. E. 46; *City Council of Anderson v. O'Donnell*, 29 S. C. 361, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; *Rehkopf v. Kuhland*, 30 S. C. 238, 9 S. E. 99; *Lyles v. Roach*, 30 S. C. 295, 9 S. E. 334; *Heyward v. Farmers' Min. Co.*, 42 S. C. 149, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; *Glover v. Floyd*, 76 S. C. 297, 57 S. E. 25.

For other cases, see *Limitation of Actions*, Cent. Dig. § 18; Dec. Dig. ⚡6.]

[3. *Limitation of Actions* ⚡167.]

Under the statute then of force such note was barred in six years, but not discharged, and a mortgage of lands given to secure the note retained its lien, and might be foreclosed at any time within twenty years of its execution.

[Ed. Note.—Cited in *Plyler v. Elliott*, 19 S. C. 263; *State v. Pinckney*, 22 S. C. 504; *Dearman v. Trimmier*, 26 S. C. 512, 515, 2 S. E. 501; *Smith v. Smith*, 27 S. C. 169, 3 S. E. 78, 13 Am. St. Rep. 633; *McGowan v. Reid*, 27 S. C. 267, 3 S. E. 337; *Wallace v. Craig*, 27 S. C. 523, 4 S. E. 74; *Patterson v. Rabb*, 38 S. C. 147, 17 S. E. 463, 19 L. R. A. 831; *Bal-lou v. Young*, 42 S. C. 177, 20 S. E. 84; *Williamson v. Eastern Building & Loan Ass'n*, 54 S. C. 597, 32 S. E. 765, 71 Am. St. Rep. 822; *Swancey v. Parrish*, 62 S. C. 245, 40 S. E. 554; *Ewbank v. Ewbank*, 64 S. C. 435, 437, 42 S. E. 194; *Lyles v. Lyles*, 71 S. C. 396, 51 S. E. 113; *American Mortgage Co. v. Woodward*, 83 S. C. 529, 65 S. E. 739.

For other cases, see *Limitation of Actions*, Cent. Dig. § 652; Dec. Dig. ⚡167.]



[4. *Pleading* ⇐365.]

[Cited in *Lenhardt v. French*, 68 S. C. 302, 47 S. E. 382, to the point that motion to strike out irrelevant matter from a pleading may be made at trial.]

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1163–1172; Dec. Dig. ⇐365.]

Before Cothran, J., York, March, 1882.

Action by John Nichols against B. F. Briggs. The opinion states the case.

The Circuit decree was as follows:

The sole question discussed before me by the counsel engaged in the cause, and with much elaboration, may be thus stated: Can an action for foreclosure of a mortgage of real estate be maintained, where the note which it is given to secure has been barred by the statute of limitations? It cannot be questioned, since the decision of the court in *Arnold v. McKellar*, 9 S. C. 335, that the amendment to section 113 of the code (see *Lynch's Code*, p. 53), as of the 25th of November, 1873 (see A. A. of that year), notwithstanding the supposed irregularity of its ratification and the subsequent re-enactment of it in the A. A. of 1875, is valid and effectual; and that sealed notes in South Carolina are subject to the statutory limitation of six years, as therein provided.

It is also true, as matter of law, that this action having been commenced in January of the present year, the statutory bar is complete, unless there be some existing cause to prevent its operation. No proof to this effect was offered upon the trial, and no suggestion of the kind was made in argument by the learned counsel for the plaintiff, who insisted, with the support of many authorities, that he was entitled to a decree of foreclosure of his mortgage, non obstante. The defendant's counsel, with equal zeal, as stoutly denied the plaintiff's right in this regard. The question thus presented is one of some difficulty of determination, owing to the great conflict of foreign authorities upon the subject, (to which, I am forced to express my regret, that we are becoming so much addict-

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ed.), as also on account of \*the apparent absence of any direct adjudication of the matter by our own courts.

The plaintiff's counsel, with great propriety, insists that the statute of limitations does not discharge or extinguish the debt, but only takes away the remedy for enforcing the payment of it. Since the case of *Sturges v. Crowninshield*, decided by the Supreme Court of the United States as far back as 1819, and reported in 4 Wheat. 122 [4 L. Ed. 529], and followed by numerous decisions of our own court, this doctrine may be accepted without question. He further insists, and apparently with equal confidence, that though the debt be barred, the lien of the mortgage should be enforced; and to support this proposition, cites chapters 26 and 27 of 2 Jones

Mort., and the numerous authorities there to be found.

Upon the other hand, the learned counsel for the defendant contends: That in South Carolina the mortgage is but an incident of the debt, deriving its vitality and perpetuity only from the debt itself, and that it cannot, in the very nature of things, survive the substance of which it is but the mere shadow; that the act of 1791, so explicit in this regard, was a departure from the English doctrine and has wrought a fundamental change in the nature and character of mortgages, and of the means of enforcing them; that our own decisions have steadily maintained this divergence; citing numerous authorities, among others, *Simons v. Bryce*, 10 S. C. 367; *Warren v. Raymond*, 12 S. C. 21; *Reeder v. Dargan*, 15 S. C. 175.

And not with unbecoming confidence does he rely upon the opinion of *Dargan, Ch.*, in *Gibbes v. Holmes*, 10 Rich. Eq., 487, in which that learned judge says: "If a mortgage be given to secure a simple contract debt, when the debt is barred, the mortgage is discharged. Anything that satisfies the debt discharges the mortgage." Unfortunately for the defendant, however, this is but obiter dictum, as the question to which this would otherwise have been decisive was not before the court. Nevertheless, as the positively expressed opinion of a very great judge in his own times—and there were giants in those days—it is entitled to great consideration. The added expression above "Anything that satisfies the debt," &c., seems to me, however,

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\*greatly to weaken the force of the first proposition; for whatever contention there might be as to that, there never could have been a doubt as to the second, which clearly relates to satisfaction of the debt—not to any suspension or abridgment of the remedy. Satisfaction is the whole object, aim and end of the law in all things. I have ventured to say this much in the way of respectful criticism, for the reason that the expression is very positive; it was much relied on by the defendant's counsel, and if other reason be needed, it may be found in what Judge Wardlaw said under like circumstances in *Mitchell v. Bogan* (I believe) in venturing to differ with Judge Nott.

It might not be matter of unprofitable speculation to inquire how far this expression may have been evoked by the peculiar remedy for foreclosure, furnished by the act of 1791, which, it will be remembered, was a proceeding at law, and was bottomed upon "judgment being obtained in the Court of Common Pleas." But I forbear. It surely could never have been successfully contended in South Carolina that the right of foreclosure in equity, which became, long before the abolition of the Court of Equity, as such, the universal mode of proceeding, was absolutely

dependent upon the character or quality of the bond or debt intended to be secured.

In the case of *Gillett v. Powell*, Speers Eq. 143, property was sold and bonds and mortgages taken for the purchase-money. Foreclosure of one of these was sought, and it was discovered that the bond had been altered in a material part and thereby made void. There was no reference in the mortgage to the bond as produced in its mutilated condition. Chancellor Harper, in delivering the circuit decree, which was affirmed on this point by the whole court, said: "But I am of opinion that the alteration of the bond does not affect the mortgage, and that it must be taken as evidence of the debt. If the mortgage alone had been taken, there can be no doubt but that it would have constituted a specialty debt. At law, it is regarded as a conveyance of the property; in equity, as evidence of the debt intended to be secured by it. \* \* \* The defendant is estopped by his deed to deny the existence of the bond." See upon this point, in part, *McCaughrin & Co. v. Williams*, 15 S. C. 505.

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\*Perhaps what has been already said is sufficient to show the bent or inclination of my mind; but in the view which I shall now take of this case, it is not necessary or proper even that I should make a decision of this vexed and interesting question. It is somewhere related of King James I. of England, who largely affected learning and the society of learned men, that upon one occasion he summoned to his presence the savans of his time and propounded to them the following inquiry: "Why is it that a fish placed in a bowl of water filled to the brim will not displace a particle of the contents of the vessel?" Many learned and scientific and highly satisfactory replies were given by the several philosophers interrogated in turn, until the last of the wise men cautiously inquired, before undertaking to account for the alleged phenomenon, if, indeed, the fact were so? Actual experiment showed that it was altogether otherwise. Can it be so in this case? Let us see:

On June 5th, 1874, the defendant made and delivered his sealed note to the plaintiff, secured by the mortgage in question, for the sum of \$500, payable twelve months after date. On June 5th, 1875, the note became due, and the statute began to run. On December 24th, 1880, the legislature (17 Stat. 415) amended section 113 of the code, by extending the time for bringing actions "upon bonds or other contracts in writing, secured by mortgage of real property," to twenty years. The statute of limitations had operated upon the sealed note before the court for about five and a half years, and it had still about six months to run before the bar should be complete. What effect did the extension have upon "the contract in writing" secured by the mortgage here? The

answer will be found in the case of *Wardlaw v. Buzzard*, 15 Rich. 160 [94 Am. Dec. 148], and is in these words:

"\* \* \* Nor was it denied that the legislature might extend the statute of limitations before the bar was complete without impairing the obligation of the contract. In fact, its extension gives additional vitality to the contract, and furnishes no ground of complaint to the debtor or creditor. The debtor, if he wishes to pay can do so; and

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if the creditor desires to sue, \*there is nothing in the extension to prevent him." This seems to me to be the conclusion of the whole matter.

Wherefore, it is ordered, adjudged and decreed that it be referred to the clerk of the Court of Common Pleas for the county of York, to inquire into and compute the amount due upon the demand herein sued upon; and that upon such ascertainment, that the plaintiff have judgment of foreclosure of the premises mortgaged and described in the complaint, in the usual form, for his debt, interest and costs; and that the plaintiff herein have leave to move for any further order that may be necessary to effectuate the judgment herein rendered.

Messrs. Hart & Hart, for appellant.

Mr. W. B. Wilson, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to foreclose a mortgage upon a tract of land, executed by the defendant on June 4th, 1874, "for the better securing the payment" of his note under seal for \$500, bearing date the same day, and payable one year thereafter (June 4th, 1875), with interest from date. The action was commenced January 14th, 1882, and the defense was the statute of limitations. It was insisted that from the time the note fell due, June 4th, 1875, until the action was brought, January 14th, 1882, more than six years had expired, and recovery at law on the note being barred by the statute of limitations, the defendant was not liable to the plaintiff in any way whatever, either on the note or mortgage; adding to the third paragraph of his answer a statement that he invoked the plea of the statute "in order to reimburse himself for one-half of the Gazaway Wilson lands, of which he was fraudulently deprived by the plaintiff herein, by reason of the plaintiff taking advantage of the fact that the agreement that the plaintiff should purchase the said lands for the joint use of himself and defendant was not in writing."

The cause came on to be heard before Judge

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Cothran, who, \*upon motion of the plaintiff's counsel, granted an order to strike out so much of paragraph three of defendant's an-



swer as undertook to assign his motive for invoking the plea, viz.: all after the words "due and owing by defendant to plaintiff." The judge then considering the case, disallowed the plea of the statute of limitations, and gave the plaintiff a decree of foreclosure for the amount of the debt, on the ground that under the amendment of the code in 1880, enlarging the period of limitations as to "notes secured by mortgage of real property," the note in question was not barred by the statute of limitations.

From this judgment the defendant appeals to this court upon the following exceptions: "1. His Honor erred in striking from the answer of defendant the unnumbered section following section three, it not being 'matter of right' to plaintiff that same should have been stricken out. 2. His Honor erred in not holding that this action, for foreclosure of a mortgage of real estate, cannot be maintained, the action not having been brought within six years, the time limited for its commencement after the debt matured, as evidenced by the note and by it alone. 3. His Honor erred in holding that the act of December 24th, 1880, applied to the cause of action herein. 4. His Honor erred in not adjudging that the complaint be dismissed. 5. The decree is in other respects misleading and contrary to law."

As to the first exception, in reference to the order striking out a portion of the answer as irrelevant, it is only necessary to say that matter is irrelevant when it has no substantial relation to the controversy between the parties to the action, and that the code (section 183) provides that "If irrelevant and redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby." "An answer, otherwise good, may contain a mass of unnecessary or redundant matter, which seems only to encumber the proceedings and conceal or obscure the real issues. In such cases the plaintiff should move for an order striking out such matter as 'irrelevant.'" 2 Wait Pr. 437.

The other exceptions will be considered together. The old statute of limitations, made of force in this State, did not apply to bonds or other instruments under seal, but in 1870

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the Code of Civil Procedure was adopted, which, in title 2, under the head of "time of commencing civil actions," provided as follows:

"Sec. 96. The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes now of force shall be applicable to such cases."

"Sec. 113, Subd. 2. Within twenty years, an action upon a sealed instrument." In 1873, this provision was amended by adding the words "other than notes or personal bonds for the payment of money only, where-

of the period of limitations shall be as prescribed in the following section" (that is to say, six years), 15 Stat. 496. In 1880, the provision was again amended by changing the phraseology, as follows: "An action upon a bond or other contract in writing, secured by a mortgage of real property," so that said subdivision, with the amendments thereto, shall read as follows: "Subdivision 2. An action upon a bond or other contract in writing, secured by a mortgage of real property, an action upon a sealed instrument other than a sealed note and personal bond for the payment of money only, whereof the period of limitations shall be the same as prescribed in the following section" (six years), 17 Stat. 415; Gen. Stat. 1882, Code § 111.

According to these provisions of the law, was the sealed note secured by a mortgage of real property in this case, barred by the statute of limitations, on January 14th, 1882, when these proceedings were instituted? The note fell due June 5th, 1875, while the amendment of 1873 was the law, making the limitation upon all sealed notes for the payment of money only six years; and as more than that time had elapsed before January, 1882, when the action was commenced, the note was barred by the statute, unless there was some good reason to the contrary. But it is urged that before the bar of the statute was complete, the legislature, on December 24th, 1880, passed the second amendment above referred to, which restored the twenty years as originally provided by the code, as to "an action upon a bond or other contract in writing, secured by a mortgage of real property," and that, as the note in this case

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was so secured, the said \*second amendment included it and had the effect of extending the statute of limitations as to the note before us from six to twenty years. To this was opposed the view that, although the last amendment did change the statute as to notes secured by mortgage of real property, it was only prospective in its operation, and did not extend the period of the statute as to any contract made before the passage of the amendment.

Did the amendment include contracts in existence at the time it was passed, or should it be construed as applying only to contracts thereafter to be made? There is no doubt that the statute of limitations relates to the remedy and not to the contract itself, and that the legislature had the power, before the bar was complete, as to contracts then in existence, to extend the time necessary to complete the bar, without impairing the obligation of such contracts. The question here, however, is not whether the law-makers had such power, but whether in this case they exercised it. The general rule certainly is that "statutes are not to be construed retrospectively, or so as to have a retrospective

effect, unless it shall clearly appear that it was so intended by the legislature." *Ex parte Graham*, 13 Rich. 277. It may be true, as stated, that statutes of limitations relate only to the remedy, and are enforced according to the *lex fori*, that is to say, according to the law of the State where the party is sued; but we do not understand that these reasons extended the rule so far as to make applicable only the law of force at the time the party is sued.

It seems that these statutes, affecting the remedy only, constitute no exception to the general rule, that laws and amendments thereof of the same State operate only upon matters which arise after their passage, unless they otherwise expressly declare. "In this country, statutes of limitations are, as a general rule, applied only to a right of action which is to commence in futuro, and are not retrospective in their operation. And it is a well-settled principle of law, that the courts are to give such statutes a prospective operation, where there is nothing indicating a different intention on the part of the legislature which enacted the statute." 7 Wait *Ac. & Def.* 228.

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\*The law passed in this State, in 1861, "To extend relief to debtors, and to prevent the sacrifice of property at public sales," commonly called the "stay law," and which received construction in the case of *Wardlaw v. Buzzard*, 15 Rich. 158 [94 Am. Dec. 148], is no exception to the rule, but rather confirms it. That act shows upon its face that it was the intention, indeed the very purpose of the legislature, that it should apply to contracts in existence at the time of its passage. The fifth section was in these words: "That the operation of the statute of limitations be and the same is hereby suspended during the period in which this act is of force;" and the Court of Errors, in their judgment, said: "There is no distinction made as to the time when the causes of action arose, and they unquestionably meant and intended to embrace all money demands. If not intended to apply to causes of action then existing, the fifth section was unnecessary, and we cannot suppose the legislature would be guilty of the folly of passing an act suspending the operation of the statute of limitations, if intended only to apply to causes arising thereafter, when the act itself was limited to the duration of one year." In the amendment under consideration no such intention is manifest. From its terms we are unable to say that it was clearly intended to operate retrospectively and include contracts in existence at its passage.

Besides, from the form and manner in which the amendment was inserted into the code, certain words having been added to the subdivision 2 of the section as it stood, we think the added words were intended to take their place in the context, remaining

as a part of the section, and, of course, controlled by the declaration still unrepealed and standing at the head of the whole title—"The provisions of this title shall not extend to actions already commenced or to cases where the right of action has already accrued." "When the amendment of a statute is made by declaring it shall be amended so as to read in a given way, the amendment has no retroactive force; the new provision is to be understood as taking effect at the time the amended act would otherwise become the law." *Potter's Dwar.* 165; *Cooley Const. Lim.* 461. As the law now stands, a note secured by a mortgage of real property ex-

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ecuted since the amendment of \*1880, would not be barred in less than twenty years, but as the note in this case had been executed and was running to maturity when it was passed, we think that it must fall under and be controlled by the former amendment of 1873, and, according to its terms, being a sealed "note for the payment of money only," was barred by the statute of limitations, in January, 1882, when the action was commenced.

But the most difficult question still remains. Assuming that recovery on the note considered by itself could not be had on account of the statute of limitations, must the mortgage of real property, given to secure the same debt, also be considered as barred? The mortgage, after reciting the execution of a sealed note for \$500, proceeds to declare that, "in consideration of the said debt and sum of money aforesaid, and for the better securing the payment thereof to the said John Nichols," &c. A mortgage on land is an instrument of such character as exempts it from the bar of the statute in less than twenty years, so that if it is barred in this case, it must be upon some ground growing out of its relation to the note, which imposes upon it a like fate, that the remedy, which the law afforded to recover the note being barred, must also be barred as to the mortgage.

It is certainly remarkable that this question, so far as we are informed, has never been directly decided in this State. It is true that in *Gillett v. Powell, Spears Eq.* 145, where a bond given to secure the debt had been altered and thereby destroyed, Chancellor Harper held that a mortgage given to secure the same debt without making any reference to the bond, was not thereby affected, but should be upheld and enforced as an independent security. It is likewise true that in the case of *Gibbes v. Holmes*, 10 Rich. Eq. 487, Chancellor Dargan said that, "It is a misapprehension, I think, to suppose that the statute of limitations has any application to this case. If it is meant to apply as a bar to the debt, it cannot prevail. If a mortgage be given to secure a simple contract debt, when the debt is barred the



mortgage is discharged. Anything that satisfies or destroys the debt discharges the mortgage;" but it is manifest from the extract itself that the point as to the effect of the statute on the mortgage was not in-

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involved in the case, and, as \*we take it, had not been argued. The declaration cannot be regarded as anything more than one of those expressions which fall from a judge in the glow of argument, and are known as obiter dicta. We must regard the question as still open, and the duty imposed of deciding it upon general principles and such outside authorities as may appear analogous and sound.

There is no doubt that in this State the act of 1791 (except in one state of facts) destroyed the legal estate of the mortgagee, and, adopting the equity doctrine, declared that the mortgagor is the legal owner of the land and the mortgagee only a creditor, with a lien on the land for the security of his debt; but it must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds, personal, real, pledge, mortgage, collaterals, &c. The note given is only evidence of the debt and one of the means of collecting it, and if there is a mortgage, that is only another security for the same debt. It is true that in the case of *Cleveland v. Cohrs*, 10 S. C. 224, it is said that "The bond represents the debt, while the mortgage is a mere security for the payment of such debt. One is the principal, the other is the mere accessory." There is nothing in this inconsistent with the views suggested. The bond, undoubtedly, is the most common assurance, and for this reason, possibly, it may be regarded as the primary security and a mortgage as cumulative, or secondary, but in no proper sense can the mortgage be regarded as a security merely for the bond, which, being only the evidence of the debt, may be displaced by substitution or lost or destroyed, leaving the mortgage as a subsisting security for the debt in a new form. *Gibbes v. Railroad Company*, 13 S. C. 253, and authorities.

"A mortgage being given as a security for a debt, the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt." 1 Hill. Mort., § 3. The mortgage would have been good as a security for the \$500 even if the bond had never been given. As the court say in the case of *McCaughrin & Co. v. Williams*, 15 S. C. 505,

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"the mortgage debt exists inde\*pendently of the note—the validity of the mortgage does not depend upon the description of the debt

contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond or otherwise: it depends rather upon the existence of the debt it is given to secure." Or, as said by Chancellor Harper in *Gillett v. Powell*: "But here, as I have said, the mortgage has no reference to the bond, and I cannot consider that the party claiming under it is in a worse situation than if the bond had never been taken. If he had taken a single bill and a bond with a penalty, or a bond with and one without security, though there might have been an equity to restrain the enforcement of both, I do not see how the alteration of one could vitiate the other."

We do not understand that this doctrine, as to the different securities for the same debt, conflicts with that other as well established, that payment or anything else which reaches to the debt itself and discharges it, will at the same time discharge all the securities of every kind. We agree that anything that satisfies or discharges the debt, discharges the mortgage of course. What effect did the bar of the note by the statute of limitations have upon the debt evidenced by the note and also secured by the mortgage? It is well settled that the effect of the statute is only to take away the remedy, and not to extinguish the debt. When a security is barred the debt is not thereby necessarily discharged. *Wilson v. Kelly*, 16 S. C. 216. The rule that the discharge of the debt is a discharge of the mortgage has no application when the debt is merely discharged by the statute of limitations or a discharge in bankruptcy.

In regard to the right to enforce a mortgage lien given to secure a debt barred by the statute of limitations, there seems to be some difference of opinion in the different States, notably in California, Nevada, Texas, Nebraska, Iowa, Illinois and Kansas, but in this conflict we are content to take the general rule as laid down by Mr. Jones: "Though the debt be barred, the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations, does not necessarily, or as a general rule, extinguish the mortgage security or prevent the maintaining an action to enforce it." 2 Jones Mort., § 1204 and notes. This is the general rule, and we see no reason

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founded \*in principle why it should not be adopted here; indeed, it would seem to have appropriate application in this State, where the law, as it now exists, makes the statutory bar of a "bond or other contract in writing, secured by a mortgage of real property," twenty years. Although as we have held, that law in terms is not applicable to this case, yet we may fairly regard it as at least a legislative declaration that the mortgage given to secure the debt in such cases

takes it out of the general rule in regard to the bar of the statute of limitations.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 486

GARRISON v. DOUGHERTY.

(CRAWFORD v. SAME.)

(November Term, 1882.)

[*Ejectment* ⇨ 148; *Improvements* ⇨ 4.]

The final judgment, within forty-eight hours of which a complaint for improvements under the betterment law must be filed (Gen. Stat. § 1837), means the judgment of the Circuit Court, even in cases where the cause is further prosecuted by appeal. Where such a complaint was not filed until remittitur entered dismissing an appeal, it was not within the time limited.

[Ed. Note.—Cited in *Godfrey v. Fielding*, 21 S. C. 318.

For other cases, see *Ejectment*, Cent. Dig. § 518; *Dec. Dig.* ⇨ 148; *Improvements*, Cent. Dig. § 24; *Dec. Dig.* ⇨ 4.]

Before Hudson, J., Marion, October, 1882.

These were actions by Vige Garrison and Ervin Crawford against John Dougherty, heard together. The Circuit judge thus states the cases:

These are actions brought against the defendant for the value of alleged betterments made by the plaintiffs upon a tract of land in the county of Marion, the possession of which the defendant, John Dougherty, had recovered of the plaintiffs in an action involving the question of title. The verdict in favor of Dougherty was rendered at the April term of the Court of Common Pleas for Marion county, A. D. 1880, and judgment thereon entered up and filed May 1st, 1880.

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In due season an \*appeal was taken to the Supreme Court, and by that court the judgment of the Circuit Court was affirmed. The remittitur was sent down to the Circuit Court, and filed in the clerk's office on April 11th, 1881. On the same day the present plaintiffs filed, each for himself, a complaint for the recovery of the value of betterments on that part of the tract claimed by each. In his answer to these complaints, the defendant, Dougherty, sets up several defenses, and among them, that the complaint in each case was filed too late. The proceedings are under chapter CXXI., sections 1-7, of the General Statutes (1872) which requires the complaint for betterments to be filed in forty-eight hours after the rendering of final judgment, or during the term of the court at which such judgment is rendered. The question presented is whether the final judgment contemplated in the statute is the judgment of the Circuit Court appealed from, or that judgment affirmed by the Supreme Court, as evidenced by the remittitur sent down and filed.

A reading of all the sections of the chapter providing this summary and efficacious remedy, and the prompt steps requisite to obtain the relief, satisfies me that the final judgment contemplated is the judgment of the Circuit Court. Within forty-eight hours after the rendering of such judgment, or, at furthest, during the term at which it is rendered, this claim for betterments must be filed. Hence it is that no summons is required to be served, and no notice, except the filing of the complaint, is to be given. A prompt assertion of the claim and its speedy determination are evidently contemplated, and hence the stay of all further proceedings under the judgment for the recovery of the land.

It is therefore ordered and adjudged, that the complaint in each of these cases be dismissed with costs.

The plaintiffs appealed on the following grounds: 1. Because his Honor erred in holding that the complaint in this action was filed too late, not having been filed within forty-eight hours after the judgment was entered in the Circuit Court. 2. Because his Honor erred in holding that the filing of the complaint in the case within forty-eight hours after the filing of the remittitur of the Supreme Court was too late, and was not in

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conformity \*with the betterment act. 3. Because his Honor erred in holding that the act required the filing of the complaint within forty-eight hours after the judgment of the Circuit Court.

Messrs. Townsend & McKerall, for appellants.

Messrs. Johnson & Johnson, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN [omitting the statement of the case]. The question is simply one of construction of the statute, which having stated that "after final judgment" in an action to recover lands and tenements" &c., goes on to declare "that the defendant in such action shall, within forty-eight hours after such judgment, or during the term of the court in which the same shall be rendered, file a complaint against such plaintiff for so much money as the lands and tenements are so made better, in the office of the clerk of such court, which shall be sufficient notice to the defendant in such complaint to appear and defend against the same," &c. Gen. Stat., § 1837.

The judgment is spoken of as "a final judgment," and the word "final" does ordinarily mean "relating to the end." "ultimate," "last," "latest," but, taking the whole provision together, we can not doubt that the words were intended to apply to the Circuit Court. Manifestly great promptness



was intended. "Within forty-eight hours after such judgment or during the term of the court in which the same shall be rendered." There are expressions here which are entirely inapplicable to a judgment of the Supreme Court, sent down with the remittitur, which may not be necessarily during the term of either the Court of Common Pleas or of the Supreme Court, and can not be appropriately said to be "rendered."

The expression "final judgment," as applying to the Court of Common Pleas, occurs several times in the code of procedure. In section 11, "provided, if no appeal be taken until final judgment is entered," &c.; in sec-

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tion 305, "a transcript of a \*final judgment directing in whole or in part," &c., and in section 313, "Final judgments hereafter entered shall not of themselves constitute a lien," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 18 S. C. 489

ELLEN v. ELLEN.

(November Term, 1882.)

[1. *Lost Instruments* ¶24.]

Whether admissions of the plaintiff's grantor, while in possession of the disputed land, were sufficient evidence of the due execution and contents of an alleged lost deed, under which the defendant claimed, was a question of fact, and, therefore, properly left to the jury to be determined.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 58-63; Dec. Dig. ¶24.]

[2. *Evidence* ¶230.]

Recitals in a deed made by M. of a former conveyance by him to defendant's grantor (which conveyance is proved to have been lost), are evidence against plaintiff, who claims title under E., if E. matured title by twenty years' presumption of a grant from M., but not if plaintiff derived title through an adverse possession of E.

[Ed. Note.—Cited in *Stone v. Fitts*, 38 S. C. 397, 17 S. E. 136.

For other cases, see *Evidence*, Cent. Dig. §§ 835-851; Dec. Dig. ¶230.]

[3. *Evidence* ¶230.]

And declarations by M. of a gift to defendant's grantor are admissible against plaintiff, if they were made before E. took possession, claiming under a presumed deed from M., but such declarations can have no application to plaintiff's claim under an adverse possession by E.

[Ed. Note.—Cited in *Wingo v. Caldwell*, 36 S. C. 599, 15 S. E. 382.

For other cases, see *Evidence*, Cent. Dig. §§ 835-851; Dec. Dig. ¶230.]

[4. *Evidence* ¶263.]

After declarations by plaintiff's deceased grantor in disparagement of a claim of adverse possession have been introduced by defendant, other declarations by the same person in support of such a claim may be introduced by plaintiff in reply, only where they were parts of the same conversation already testified to, or

accompanied and were explanatory of some special act of ownership.

[Ed. Note.—Cited in *Metz v. Metz*, 48 S. C. 486, 26 S. E. 787; *Knight v. Knight*, 95 S. C. 138, 78 S. E. 744.

For other cases, see *Evidence*, Cent. Dig. § 1025; Dec. Dig. ¶263.]

[This case is also cited in *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9, and distinguished therefrom.]

Before Witherspoon, J., Marion, April, 1882.

This is a second appeal in this case, the first being reported in 16 S. C. 132, where the facts will be found more fully stated. For the purpose of understanding this appeal, the opinion here sufficiently states the case.

Messrs. W. W. Harlee, Johnson & Johnson, for appellant.

Messrs. Townsend & McKerall, W. W. Sellers, contra.

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\*February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is a contest over a tract of land containing one hundred acres lying in Marion county. The plaintiff is a son of David Ellen by his second wife, the defendant being a son by the first wife. The defendant is in possession of the land, and this action has been brought for its recovery.

The plaintiff introduced a grant from the State to one Isaac Hyatt, A. D. 1792, covering the land; then a deed from Hyatt to one Robert McKenzie, Sr., dated May 19th, 1804; then evidence of a long and continued possession (some forty years) by his father, David Ellen, which he claimed was adverse; and finally a deed to himself of the said land from David Ellen, dated August 18th, 1871, and rested, claiming that the possession of David Ellen was adverse, and thereby David Ellen had acquired good title before the execution of his deed to the plaintiff, both under the operation of the statute of limitations, and also by the legal presumption of a deed from Robert McKenzie, Jr., and also from the said William B. Ellen, arising from over twenty years of possession.

The defendant claimed title from Robert McKenzie, Sr., first, by a deed executed from Robert McKenzie, Sr., to Zimri M. Ellen, a grandson, and the brother of defendant, William B., dated in 1833 or 1834; and, second, by deed from Zimri to defendant, executed and duly recorded March 12th, 1861; and he denied that the possession of David Ellen, his father, had at any time been adverse either to the title of Robert McKenzie, Sr., Zimri M. Ellen or of the defendant, but that he had always held with full knowledge of and subordinate to these titles. The defendant was unable to produce the deed

from Robert McKenzie, Sr., to Zimri M. Ellen. This was alleged to have been lost when Sherman's army passed through that portion of the State, and other and secondary evidence was introduced as to its execution, among which was an admission of David Ellen, through whom plaintiff claimed. Upon this admission the defendant requested the judge to charge that this was

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"sufficient evidence \*of the due execution as well as the contents of such deed, and that no further proof thereof was necessary."

The defendant offered to introduce a deed from Robert McKenzie, Sr., to Robert McKenzie, Jr., containing recitals as to the boundaries, to wit, that Robert McKenzie, Sr., had given the land in dispute to Zimri M. Ellen, which was ruled incompetent as irrelevant. After the defendant had introduced declarations of David Ellen, while he was in possession in disparagement of his title as an adverse claimant, the plaintiff was allowed to introduce David Ellen's declarations also in rebuttal of this testimony. The verdict was for the plaintiff, for the land in dispute and \$300 damages.

The defendant has appealed, his appeal raising the following legal questions: First. Did his Honor err in refusing to charge as requested, "that the admission of David Ellen while in possession as to the execution of the deed from Robert McKenzie, Sr., to Zimri M. Ellen, was sufficient evidence of the due execution as well as the contents of such deed, and that no further proof was necessary?" Second. Did he err in excluding the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., with its recitals? Third. Did he err in admitting declarations of David Ellen in reply, rebutting the testimony of defendant as to declarations of said David Ellen in disparagement of his title by adverse possession? and, fourth, Did his Honor err in ruling out the declarations of Robert McKenzie, Sr., that he had given the land in dispute to his grandson, Zimri M. Ellen, and also ruling out proof that Robert McKenzie, Sr., had gone round the lines of the tract of land in dispute and shown them to his grandson, Zimri Ellen, as his own? There were other exceptions, but as they involve questions of fact they are beyond our jurisdiction and cannot be considered.

This case is now before us upon a second appeal, a new trial having been ordered in the former appeal. In that appeal the defendant excepted on the ground that the presiding judge did not instruct the jury, "that as to the deed of Robert McKenzie, Sr., to Zimri M. Ellen, the admissions of David Ellen, under whom respondent claimed, were conclusive against him not only as to its existence but as to its contents." This ex-

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ception was \*overruled by the court on two

grounds: First, it appeared from a statement made by the presiding judge in refusing a motion for a new trial made on that exception, that it rested on a mistake of counsel as to the precise charge of the judge; and, second, that no request to charge had been made, and consequently no error as to this matter could be assigned upon appeal. *Ellen v. Ellen*, 16 S. C. 132, citing *Madsden v. Phoenix Ins. Co.*, 1 S. C. 24; *Abrahams v. Kelly and Barrett*, 2 Id. 238. On this trial the request was made. The judge declined to charge it, but stated that he "would submit all of the testimony, including the declarations of David Ellen as to the alleged lost deed, to the jury, leaving the jury to decide as to the effect of such declarations according to the weight or preponderance of the evidence."

We find nothing in the points and authorities of appellant's counsel upon this exception, nor have we been able to find any authority ourselves to sustain it. The presiding judge pursued the proper course; he admitted the testimony, that, and all other offered, bearing upon the question immediately at issue, leaving its force and effect to the jury. It was beyond his province to discuss the sufficiency of this testimony. This, under the constitution, belonged to the jury, and the judge would have been invading their powers had he charged that any special fact had been proved, and that no further evidence was required. The question at issue was whether a deed from Robert McKenzie, Sr., to Zimri M. Ellen, had ever been executed. This was a question of fact. The admissions of David Ellen were introduced to prove this fact; whether this evidence was competent was a question of law for the court, but its effect and force was for the jury.

Second. Was it error in excluding the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., containing a recital which called for lands which the grantor had given to his grandson, Zimri M. Ellen, dated in June, 1833? "The recital of a deed in another deed is evidence of the recited deed if the original is lost, against the party who executed the reciting deed, or against any person claiming under him." 2 Phil. Ev., C., H. & E. Notes 574. This seems to be the

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English doctrine, the \*evidence being received as secondary evidence, the recited deed having been lost.

In the United States, however, this evidence has been received as primary evidence, as evidence not only against the parties, but against privies in blood, in estate, and in law. See numerous authorities in Note 476, 2 Phil. Ev. 574, supra. "In regard to recitals, the general rule is that all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest, if it be a deed of conveyance, and bind-



ing both parties and privies—privies in blood, privies in estate, and privies in law. Between such parties and privies, the deed or other matter recited needs not at any time to be otherwise proved, the recital of it in the subsequent deed being conclusive. It is not offered as, secondary, but as primary, evidence which cannot be averred against, and which forms a muniment of title." 1 Greenl. Evid. 30, § 23. "But such recital does not bind strangers or those claiming by title paramount to the deed. It does not bind persons who claim by an adverse title, or persons claiming from the parties anterior to the date of the reciting deed." *Ibid.*, Note; *Carver v. Jackson*, 4 Peters 1, 83 [7 L. Ed. 761].

Now, in the case before the court, the plaintiff rested his claim in part upon a deed from Robert McKenzie, Sr., to David Ellen, presumed to have been executed from twenty years' possession by David Ellen. It is true he also relied upon the adverse possession of David Ellen. But in so far as he claimed through this presumed deed arising from David Ellen's twenty years or more possession, he was to that extent a privy to Robert McKenzie, Sr., and under the authorities above cited would be subject to recitals in the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., that deed having been executed, as alleged anterior to the presumed deed. And in this case, this would be so whether the limited doctrine of the English authorities as to secondary evidence, or the wider doctrine of the American as to primary is the better law, the fact being that the recited deed to Zimri M. Ellen was lost, and, therefore, secondary evidence in reference thereto was admissible.

We think it was error in the presiding judge to exclude this deed if otherwise proved. The deed should have been admitted

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\*as applicable to so much of plaintiff's claim as rested upon the presumed conveyance from Robert McKenzie, Sr., to David Ellen, arising from David Ellen's twenty years' possession or more. But it would have no application to plaintiff's title derived through the adverse possession of David Ellen. Note to 1 Greenl. Evid., § 23, *supra*.

Third, "As to the admission of the declarations of David Ellen in reply, rebutting testimony of defendant as to David Ellen's declarations in disparagement of title by adverse possession." This court held in the former appeal in accordance with the doctrine laid down in 1 Greenl. Evid., § 109, and in our own cases of *Turpin v. Brannon*, 3 McC. 266, and *Martin v. Simpson*, 4 McC. 263, that such declarations were admissible when they accompanied an act and were explanatory thereof. It further held that Judge Hudson did not violate this principle in his ruling, as explained by him in dismissing a mo-

tion for a new trial, where he stated "that the plaintiff was confined to proof of acts of ownership without declarations as rigidly as possible."

Judge Witherspoon seems to have gone a step beyond this rule, above. He admitted the declarations of David Ellen in support of his title as independent testimony, in reply to his declarations in disparagement thereof, introduced by the defendant. If these declarations had been part of the same conversation as that introduced by the defendant, or had been explanatory of some special act, then they might have been admissible as part of the *res gestæ*, but the declarations of a party interested can never per se be admitted as evidence of his right. *Martin v. Simpson*, *supra*. As we understand the ruling of Judge Witherspoon, he admitted the declarations of David Ellen in support of his own title without regard to their connection with special acts and explanations thereof, but per se and in reply to the declarations introduced by the defendant. This, we think, was error.

Fourth. As to the exception "that the presiding judge erred in ruling out the declarations of Robert McKenzie, Sr., that he had given the land in dispute to his grandson, Zimri Ellen, and also in ruling out proof that Robert McKenzie, Sr., had gone around the lines of the tract of land and shown

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them to his \*grandson, Zimri, as his own." It does not appear in the brief at what time these declarations or this inspection of the lines were made. If before David Ellen took possession, claiming by presumed deed from Robert McKenzie, Sr., the evidence was admissible under the principles discussed above; if afterwards, they were inadmissible. In the absence of the facts the court can make no positive ruling upon the subject. If admissible at all, it could have no application to claim of plaintiff's title resting upon the adverse possession of David Ellen.

The other exceptions of defendant, as to the delivery of the deed from David Ellen to plaintiff, and as to the weight and preponderance of the testimony, being questions of fact, cannot be considered. It is the judgment of this court that the judgment of the Circuit Court be reversed.

18 S. C. 495

DAVIS v. McDUFFIE.

(November Term, 1882.)

[1. Injunction ⇨ 129.]

Upon the reading of the complaint at the hearing, and the affidavit upon which a preliminary injunction had been granted, the complaint, on defendant's motion, may be dismissed, if not stating facts sufficient to constitute a

cause of action: nor is it proper in such case that the answer should be read.†

[Ed. Note.—Cited in *Sandel v. Atlanta Life Ins. Co.*, 53 S. C. 243, 31 S. E. 230.]

For other cases, see *Injunction*, Cent. Dig. § 279; Dec. Dig. § 129.]

[2. *Specific Performance* § 99.]

Where a purchaser at a master's sale fails to comply on the day of sale, under a verbal agreement with the master, and afterwards tenders the cash portion and offers otherwise to comply, but the master refuses, a higher bid at a resale having been guaranteed, and infants being interested. *Held*, that an action by the purchaser against the master for specific performance would not lie.

[Ed. Note.—Cited in *Spears v. Long*, 32 S. C. 334, 11 S. E. 332.]

For other cases, see *Specific Performance*, Cent. Dig. § 301; Dec. Dig. § 99.]

3. This case distinguished from *Yates v. Gridley*, 16 S. C. 496.

[4. *Judges* § 26.]

The proper proceeding by the purchaser was a rule against the master in the original cause still pending, and such a rule having been applied for and discharged, the purchaser's only further remedy was an appeal from such refusal.

[Ed. Note.—Cited in *Ex parte Qualls*, 71 S. C. 92, 93, 50 S. E. 646.]

For other cases, see *Judges*, Cent. Dig. § 107; Dec. Dig. § 26.]

[This case is also cited in *Cartee v. Spence*, 24 S. C. 556, and distinguished therefrom.]

Before Witherspoon, J., Marion, March, 1882.

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\*This was an action by Matilda E. Davis against A. Q. McDuffie and the distributees of Archibald McIntyre, deceased, commenced in December, 1880. The opinion states the case.

The Circuit decree, omitting its statement, was as follows:

Upon hearing the complaint, affidavit and order of injunction above referred to, defendants' counsel insisted that the complaint should be dismissed upon the following grounds, to wit:

1. That the complaint did not set forth facts sufficient to constitute a cause of action; that, admitting the allegation to be true, there was no cause of action. 2. Because the court has now no jurisdiction of the matters set forth in the complaint.

The plaintiff's counsel insisted that the defendants should have demurred or given notice of a motion to dismiss the complaint, and that having answered, it was too late to object in this way. I held and adjudged that it was not necessary that defendants should have made such objection to the complaint, either by demurrer or answer, or even make a motion to dismiss the complaint; that upon hearing the complaint at the trial, the court, of its own motion, can and should dismiss it, if it does not set forth a sufficient

cause of action, or if the court cannot entertain jurisdiction, or will not grant the relief asked for.

I further hold and adjudge: That the complaint asks for a relief the court cannot grant; that the court cannot decree the specific performance by its officer, the master, of a mere understanding or agreement by which he was to give time and indulgence to a purchaser at a sale made by him, which, in law, he had no right or authority to do, and which, in any event, he could only do with the consent of the parties in interest. The terms of sale, fixed by the order of the court, were the law of the case, and they must be strictly followed. They cannot be altered by usage or custom. When plaintiff obtained time and indulgence, without the consent of parties in interest, she took all the risks, and, by her own showing, forfeited all her rights as purchaser, by not complying with bid, in accordance with terms of sale. See cases of *Seymour v. Preston*, *Spears Eq.* 485, and *Baily v. Baily*, 9 Rich. Eq. 392.

But even if a sufficient cause of action had been set forth in the complaint, I hold and adjudge that this court cannot take

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\*jurisdiction now of the matters alleged, because it appears that they have already been fully heard and passed upon by a Circuit judge in open court, viz., by rule, and he has refused to order the master to make title to plaintiff. If she was dissatisfied with said decree of Judge Aldrich, plaintiff should have appealed therefrom, and not come again into the court in another form of proceeding, to ask it to correct its own errors.

It is therefore ordered and adjudged, That the complaint be dismissed with costs, that the injunction heretofore granted by Judge Hudson be dissolved, and that the master, A. Q. McDuffie, do proceed to carry out the order for sale, dated October 8th, 1880, by selling the tract of land described in the complaint herein, on the first Monday in October next, or some convenient sales day thereafter, after duly advertising same, on the terms fixed by said order.

From this decree the plaintiff appealed.

Messrs. Townsend & McKerrall, for appellant.

Messrs. C. A. Woods, Blue & Walsh, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. Under proper proceedings instituted in the Court of Common Pleas for Marion county, which are still pending, an order was made for the sale of all the real estate of Archibald McIntyre, deceased, in separate lots or parcels, on the following

†See *Kennerty v. Etiwan Phosphate Company*, 17 S. C. 411.



terms, viz.: one-third cash, the balance on a credit of one and two years, to be secured by bond and mortgage. In pursuance of this order, the master offered the real estate for sale in separate lots, on the first Monday (being the first day) of November, 1880, when one of the lots, No. 2, was bid off by the plaintiff in this case at \$2,500, through her husband and agent, Ezra M. Davis.

The complaint, after setting out substantially the foregoing facts, alleges that on the day of sale, the agent of the plaintiff "made an agreement with A. Q. McDuffie, master,

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that the said \*bid would be complied with in a reasonable time by paying the cash portion of the purchase-money, and executing a bond and mortgage to secure the credit portion of the same, as was the custom in such sales in said county; and that on or about the fifteenth day of November, 1880, the plaintiff, by her agent aforesaid, duly tendered to the defendant, A. Q. McDuffie, master, the cash portion of said purchase-money, and her bond and mortgage for the residue," but that said defendant then refused and still doth refuse to make her a conveyance of said lot of land.

It is also alleged in the complaint that, at the instance of the plaintiff, a rule was issued by the Court of Common Pleas, requiring the master to show cause why he refused to make title to the plaintiff, and that upon hearing the rule and answer thereto, the Circuit judge made a decree, in which, while plainly intimating that, in his opinion, the master ought to make titles, yet stated that it was a matter in the discretion of the master, and he declined to order the master to exercise his discretion, especially as the interests of infants were involved, and a paper had been filed, at the hearing of the rule, by one of the parties interested, guaranteeing that the land bid off by the plaintiff would bring, at a resale, at least \$1,000 more than her bid. He therefore left the master to act as he might be advised, "so that a proper case may be made for the judgment of the court."

The complaint further alleged, that the master had re-advertised the land for sale on the first Monday in January, 1881. Thereupon the plaintiff brought this action, wherein she demands judgment, first, for an injunction restraining the master from selling; second, "that A. Q. McDuffie, master, be required and ordered to fulfill his agreement, and to make a title to the plaintiff" for the said tract of land, "on the plaintiff paying forthwith to him the cash portion of the price at which the said land was bid off, and executing her bond and a mortgage of the land to secure the residue, in accordance with the directions of the said decretal order."

Upon the complaint and an affidavit supporting its material allegations, an ex parte

order of injunction was made, restraining the master from selling until the further

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order of the court. \*When the case came up for hearing before the Circuit Court, after the complaint was read, together with the order for injunction and the affidavit upon which it was based, the counsel for defendants made a motion to dismiss the complaint upon two grounds: 1. Because it did not state facts sufficient to constitute a cause of action. 2. Because the court had now no jurisdiction, as the matter had been disposed of by the decree of Judge Aldrich. The counsel for plaintiff opposed the hearing of the motion, upon the ground that no notice of it had been given, and he also insisted that before the motion could be heard the answers should be read; but the Circuit judge declined to hear them, and, after argument, granted the motion to dismiss the complaint upon both the grounds upon which it was based.

Thereupon the plaintiff appealed upon numerous grounds, which, though stated in various forms, practically raise the following questions only: First. Whether notice of the motion to dismiss the complaint, upon the grounds stated, was necessary? Second. Whether it was necessary that the answer should be read before determining the motion? Third. Whether the complaint stated facts sufficient to constitute a cause of action? Fourth. What was the effect of the decree of Judge Aldrich refusing to make the rule against the master absolute?

The first question is disposed of by the case of *Brown v. Buttz*, 15 S. C. 488. This was not a motion preliminary to the hearing of a cause, nor was it a motion to dissolve an injunction, but it was a motion made at the hearing on the merits of the case, and no notice was required. It was, in fact, a demurrer under section 165 of the revised code, which was not waived by a failure to make the objection by a formal demurrer or answer. *Id.*, § 169.

As to the next question, we can see no reason why the answers should have been read. The questions submitted by the motion to dismiss the complaint depended solely upon the allegations contained in the complaint, which, for the purposes of the motion, were to be regarded as true. The answers could not possibly have thrown any light on the questions submitted for the consideration of the court, and were, therefore, wholly irrelevant, and if read could not have

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been considered. We see no \*error, therefore, on the part of the Circuit judge in declining to hear the answers.

The next and fundamental inquiry in the case, is whether the complaint stated facts sufficient to constitute a cause of action. We agree entirely with the Circuit judge, that it did not. Conceding every fact stated in the

complaint to be absolutely true, we are unable to perceive what cause of action the plaintiff can have. To say nothing of the anomaly of a court entertaining an action against its own officer for declining to execute fully an order of sale made in a cause still pending, wherein his compliance could be enforced by the more summary proceeding by rule and attachment, we do not think that the plaintiff has stated a case entitling her to the relief demanded—specific performance of an agreement for the sale of land—or any other relief.

It is not very clear, from the statements made in the complaint, what agreement she is asking the specific performance of. If it is the agreement arising from the bid made by the plaintiff, at the sale made under the order of the court, then it is very clear that the plaintiff is not entitled to the relief demanded, for, according to her own showing, she did not comply with the terms of that agreement, as fixed by the order of sale, inasmuch as she failed to make the cash payment as required by the terms of that order. If, on the other hand, the agreement she is seeking to enforce is the verbal arrangement made by her agent with the master on the day of sale, then she is not only asking the specific performance of an agreement for the sale of land which was not in writing, but, what is of more consequence, she is seeking to enforce an agreement which the master had no authority whatever to make, for nothing can be clearer than that the master has no power to add to or vary the terms fixed by the court in the order of sale. *Seymour v. Preston*, Spears Eq. 481; *Baily v. Baily*, 9 Rich. Eq. 392.

The case of *Yates v. Gridley*, 16 S. C. 496, relied on by the appellant, is not in point. In that case the order of sale required not that a fixed sum should be paid in cash, but so much as might be necessary to pay the costs of the suit; and it did not appear that the amount necessary for that purpose had been ascertained on the day of sale, and, in-

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asmuch as the clerk afterwards received the cash payment without objection and executed the deed, the legitimate inference was that the parties interested had acquiesced in the delay, and, therefore, could not afterwards make such delay a ground for setting aside an executed contract. Again, in *Yates v. Gridley*, the contract was executed, while here it is executory merely, and as is said in *Gasque v. Small*, 2 Strobb. Eq. 76: "There is a material difference between a party who seeks to rescind and one who seeks to enforce an agreement, as it requires much stronger evidence to effect the former, than will be sufficient to enable the defendant to resist the latter, and, in applying either of the remedies, an important distinction must be observed between executory and executed

contracts. It seems from what is said by all elementary writers on this subject, that the specific performance of agreements is not an absolute right in the party, but a question of sound discretion in the court."

Hence, even if there was no other obstacle in the way of the plaintiff, it is, to say the least, very doubtful whether the court, in the exercise of its discretion, would enforce the performance of this agreement, where the plaintiff has not herself strictly complied with the terms of the sale, and the court is given to understand that if the property is resold it will bring a much larger price, especially as it appears that the interests of minors are involved.

The only remaining inquiry is as to the effect of the proceedings before Judge Aldrich. Under the view already taken this becomes a matter of no practical importance, but we may say that the proceeding by rule was the proper course for the plaintiff to pursue, and when the relief thus sought was denied, her remedy was by appeal and not by another action. The case in which the order of sale was made was still pending, and if any of the parties to that cause, or a purchaser at a sale made under an order in such cause, who thereby became a party to the extent necessary to enable him to move in the cause, conceived that his rights were prejudiced by the non-action of the officer ordered to make the sale, his remedy would be by rule against such officer, and not by another action.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 18 S. C. \*502

## \*McMAKIN v. GOWAN.

(November Term, 1882.)

[1. *Limitation of Actions* ⇨46.]

Plaintiff held a sealed note against the defendant, dated in 1862, and in 1873 he received a certain sum in settlement and surrendered the note. In 1879, more than six years afterwards, plaintiff brought this action against defendant, alleging that the settlement was made by agreement under the sealing act, and that there was an error in the settlement by a stated amount, which was unpaid, and for which he demanded judgment. *Held*, that the action was barred by the statute of limitations.

[*Ed. Note.*—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 240-253; Dec. Dig. ⇨46.]

[2. *Limitation of Actions* ⇨36.]

The action was not for equitable relief, and, therefore, governed by section 120 of the code of procedure, but was founded upon a purely legal demand.

[*Ed. Note.*—Cited in *Bolt v. Gray*, 54 S. C. 97, 32 S. E. 1-8.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 168-181; Dec. Dig. ⇨36.]

[3. *Limitation of Actions* ⇨22.]

The action not being founded upon the sealed note, but upon an alleged agreement at



which the note was surrendered, the limitation of twenty years did not apply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 103; Dec. Dig. ¶22.]

Before Pressley, J., Spartanburg, March, 1882.

Action by James McMakin against William Gowan, and after the death of William Gowan revived against his executors. The opinion states the case.

Messrs. Bobo & Carlisle, for appellant.

Messrs. Evins, Simpson & Bomar, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The principal question in this case is whether the claim of appellant was barred by the statute of limitations. The presiding judge, Judge Pressley, so held, and also that the laches of appellant was sufficient to bar the action. The appellant excepted to the rulings of his Honor on both the points. The case was heard on the pleadings without testimony from either side.

The action was in substance an action at law for the recovery of money, \$92.76, balance on agreement omitted to be paid by mistake in the calculation. The allegation

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of the complaint \*was that the defendants' intestate, in November, 1862, had given the plaintiff a sealed note for \$672; that on July 25th, 1873, at the request of defendant, the plaintiff made a calculation of the amount due according to the Corbin scale, which defendant then paid, the amount being \$432.76; that afterwards he found that there was an error in the settlement to the amount of \$92.76, of which the defendant was at once informed, but had refused and neglected to pay the additional sum, and the plaintiff prayed judgment for \$92.76. The defendant denied that there was any mistake as to the settlement, stating that the note had been given in purchase of a slave; that it being doubtful at that time whether such notes were recoverable, the plaintiff, on July 25th, 1873, after some calculation, agreed with defendant to receive in full payment of the note, by way of compromise, the sum which was paid, the plaintiff at the same time surrendering and delivering up to the defendant the note. He further denied that the sum which plaintiff agreed to take, and which the defendant paid, had any reference to the Corbin act whatever, but was proposed and accepted as a definite sum for settlement by way of compromise. He also interposed the statute of limitations and asked a dismissal of the complaint. The presiding judge dismissed the complaint as stated, with costs.

The settlement was made on July 25th, 1873; this action was commenced on September 10th, 1879, something over six years in-

tervening between the two events. It cannot be doubted that if the cause of action is a money demand, founded on contract to pay a certain sum on July 25th, 1873, only a part of which was then paid, leaving a balance due, for which balance the action has been brought, that then the statute is a complete bar. If not, we cannot conceive of a case where it would be. The right of action accrued on July 25th, 1873, and more than six years have elapsed since without any payment or post-acknowledgment, new promise, or anything that would prevent the statute from being interposed.

This seems to be admitted by appellant on the case stated, but the effort is made to construct out of the facts a different case from the one suggested, demanding the application of a different rule as to the statute. First, it is contended that it is not a

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case \*at law, but a case in equity for relief, and as to the statute of limitations it is governed by section 120 of the code (first edition), which provides "that actions for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued."

This has some plausibility, but it is without real foundation. The action is not an action to reconstruct the agreement between these parties and to add something to it, which by mistake was left out at the time it was entered into, but it is to recover a certain sum of money which the appellant alleges the defendant contracted to pay, but which by mistake he did not pay. The cause of action is not the mistake, but the breach of promise. This breach is alleged to have occurred through a mistake in the calculation of the amount due. The calculation was not based on a mistaken agreement; it was based on the agreement as understood by the plaintiff, and the mistake occurred simply in the figures.

This can make no difference as to the cause of action. If the agreement required the defendant to pay the full amount now claimed by the appellant, as he contends, and the defendant has failed to do so from any cause, whether inability, perverseness, mistake or otherwise, the plaintiff has a right of action; not, however, on the cause which produced the failure to comply, but upon the failure itself, arising from whatever cause it may. Taking the agreement of the parties, as understood by the appellant, to be the true agreement, what is it? He alleges that the note was to be settled under the scaling act, but in applying this act he made a mistake in the calculation. Admit this; then it would follow that defendant, according to the agreement, was at that time indebted in the sum omitted by this mistake, having paid all but that; not indebted, however, on account of the mistake, but before the mistake occurred, and

on the agreement made. The case in its essential elements is nothing more than an ordinary case of breach of contract, remediable by action at law for the recovery of money, to wit, the amount due according to the terms of the contract, after allowing defendant credit for such amount as he may have paid; and such being the case, the limitation act applicable to such cases, must apply.

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\*It is contended, however, that the original note was a sealed note, and this will prevent the statute. If the action was upon the note, this point would be well taken; but such is not the fact. According to plaintiff's own statement a new contract was made, which, being performed, as plaintiff understood, the note was delivered up and canceled, and now plaintiff has brought his action, not on the old note alleging that it was lost or destroyed and that there is something yet due on it, but upon the new promise alleging that defendant has failed to comply fully with that promise, and he seeks to recover the balance due on the new contract. He cannot now interject the sealed note, but must stand or fall by the cause of action found in his complaint. We think section 113 of the code (first edition) applies, and six years having elapsed from the accrual of the right of action on the cause alleged in the complaint, the action was properly held barred by the presiding judge. It is hardly necessary to discuss the doctrine of laches. We think, however, that Judge Pressley was right, even supposing that this case was an equity case. *Kirksey v. Keith*, 11 Rich. Eq. 33; *White v. Bennett*, 7 Rich. Eq. 260.

The case of *Oakes v. Howell*, 27 How. Pr. 145, relied on by appellant as to the statute, does not apply. There the action was to reform a sealed agreement entered into between the parties, the plaintiff alleging that by the terms of the contract as actually made, annual interest was to be paid, but that this stipulation was left out of the written agreement by "inadvertence, mistake, or oversight," and he sought to reform this agreement in the equity jurisdiction of the court. The court held that the case was within the ten years limitation prescribed by the code (in our code, section 120). But it will be at once seen that the facts and the object of the two actions were widely different, and therefore *Oakes v. Howell* can have no application here.

It is the judgment of this court that the order below be affirmed.

## 18 S. C. \*506

\*BENEDICT, HALL & CO. v. FLANIGAN.  
(November Term, 1882.)

## [1. Evidence ¶561.]

Comparison, as an original means of ascertaining the genuineness of handwriting, will not

be permitted; but when introduced in aid of doubtful proof, already offered, it may be allowed.

[Ed. Note.—Cited in *Graham v. Nesmith*, 24 S. C. 296; *State v. Ezekiel*, 33 S. C. 116, 11 S. E. 635; *Rose v. Wimsboro National Bank*, 41 S. C. 193, 19 S. E. 487.

For other cases, see Evidence, Cent. Dig. § 2381; Dec. Dig. ¶561.]

## [2. Appeal and Error ¶1010.]

Whether the proof is doubtful must be determined, in the first instance, by the trial judge, and his ruling will not be disturbed unless his error be very patent. The direct proof in this case was properly held by the Circuit judge to be doubtful.

[Ed. Note.—Cited in *Graham v. Nesmith*, 24 S. C. 296.

For other cases, see Appeal and Error, Cent. Dig. §§ 3579-3982, 4024; Dec. Dig. ¶1010.]

## [3. Evidence ¶563.]

The rule established in this State does not require the witnesses making the comparison to be professional experts in the matter of handwriting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2384; Dec. Dig. ¶563.]

Before Wallace, J., Richland, April, 1882.

This was an action by Benedict, Hall & Co. against J. T. Flanigan and others, commenced in March, 1873. Mrs. L. M. Flanigan, one of the defendants, denied her alleged signature, judgment by default being taken against the other defendants. H. R. Flanigan, one of the defendants, and a son of L. M. Flanigan, was called as a witness by plaintiffs, and testified as stated in the opinion. Plaintiffs then called J. H. Sawyer and C. J. Iredell, bank cashiers, and R. S. Desportes, a merchant of long standing, and "a banker in a small way," who testified that from a comparison of the signature to the note with two admitted signatures of L. M. Flanigan, they thought the signature was genuine. This testimony was objected to by the defendant. The judge charged the jury that the only issue before them was the genuineness of L. M. Flanigan's signatures to the three notes. That they, the jury, were to make the comparison of the papers themselves, as well as to consider the testimony of the witnesses who have been examined as experts, and the other testimony in the case; that as we had no professional experts in this State, persons who had experience in the comparison of signatures to notes were competent to testify to the genuineness of signatures in controversy, by comparison with signatures proven to be genuine, and that their testimony was entitled to weight according to their experience and skill in making such comparisons; that cashiers of banks, who, in the discharge of duty, had frequent occasion to examine signatures to notes and determine their genuineness, were competent to testify to the genuineness of signatures in controversy by comparison with signatures proven to be genuine, and that their testimony was entitled to weight ac-

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ing such comparisons; that cashiers of banks, who, in the discharge of duty, had frequent occasion to examine signatures to notes and determine their genuineness, were competent to testify to the genuineness of signatures in controversy by comparison with signatures proven to be genuine, and that their testimony was entitled to weight ac-



cording to their experience and skill in making such comparisons.

The jury found a verdict for plaintiffs against L. M. Flanigan for \$3,673.97. Defendant appealed.

Mr. J. H. Rion, for appellant.

Messrs. Melton, Clark & Muller, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The exceptions in this case, six in number, though presented in different forms, raise at last but a single question for the consideration of this court, to wit: The question of the competency of the opinion of a witness not a professional expert, as to the genuineness of a signature, derived entirely from comparison—the witness being wholly unacquainted with the handwriting of the party.

The most direct and satisfactory proof of the genuineness of a writing is the testimony of one who was present and saw the writing executed; but this is not always possible, hence the testimony of those who are acquainted with the writing of the party in question, either from having seen him write or otherwise familiar with his acknowledged writing, has invariably been allowed. From a knowledge thus acquired, the witness is supposed to have a standard in his mind, impressed by his memory, with which he can compare the disputed writing and thus reach a correct conclusion. This being the theory upon which such testimony has been uniformly received it is somewhat illogical that comparison on the witness stand of a disputed signature with one acknowledged to be genuine has been as uniformly rejected by most of the courts.

The basis of the first class of testimony

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being nothing more \*than a comparison with a standard resting in memory, it would seem that the latter class would be more reliable, resting, as it does, upon a comparison with an acknowledged standard present and in juxtaposition with the disputed writing, especially where the comparison proposed is generally to be made by witnesses of intelligence and familiar with chirography. But, nevertheless, while testimony of the character first above referred to has never been questioned, yet testimony of the latter character has generally been excluded. In England, until the Statute of 28 and 29 Victoria, ch. 18, § 8, the weight of authority was against such testimony. That statute, however, authorized a comparison by the jury and witnesses of a disputed writing with one proved to the satisfaction of the judge to be genuine, and such has been the ruling doctrine in England since. In the American States, the authorities have differed, some holding to the common law decisions and others following the Statute of Victoria.

In our State a medium line has been adopt-

ed by our court of last resort. It has been generally accepted here that comparison as an original means of ascertaining the genuineness of handwriting will not be permitted, but when introduced in aid of doubtful proof already offered it may be allowed. We have three decisions upon this subject, from which the rule as just stated may be fairly deduced. The cases of *Boman v. Plunkett*, 2 McM. 518; *Bird v. Millar*, 1 McM. 125, and *Bennett v. Mathewes*, 5 S. C. 478. In the first of these cases a comparison by jury was permitted in aid of doubtful proof. In the second it was permitted to be made by a witness, and the papers were also submitted to the jury, and Judge Evans, in delivering the opinion of the court, said: "Admitting the principle to be correct, that such testimony is inadmissible in the first instance, yet in a case of conflicting evidence this kind of evidence was admitted in the case of *Plunkett ads. Boman*, not as original, but as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. In a practice of many years I have not known the admissibility of this kind of evidence for the purpose stated, questioned."

In the last case, upon the authority of the two first, similar testimony was admitted,

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the comparison being made by the \*witnesses in the presence of the court in aid of doubtful proof, and in that case the witnesses were not professional experts, one of them being nothing more than a book-keeper in a bank, and the other a notary public. Without discussing further the authorities in other States, we may say that it has been settled with us that such testimony is competent when offered not as original evidence, but in aid of doubtful original proof, or when it is conflicting. Nor does it seem necessary that the comparison shall be made by professional experts alone; others will be permitted, the value of the comparison depending in each case upon the intelligence, skill and experience of the witness in such matters.

But the question arises, Who is to determine when the evidence is so doubtful or conflicting as to admit this supplemental testimony? The presiding judge must, of course, determine this in the first instance. The witnesses are in his presence, and the whole matter is before him, and he must at first decide whether the case is of a character to authorize such testimony. His decision is subject to review by this court, as it is not a question entirely of discretion with him, but the case should be a very strong one and the error of the judge very patent, to warrant this court to overrule this judgment. He is more directly in contact with the question, and with all of its surroundings. The witnesses are examined in his presence, and their manner and bearing subject to his observation, and he is the better able to determine the effect of the testimony. His opin-

ion, therefore, is and should be entitled to much weight.

But, independent of this, we think the facts below sustained the ruling of Judge Wallace. Only one witness was examined directly as to the signature of the defendant, a son of the defendant. He testified in chief that he had seen his mother write, and in his opinion the signatures to the notes were not hers; but he afterwards stated that he would take the signatures to be his mother's without comparing them with the other acknowledged signatures presented to him, to wit, her signature to a guano note and the affidavit on the original answer, but upon comparing them he would deny the signatures on the notes sued on to be hers. This certainly raised a doubt as to the re-

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liability of \*his testimony. Under such circumstances we think a case was made for the introduction of supplementary testimony. Judge Wallace, in admitting this evidence, properly limited its force and effect by stating that it was entitled to such weight only as the experience and skill of the witnesses making the comparison might demand.

As has already been stated, the rule in this State, as established and illustrated in these cases above referred to, does not seem to require that the witnesses making the comparison shall be professional experts. In *Bennett v. Mathewes*, supra, they have no higher qualifications in that respect than the witnesses in this case, and yet they were admitted there, and no question was raised as to that in *Bird v. Millar*. It is true such testimony, as all testimony founded upon opinion merely, is weak and uncertain, and should in every case be weighed with great caution; but the force and effect of such testimony is not before us—we are concerned only with its competency—and we think in this case that Judge Wallace followed the leading of the three cases cited from our own books, and, therefore, his ruling must be sustained.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

### 18 S. C. 510

#### HUFF v. WATKINS.

(November Term, 1882.)

#### [1. *Master and Servant* ⚭3.]

In action for damages for employing an agricultural laborer in plaintiff's service, the judge erred in charging the jury that "the law required the contract between the laborer and the plaintiff upon which this action is based, to be made in the presence of one or more disinterested witnesses."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 2, 3; Dec. Dig. ⚭3.]

#### [2. *Master and Servant* ⚭336.]

Section 2081 of the General Statutes does not abolish the common law right of agricultural laborers to contract with an employer, and

the relation of master and servant as to such laborers may exist without regard to this statute. *Daniel v. Swearingen*, 6 S. C. 304 [24 Am. Rep. 471], recognized and followed.

[Ed. Note.—Cited in *State v. Sanders*, 52 S. C. 580, 582, 30 S. E. 616; *State v. Rhody*, 67 S. C. 288, 45 S. E. 205.

For other cases, see *Master and Servant*, Cent. Dig. § 1281; Dec. Dig. ⚭336.]

#### [3. *Agriculture* ⚭11.]

[Cited in *State v. Lanier*, 79 S. C. 105, 106, 60 S. E. 225, to the point that it is not a prerequisite to a lien for labor that the contract between landlord and tenant be reduced to writing, unless requested by either party, but that it is sufficient to create a lien for labor that the contract should be witnessed before one or more disinterested persons and should set forth the conditions of the contract.]

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 15-30; Dec. Dig. ⚭11.]

[This case is also cited in *State v. Lanier*, 79 S. C. 103, 107, 60 S. E. 225, and held to practically overrule *Hair v. Blease*, 8 S. C. 63.]

Before Pressley, J., Newberry, February, 1882.

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\*Action by William T. Huff against William Watkins. The opinion states the case.

[For subsequent opinions, see 20 S. C. 478; 25 S. C. 243.]

Messrs. Moorman & Simkins, for appellant.  
Messrs. Suber & Caldwell, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The appeal in this case presents but a single point, as will be seen from a brief statement of the facts. The action was brought by the appellant to recover damages alleged to have been incurred because of the fact that defendant had employed a hired agricultural laborer of appellant (one Jordan Butler), after he had been in the employment of appellant some two months of the year for which he was hired, and that after notice thereof the defendant failed to discharge the said Butler. The presiding judge charged the jury "that the law required the contract between Jordan Butler and the plaintiff, to be made in the presence of one or more disinterested witnesses, and there being no testimony to the effect that it was so made, they should find for the defendant." The jury accordingly found for the defendant. The only witnesses offered to prove the contract were the other farm laborers on the place and embraced in the same contract with Jordan Butler. The judge indicated that this testimony might be received, but that it would not avail the plaintiff, as these witnesses were not disinterested.

The appellant excepted and appeals upon the ground: "Because the presiding judge erred in charging the jury that the law required the contract between Jordan Butler



and the plaintiff, upon which this action is based, to be made in the presence of one or more disinterested witnesses, and that there being no testimony to the effect that it was so made, they should find for the defendant."

We think the cases of *Huff v. Watkins*, 15 S. C. 87 [40 Am. Rep. 680], and *Daniel v. Swearingen*, 6 S. C. 304 [24 Am. Rep. 471], are conclusive of this case and against the charge of the presiding judge. In *Huff v. Watkins*, a former appeal in this case, the

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court held that the relation \*of master and servant might be created by contract between an employer and an agricultural laborer, though the laborer was to receive a portion of the crop for his services instead of standing wages; in such case the master could maintain an action against one who, with knowledge of the prior contract, employs such servant. The point as to the evidence of the contract was not made or passed upon, the question being simply whether a farm laborer, for a share of the crop, could be regarded as a servant subject to the common law right of action.

In the case of *Daniel v. Swearingen* the same principle was announced, and further, that it was not necessary, under the act of 1869, in reference to contracts with laborers, relied on by respondent here, that the contract should be in writing, nor was a master restricted to the mode of redress prescribed in the act. On the contrary, the court said "that this act did not take away or impair the power to contract by parol, as it existed at common law, or limit the remedies for any violation of the contract to those afforded by the said act." This case is quoted with approval in *Huff v. Watkins*, on that point.

The act of 1869, relied on by the respondent, found now in section 2081 of the General Statutes, provides that all contracts made between owners of land \* \* \* and laborers shall be witnessed by one or more disinterested persons, and, at the request of either party, be duly executed before a trial justice, whose duty it shall be to read and explain the same to the parties, providing in a subsequent section a remedy for the breach of such contract. Now, if this controversy grew out of an effort by the appellant to enforce the remedy prescribed in the act, and with reference to a contract claimed to have been made under it, then we would not say but that it should have been made, either in writing, or witnessed by one or more disinterested witnesses. Neither of these questions are touched in *Huff v. Watkins*, or *Daniel v. Swearingen*, supra; the main question in the first being, whether an agricultural laborer for a share in the crop could be regarded as a servant, in the common law sense; and in the second, that question, and also whether, in order to create such a relation, it was necessary that the contract

should be in writing, and whether the remedy prescribed by the statute was the only

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remedy that \*could be resorted to by either party for a violation of the contract. In the first case, as stated, it was held distinctly that such relation could exist as to agricultural laborers for a part of the crop as well as to menial servants, or servants for wages, and in that case the contract, though not in writing and not attested by disinterested witnesses, was the subject of the action. In the latter case, it was held that a contract made under the act even, need not necessarily be in writing, unless required by one of the parties, nor were the parties restricted to the statutory remedy for a breach.

It would seem, then, from these cases, and especially from the case of *Daniel v. Swearingen* that there may be two classes of contracts in such cases, one under the statute and one at common law, each having its own remedy for a violation—the class under the statute to be in writing, if required by either of the parties, otherwise not, but by the express terms of the statute "to be witnessed by disinterested persons." It is only in such a contract that the stringent remedy afforded by the act can be invoked, and where the party intends to rely upon this remedy, the contract must be made in accordance with the requirements of the act. But the act does not declare that all other contracts in such cases shall be void. It does not abolish the common law right of parties intending to enter into this relation, to contract, if they so see proper, as they could do in reference to any other matter. It simply gives them the privilege, for their own protection, to come under the act if they choose to do so, thereby becoming entitled to the remedies which the act affords.

This is the principle upon which the case of *Daniel v. Swearingen* was based, for the court said: "But even if a writing was necessary, it was only for the purpose of allowing either of the parties to avail himself of the remedy allowed to such contracts by the twelfth section of the act. Its provisions extend alone to those contracting, and were intended for their protection. The employer was not deprived of any rights he might have against a third person for improperly interfering with those in his service in any way by which it becomes less available to him. But in any view, the

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provisions referred to \*do not take away or impair the power to contract by parol, as it existed at common law, or limit the remedies to those afforded by the said section, and the same may be said as to the requirement that it shall be witnessed by disinterested persons. The common law does not require that a contract like this should be witnessed by disinterested persons, nor does the act

say that a contract not so witnessed shall be void. It only provides that a contract so witnessed shall be entitled to the remedies prescribed therein."

The second branch of respondent's argument proceeds upon the supposition that if the contract cannot be brought under the act it was void; that Jordan Butler was not bound by it, and that he had the right to leave when he pleased; and such being the case, that no action would accrue to appellant against respondent for employing him. The fundamental fact that Butler was the servant of appellant, being absent, this would be unanswerable if the premise upon which it is based was sound (to wit), that these parties could not contract except under the act, and that the relation of master and servant as to laborers could not exist except by virtue of the act. We think it could, or at least we think it has been so held in *Daniel v. Swearengen*.

As the appellant is not seeking to enforce any remedy afforded by the act, we think it was error in the judge to charge that it was necessary that the contract should be witnessed by one or more disinterested witnesses.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

### 18 S. C. 514

#### STATE v. PAULK.

(November Term, 1882.)

##### [1. *Criminal Law* ⚡570.]

Where insanity is interposed by defendant as a defense under a plea of not guilty in a criminal prosecution, the defense must be proved by a preponderance of evidence.

[Ed. Note.—Cited in *State v. Alexander*, 30 S. C. 83, 8 S. E. 440, 14 Am. St. Rep. 879; *State v. Bethune*, 88 S. C. 410, 71 S. E. 29.]

For other cases, see *Criminal Law*, Cent. Dig. §§ 1285-1288; Dec. Dig. ⚡570.]

##### [2. *Criminal Law* ⚡570.]

The mere interposition of such a defense without any evidence to support it, does not require the State to prove its non-existence beyond all reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1285-1288; Dec. Dig. ⚡570.]

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##### [3. *Criminal Law* ⚡57.]

\*Where a criminal act was the immediate result of voluntary intoxication, and committed while it lasted, the intoxication affords no excuse as defense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 70; Dec. Dig. ⚡57.]

##### [4. *Criminal Law* ⚡570, 572.]

Where the State fully proves a prima facie case, and a special defense, such as insanity, alibi, &c., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sus-

tained beyond all reasonable doubt; if not so established, the defendant should be convicted.

[Ed. Note.—Cited in *State v. Bundy*, 24 S. C. 443, 58 Am. Rep. 263; *State v. Nance*, 25 S. C. 173; *State v. Welsh*, 29 S. C. 6, 6 S. E. 894; *State v. Bodie*, 33 S. C. 133, 11 S. E. 624; *State v. Anderson*, 59 S. C. 231, 232, 37 S. E. 820; *State v. Long*, 93 S. C. 515, 77 S. E. 61.]

For other cases, see *Criminal Law*, Cent. Dig. §§ 1268, 1285-1288, 1289-1291; Dec. Dig. ⚡570, 572.]

##### [5. *Criminal Law* ⚡327.]

[Cited in *State v. Jackson*, 87 S. C. 414, 69 S. E. 883, to the point that the state must prove all essential elements of crime, notwithstanding defense of insanity.]

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 720; Dec. Dig. ⚡327.]

Before Cothran, J., Union, June, 1882.

This was an indictment against Richard Paulk, a white man, for marrying Dora Brown, a mulatto woman, on April 8th, 1882. The opinion states the case.

Mr. David Johnson, Jr., for appellant.

Mr. Solicitor Duncan, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was indicted at the June term of the Court of Sessions, A. D. 1882, for Union county, charged with violating the provisions of the act of Assembly entitled "An act to prevent and punish the intermarrying of races," approved December 12th, 1879. The defendant claimed immunity from conviction and punishment on account of insanity caused by gross and excessive drunkenness.

The portion of the charge which is material to the questions raised in the appeal is as follows: The judge said to the jury: "That the well-established rule upon this subject is, that every man is presumed to be sane, and consequently responsible for his acts, until the contrary is made to appear by satisfactory proof. That where the defense of insanity is interposed it must, in order to avail, be sustained by proof sufficient to bear down and overcome this presumption of sanity. The defendant undertakes to do this, and must do it not beyond a reasonable doubt, but by such preponderance of testimony as to overcome the legal presumption of sanity which attaches to every citizen of sufficient age who has not been adjudged a lunatic. That this

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\*question was solely for their determination, and must be decided upon the testimony of the witnesses whom they had seen and heard."

Upon the matter of drunkenness as an excuse for the commission of a crime, they were charged as follows:

"The law makes a distinction between criminal acts which are the immediate re-



sult of drunkenness, and committed while it lasts, and acts produced by previous habits of gross intemperance. The former are punishable, the latter not. In other words, the law deals with results and will not punish an insane man. But insanity must exist, and be made to appear by satisfactory proof, to enable him who sets it up as a defense to escape criminal responsibility. It matters not whether that delicate and mysterious organism which we call the mind, and which is supposed to be the seat and center of volition, be destroyed by the acts of the accused or by the touch of the finger of God; if the fact of insanity existed at the time of the commission of the offense, the defendant cannot be legally convicted. But if he has failed with the proof exhibited to overcome the presumption of insanity, and you believe the testimony of the witnesses for the prosecution, he is guilty and ought to be convicted. That upon this issue, as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt."

The defendant was convicted and sentenced. His counsel, on appeal, relies upon the negative of two propositions laid down in the charge: 1. That when insanity is interposed under a plea of "not guilty" by the defendant in a criminal action, it must be proved by a preponderance of evidence. 2. That when the criminal act was the immediate result of voluntary intoxication, and committed while it lasts, the intoxication affords no excuse as defense. Both of these propositions are denied by the appellant, and error is assigned because they were charged.

The argument of appellant admits the general principle, that as sanity is the normal condition, the law presumes every man to be sane, and judgment will follow, unless the contrary is proved. But it is urged, as if this had been denied to the defendant by the judge, that where insanity is set up as

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a defense \*and this becomes a question of evidence, the defendant is entitled to the benefit of all reasonable doubts in the mind of the jury on that subject, as well as all others pertaining to his guilt, and, therefore, he excepts to the charge, understanding, as he does, that defendant had been denied the benefit of this principle by the judge.

We think the defendant has misunderstood the meaning and scope of the charge. The judge said, that where the defense of insanity is interposed, it must, in order to avail, be sustained by proof sufficient to bear down and overcome this presumption of sanity. The defendant undertakes to do this, and must do it, not beyond a reasonable doubt, but by such preponderance of testimony as to overcome the legal presumption of sanity which attaches to every citizen of

sufficient age who has not been adjudged a lunatic. In civil cases the truth of the facts alleged depends upon the weight or preponderance of the testimony, but in criminal cases, by the humanity of the law, the guilt of the defendant must appear beyond a reasonable doubt, and this applies to all essential elements of the crime.

As we understand the charge, Judge Cothran intended to apply this principle to the defense of the defendant, in the extracts above. He did not hold the defendant to the strict rule of proving beyond all reasonable doubt that he was insane when the act was committed, but he held him simply to the rule which prevails in civil cases, to wit, that he should prove it by the preponderance of testimony, with the view to give the defendant the benefit of all reasonable doubt, as to the facts required to be proved by the prosecution. He held the State bound to prove them to that extent and to the same end; when he came to the defense he relaxed the rule and required only a preponderance, stating distinctly that defendant need not prove his alleged insanity beyond all reasonable doubt; on the contrary, if but the preponderance of testimony was on that side, let the defendant have the benefit of it; concluding his charge with the following direct and unmistakable instruction, "That upon this issue (insanity), as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt."

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\*Thus understood, we think the charge was in accordance with the position taken by appellant, in the line of the authorities cited, and certainly as favorable to the accused as it could have been put. If we have not misapprehended the position of the appellant, he has no cause of complaint as to the first exception, because he was permitted to invoke every reasonable doubt, that might exist which is all that he seems to have claimed or was entitled to demand.

If, however, the position of appellant is, that the defendant having interposed insanity as his defense, the State was bound to prove, beyond all reasonable doubt, that he was not insane—in other words, that the mere interposition of the defense of insanity destroyed the legal presumption of sanity and at once shifted the burden of further proof, as to that question, on to the prosecution, with the responsibility of proving by some additional testimony, beyond all reasonable doubt, that the accused was not insane, and that the judge should have so charged, which from some portion of the argument it would seem that appellant claims—then we would say that such a position has no foundation in any principle or authority that we have been able to discover.

It is true that the State is bound to make out all the essential elements of the crime

beyond a reasonable doubt, and until this is done the accused is in no danger, but it would be stretching the doctrine of humanity beyond all precedent to require the State also to prove that the special defense set up by the accused is false beyond all reasonable doubt, in advance of any testimony offered to support it. In a special defense like insanity, the burden of proof rests upon the defendant, and if the defense is sustained not to the extent of a reasonable doubt, but by a preponderance, then the accused becomes entitled to a verdict of not guilty.

With regard to the second proposition, the judge charged: "That the law makes a distinction between criminal acts which are the immediate result of drunkenness and committed while it lasts, and acts produced by previous habits of gross intemperance. The former are punishable, the latter not." That this distinction stated exists, as a general

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rule, is well settled. 1 Arch. \*Cr. Pl. & Pr., Waterman's Notes 32, 832. In *People v. Garbutt*, 17 Mich. 9, cited by appellant, the court held that voluntary drunkenness of whatever degree constitutes no defense to the commission of crime. In *Smith v. Commonwealth*, 1 Duvall 224, also cited by appellant, the same doctrine is held.

In the first case, Judge Cooley states the ground upon which this is held so strongly that I quote his exact language, instead of simply stating the principle. He says: "A doctrine like this, to wit, that drunkenness should excuse, would be a most alarming one to admit in the criminal jurisprudence of the country, and we think that the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and since it is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, the law has never recognized it as an excuse for crime," citing numerous authorities. 17 Mich. 19.

But Judge Cothran did not charge that voluntary drunkenness would preclude the idea of insanity, and that if the act was committed while the accused was in that condition, he should be convicted whether he was really insane or not; on the contrary, the fair inference from the language used by him, is that he intended that drunkenness in itself without more would not excuse, because he followed his first remark with the emphatic statement that, "It matters not what may have overthrown the volition of the accused, whether it be his own act or the act of God, yet, if the fact of insanity existed at the time of the commission of the offense, the

defendant can not be legally convicted." The defendant can take nothing therefore from his exception resting upon the second proposition.

We think the charge as a whole was in accordance with the principles which govern in criminal cases. As is well understood, one of the most important principles in such cases is, that the accused should have the benefit of every reasonable doubt, and this applies to all the facts necessary to his guilt, the act, the intent, and all other essentials,

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and the State in the first instance must make out its case as to all these, beyond a reasonable doubt. The legal presumption of the innocence of the accused demands this. The State having made a case which in the absence of defense comes up to this requirement, the accused may overthrow it, and this is done when he raises a reasonable doubt as to the facts made by the State, or by proving an alibi, insanity, or any other defense inconsistent with guilt. These defenses, however, must have some foundation in the evidence adduced by the defendant, before they can have the effect of either overthrowing the State's case, or raising a reasonable doubt thereto, supposing, as we have, that the State has made a *prima facie* case.

Now the question is, as to the quantum of proof required by such defense to have the desired effect; shall it be such as would prove the defense beyond a reasonable doubt? or, may it be done simply by a preponderance of the testimony? Judge Cothran held the latter, and we think he was right. According to the supposition, the prosecution, by proving the act by testimony, and applying the principle of law as to the presumed sanity of the accused, has made out its case in the first instance beyond a reasonable doubt. This must be overthrown by the accused, either by showing the charge entirely false, or by raising a reasonable doubt of its truth, but to do this certainly some testimony is required.

The question is, how much? It is answered, enough to make it reasonably certain, from the preponderance of testimony, that the defense is well founded. If, with such testimony, a case should go to the jury with instructions from the court that after considering the whole testimony, with the legal presumptions that appertained both as to the question of the sanity and the innocence of the accused, they are satisfied that the charge has been proved beyond all reasonable doubt, then to find a verdict of guilty, in our opinion no exception could be sustained on the ground that the State had not been held to the rule of reasonable doubt, or that the defendant had been denied its benefit.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.



## 18 S. C. \*521

\*KERCHNER v. GETTYS.

SAME v. HUCKABEE.

(November Term, 1882.)

[1. *Bills and Notes* ¶92.]

Negotiable notes given for a completed purchase of shares of stock in a corporation or joint stock company are based upon a sufficient consideration, the certificates of stock having been delivered to the seller as agent of the purchasers, or else left with him as security for the payment of the notes.

[Ed. Note.—Cited in *Glenn v. Rosborough*, 48 S. C. 278, 26 S. E. 611.]

For other cases, see *Bills and Notes*, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. ¶92.]

[2. *Corporations* ¶90.]

These certificates were given to the seller to be delivered to the purchasers when the notes matured or were paid, before which time a steamboat, the only property of the company, was lost to the company. Held, that there was no failure of consideration to the notes.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 387; Dec. Dig. ¶90.]

[3. *Corporations* ¶29.]

Quære. Can a purchaser of shares in a corporation, in action for the purchase-money, deny its corporate existence?

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 77-79, 2504; Dec. Dig. ¶29.]

[4. *Corporations* ¶631.]

A corporation chartered by the laws of one State may lawfully do business in another State unless forbidden by its charter, or by the laws of such other State.

[Ed. Note.—Cited in *Ober v. Blalock*, 40 S. C. 36, 18 S. E. 264; *Cone Export & Commission Co. v. Poole*, 41 S. C. 72, 19 S. E. 263, 24 L. R. A. 289.]

For other cases, see *Corporations*, Cent. Dig. §§ 2489-2494, 2528; Dec. Dig. ¶631.]

[5. *Corporations* ¶631.]

A corporation chartered by the laws of North Carolina may do business in this State, and may select for its officers citizens of this State.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2489-2494, 2528; Dec. Dig. ¶631.]

Before Wallace, J., Kershaw, February, 1882.

Actions by F. W. Kerchner against J. L. Gettys and A. A. Huckabee, heard together. To the statement made in the opinion will be added only the following extract from the agreed case: "The company was chartered under the general law of North Carolina, an abstract of which is furnished. Neither Gettys nor Huckabee ever attended any of the meetings of the stockholders or took any part in the management of the boat. E. Parker was elected president at a meeting of stockholders held in South Carolina, and F. L. Phelps, secretary; both said parties were residents of South Carolina." All of the points considered by the court are raised in the exceptions.

Messrs. J. T. Hay and Workman & Son, for appellants.

The company was chartered in North Carolina, but never organized except in South Carolina. It therefore had no legal existence here. 13 Pet. 519; 27 Me. 509; 1 Sumn. 47; \*522

14 Pet. \*129; 1 Blatchf. 628; 1 Black 286; 4 Jones Eq. 231; 26 Me. 326; Field Corp., §§ 25, 243; Moraw Priv. Corp., § 535. The notes were not given for any interest in a steamboat, nor could it have been, as the law was not complied with. Rev. Stat. U. S., § 4170. If so, then there has been a failure of consideration. Blackb. Sales 199; Add. Cont., §§ 554, 575, 585, 662; 1 Pars. Cont. 462. The stock being a nullity, the consideration has failed. 1 Dan. Neg. Inst. 177.

Messrs. W. M. Shannon, W. D. Trantham, contra, upon the point of the legal existence of the corporation in this State, cited Moraw Priv. Corp., § 502; 13 Pet. 519; 101 U. S. 356. The defendants are estopped from denying a corporate existence. 14 Johns. 238; 16 Mass. 94; 6 N. H. 164.

February 15th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, involving the same questions, were heard, and will be considered together. They were ordinary actions upon promissory notes, and the defenses were failure and want of consideration. By consent they were heard by the Circuit judge, without a jury, upon an agreed statement of facts, substantially as follows:

The Palmetto Steam Boat Company was chartered in 1873 by the State of North Carolina, but not by the State of South Carolina, for the purpose of doing a general freight, passenger and towing business upon the waters of North and South Carolina. The only property owned by the company was a steamboat called "The Lillington," which was purchased and placed upon the Wateree river, in South Carolina, and seems to have been engaged in passenger and freight traffic between the bridge of the W. C. & A. Railroad Company and Parker's Landing, on that river. On May 13th, 1874, the plaintiff, who was the owner of one-half or more of the stock of the company, contracted with Gettys for the sale of four shares, and with Huckabee for the sale of two shares of said stock. These parties accordingly gave their negotiable notes to the plaintiff, dated May 14th, 1874, payable six months after date, the one

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\*for \$200 and the other for \$100. Thereafter, but at what particular date is not stated, certificates for four shares of said stock were filled out in the name of Gettys, and for two shares in the name of Huckabee, signed by E. Parker, president, and F. L. Phelps, secretary, citizens of South Carolina, and delivered to the plaintiff to be delivered to the defendants when their notes matured or were paid. A short time before the maturity of

these notes "The Lillington" partially sank in the Wateree river, with a large cargo of rosin, and the company not being able to pay the expenses incurred in saving the cargo and raising the boat, it was sold under a decree of the United States Court, obtained by one English, who had been employed for that purpose, for an amount insufficient to pay his claim. The Circuit judge held that there was a sufficient consideration to support the notes; that there was no failure of consideration, and that the certificates of stock were delivered to the plaintiff as agent of the defendants, and rendered judgment for the plaintiff in both of the cases.

From these judgments the defendants appeal upon various grounds set out in the record. We do not deem it necessary to make a detailed statement of the grounds of appeal, for we think the only questions in the case are: 1. Whether there was any consideration originally for the notes; and, if so, 2d. Whether such consideration has failed.

The first question depends upon whether there was a completed sale of the stock, for, if so, it can scarcely be doubted that the transfer of shares in a joint stock company constitutes a sufficient consideration to support a note given for the price agreed upon for said shares. There can be no doubt that the defendants contracted to buy from the plaintiff shares of the stock, and actually gave him their negotiable notes for the price agreed upon. They had, therefore, done everything required upon their part to complete the purchase. There is as little doubt that the plaintiff procured certificates of stock, to be issued by the proper officers of the company in the names of the defendants, and this operated as a transfer, by him to them, of the property in or title to the stock.

The fact that these certificates were never

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actually delivered to the defendants personally, cannot affect the question. It does not appear that they ever applied for and were refused possession. On the contrary, the Circuit judge finds as matter of fact (and in a case like this his finding of fact must be regarded as having the same force and effect as the verdict of a jury) that the certificates were delivered to the plaintiff as the agent of the defendants, which, of course, is equivalent to a delivery to them personally. The necessary inference from the fact that the officers of the company made out these certificates in the names of the defendants, and parted with the possession of them by delivering them to the plaintiff, would be that the defendants stood on the books of the company as stockholders, and as such entitled to exercise all the rights belonging to stockholders, and the fact that they never saw fit to claim or exercise their rights as such, cannot have the effect of depriving them of their character as stockholders.

If these certificates were left in the hands

of the plaintiff as a security for the payment of the notes, as seems to be the legitimate inference from the conduct of the parties, that would be nothing more, in effect, than a mortgage to secure the payment of said notes, and would, of course, imply ownership of the stock by the defendants. It is scarcely conceivable that defendants would give their negotiable notes for property to which they had acquired no title, and we are, therefore, forced to conclude that the true meaning of the transaction was that the defendants had bought the stock on a credit, and only left the certificates in the hands of the plaintiff as security for the payment of the notes, at maturity, and that upon payment of their notes they will be entitled to demand possession of the certificates of stock. There was, therefore, no want of consideration for the notes.

Our next inquiry is, whether there has been a failure of consideration. The loss of the boat, constituting, as it did, the principal, if not the sole property of the company, cannot operate as a failure of the consideration, for the thing purchased was not the boat, or any undivided interests therein, but shares in the stock of the company, and to these the defendants are still entitled. The stock of a company is a totally different thing from the property owned by the company, and

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surely it cannot be said that because a corporation or joint stock company loses its property by some accident incident to the business in which it is engaged, that the purchaser of shares therein is thereby released from the payment of the price at which he has bought such shares from another stockholder. That is a loss which falls in common upon all the stockholders, and it would be not only without any warrant in law, but grossly inequitable, to throw it upon any one or more of them for the purpose of relieving those who may have bought some of the stock on a credit, and had not paid the purchase-money before the loss occurred. There is not the slightest evidence in this case tending to show that the loss of the property of this company was the result of any fault of the plaintiff; nor is there any evidence that the plaintiff gave any guaranty whatever that the stock should be worth as much at the maturity of the notes as it was at the time they were given. We are, therefore, unable to discover any ground upon which it can be said that there has been a failure of the consideration for which these notes were given.

The fact that the company, in which the defendants bought shares, was a foreign corporation doing business in this State, cannot be allowed to affect the questions raised. Whether the defendants, after recognizing the existence of such corporation by the purchase of shares therein, are now in a condition to question its legality, might well be



worth consideration; but aside from this, it is now well settled by the cases cited in respondent's brief, that a corporation created by the laws of one State may lawfully do business in another State, unless forbidden by its charter or by the laws of such other State. The Bank of Augusta v. Earle, 13 Pet. 519 [10 L. Ed. 274]; Christian Union v. Yount, 101 U. S. 352 [25 L. Ed. 888]. It is not only not suggested that there was anything in the charter of this company forbidding it from doing business in this State, but, on the contrary, it is expressly stated that it was chartered "for the purpose of doing a general freight, passenger and towing business upon the waters of North and South Carolina." Nor are we aware of any law or public policy of this State either expressly or impliedly prohibiting such a corporation from doing business in this State.

So, too, we see nothing illegal or extraor-

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ordinary in the fact \*that the president and secretary of this foreign corporation were citizens of South Carolina. It is a matter of common notoriety that one of the largest and most important corporations in this State now has for its president, and some of its other officers, citizens of the State of New York. In the absence of any prohibition in their charter, the stockholders in a corporation can select whomsoever they may please to manage its affairs, and persons dealing with such corporation have no right to object.

The judgment of this court is that the judgments of the Circuit Court, in the two cases above stated, be affirmed.

## 18 S. C. 526

SUBER v. CHANDLER.

(November Term, 1882.)

### [1. *Limitation of Actions* ¶60.]

A creditor held a sealed note, dated in 1863; in 1869, the debtor made a voluntary deed, to his wife and daughters, of a tract of land. In 1874, action was commenced on the note and judgment obtained in 1879, and a return of nulla bona had the same year; on the next day action was instituted to vacate the deed. *Held*, that this latter action was not barred by the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 333-341; Dec. Dig. ¶60.]

### [2. *Limitation of Actions* ¶43.]

The statute of limitations is inert and inoperative until a right of action arises.

[Ed. Note.—Cited in *Garrett v. Weinberg*, 48 S. C. 43, 26 S. E. 3; *Gardner v. Reedy*, 62 S. C. 505, 40 S. E. 947; *Lyles v. Lyles*, 71 S. C. 399, 51 S. E. 113.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 217-219; Dec. Dig. ¶43.]

### [3. *Fraudulent Conveyances* ¶248.]

A voluntary deed, as against an existing creditor of the grantor, is fraudulent, but no

right of action exists in favor of such creditor to have the deed vacated, until he has exhausted his legal remedy by obtaining a return of nulla bona on his execution; until then, the statute of limitations does not begin to run in favor of the grantees as against the fraud.

[Ed. Note.—Cited in *Richardson v. Mounce*, 19 S. C. 478, 482; *McMahan v. Dawkins*, 22 S. C. 319, 320; *McSween v. McCown*, 23 S. C. 351; *Austin, Nichols & Co. v. Morris*, Id. 402; *National Bank of Newberry v. Kinard*, 28 S. C. 111, 112, 113, 5 S. E. 464; *Compton v. Patterson*, 28 S. C. 154, 5 S. E. 470; *Bates & Co. v. Cobb*, 29 S. C. 407, 7 S. E. 743, 13 Am. St. Rep. 742; *Miller v. Hughes*, 33 S. E. 539, 12 S. E. 419; *Meinhard Bros. v. Youngblood*, 37 S. C. 238, 15 S. E. 950, 16 S. E. 771; *Harrell v. Kea*, 37 S. C. 376, 16 S. E. 42; *De Loach v. Sarratt*, 55 S. C. 289, 33 S. E. 2, 35 S. E. 441; *Steinmeyer v. Steinmeyer*, 64 S. C. 417, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 733; Dec. Dig. ¶248.]

### [4. *Limitation of Actions* ¶100.]

This statute runs from the discovery of fraud, only where a right of action also then exists.

[Ed. Note.—Cited in *McGee v. Jones*, 54 S. C. 153, 13 S. E. 326; *Toole v. Johnson*, 61 S. C. 41, 39 S. E. 254.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. ¶100.]

### [5. *Limitation of Actions* ¶60.]

Delay in suing the note to judgment, short of the time allowed by the statute, does not start the currency of the statute in favor of such a deed.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 333-341; Dec. Dig. ¶60.]

### [6. *Limitation of Actions* ¶60.]

In such cases the Court of Equity will refuse to lend its aid to enable a party to escape from the consequences of a fraudulent act by interposing the bar of the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 333-341; Dec. Dig. ¶60.]

7. *McGowan v. Hitt*, 16 S. C. 602 [42 Am. Rep. 650], overruled.

### [8. *Action* ¶2.]

[Cited in *Lumb v. Pinckney*, 21 S. C. 473; *Drake v. Whaley*, 35 S. C. 190, 14 S. E. 397; *Holman v. Ashley*, 40 S. C. 420, 19 S. E. 13; *Heath v. Haile*, 45 S. C. 649, 24 S. E. 300, to the point that a cause of action exists when the rights of one party have been invaded by another.]

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 10-16; Dec. Dig. ¶2.]

### [9. *Fraud* ¶3.]

[Cited in *Michalson v. Myrick*, 47 S. C. 306, 25 S. E. 162, as to the difference in effect between actual and legal fraud.]

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 1; Dec. Dig. ¶3.]

### [10. *Fraudulent Conveyances* ¶74.]

[Cited in *Harrell v. Kea*, 37 S. C. 374, 16 S. E. 42, to the point that a voluntary conveyance without consideration, a gift, is not necessarily fraudulent, although made by one in debt at the time.]

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 186-190; Dec. Dig. ¶74.]

[11. *Limitation of Actions* ⇨43.]

[Cited in *Re Smith v. Steen*, 38 S. C. 364, 16 S. E. 1003, as to the proposition that a right of action accrues the moment a cause of action arises.]

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 217-219; Dec. Dig. ⇨43.]

[12. *Limitation of Actions* ⇨99.]

[Cited in *De Loach v. Sarratt*, 55 S. C. 286, 33 S. E. 2, 35 S. E. 441, as going far to support the doctrine that, in the absence of a denial of knowledge until within six years before suit commences, a complaint to set aside actual moral fraud must be begun within six years of the commission of the alleged fraud.]

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 477-479; Dec. Dig. ⇨99.]

[This case is also cited in *Gregory v. Rhoden*, 24 S. C. 90, and distinguished therefrom and in *State ex rel. George v. Aiken*, 42 S. C. 228, 20 S. E. 221, 26 L. R. A. 345, as to the doctrine of *stare decisis*.]

Before Pressley, J., Newberry, February, 1882.

Action by Ivy M. Suber against Dolly L. Chandler, Effa S. Chandler and Fannie T. Chandler. The opinion makes a full statement of the case.

[For subsequent opinions, see 28 S. C. 382, 6 S. E. 155; 36 S. C. 344, 15 S. E. 426.]

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\*Messrs. George S. Mower, Jones & Jones, for appellant.

Messrs. Suber & Caldwell, M. A. Carlisle, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In September, 1869, Thomas Chandler, now deceased, in consideration of natural love and affection, executed a conveyance to his wife and two daughters, the defendants, of a certain tract of land situate in Newberry county, containing two hundred and sixty acres, reserving a life estate to himself. The deed was duly recorded September 11th, 1869. At the time of the execution of this deed, Chandler, the grantor, was indebted to appellant by sealed note, which bore date in 1863. In December, 1874, which was five years and three months after the execution and recording of the deed, the appellant brought action upon his note against Chandler, before the termination of which Chandler died, but the action was revived against his representatives, and judgment was obtained on February 13th, 1879, for \$1,798.07.

In October, thereafter, the sheriff made return of nulla bona on the execution issued on this judgment, and on the next day, to wit, October 2d, 1879, the present action was commenced to set aside the deed to the defendants as fraudulent. The defendants, with other defenses not involved on this appeal, interposed the statute of limitations. The presiding judge, Judge Pressley, sus-

tained the plea, and on that ground dismissed the complaint, with costs. The question before us is whether this ruling was error, and this is the only question in the case.

It is a general principle that the statute of limitations does not begin to run until the right of action accrues. This has been long since settled, and is well understood, as an established initial principle in connection with this statute. Mr. Angell says, "that the time is to be computed from the time at which the creditor is authorized to bring his suit. If the contract is to pay money at a future period, or upon the happening of a certain event, the statute, it is very clear, is inoperative until the specified period has elapsed, or the particular event has occurred,

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or, \*if upon condition, not until the condition has been performed." Ang. Lim., ch. XVI., p. 46. It is also well understood that there are certain disabilities (savings in the statute) which prevent its operation while they exist, one of these being absence from the State of the defendant when the right of action accrues. And it has been held in several cases in our State, that the statute is not set in motion against fraud until the fraud has been discovered. *Egleberger v. Kibler*, 1 Hill Ch. \*113 [26 Am. Dec. 192]; *Farr v. Farr*, Id. \*387; *Means v. Feaster*, 4 S. C. 249.

All these follow as necessary sequences to the general principle upon which the statute of limitations rests, and which makes it a statute of peace and repose, to wit, unnecessary delay in attempting to enforce a right. Because, when no right of action has accrued, or, if accrued, an insurmountable legal disability stands in the way of asserting it, to permit a party to shield himself by interposing the statute, claiming the benefit of a delay which by no possibility could have been avoided by the plaintiff, would be repugnant to every sense of justice and a reproach to any system of law which claims to be the perfection of reason.

Now, the important questions in this case are, First, When did the right of action accrue? Second, Was the plaintiff, at that time, laboring under any legal disability, and, if so, when was this disability removed? And, finally, was this action commenced within a competent time thereafter? As to the first question, it may be stated as a general proposition, that a right of action accrues the moment a cause of action arises, and not before. Sometimes it may be that this right cannot be exercised at the moment of its accrual, because of some existing disability, applicable either to the plaintiff or the defendant, but, nevertheless, it may exist with its active energy suspended during the pendency of the disability. But the right of action certainly can never accrue before the cause of action arises.

The object and purpose of the present ac-



tion was to set aside a deed on the ground of fraud upon the appellant. The deed was a voluntary conveyance by the appellant's debtor to the defendants, of a tract of land which, at the date of the deed, belonged to this debtor. It cannot be contended successfully that a voluntary conveyance without

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consideration, a gift, is \*necessarily fraudulent, although made by one in debt at the time. To give, it is said upon the highest authority, is praiseworthy; it not only blesses the receiver but the bestower, and there can be no higher enjoyment than the exercise of this right when properly indulged. Generous and benevolent liberality to the objects of one's love and affection, or to promote laudable and praiseworthy purposes, should not only be free from reproach, but be deserving of commendation.

There is, however, a still higher principle than this, a principle of justice, which demands that one shall be just before he is generous; and this principle, while not discouraging or condemning gifts, will not allow them to stand, if by so doing the just rights of others are defeated. Accordingly, in the harmonious application of these principles, it has been held by our courts, that while a voluntary conveyance of property is not of itself fraudulent even by one in debt, yet, if it was intended to hinder, delay and defeat present creditors, or shall ultimately have that effect, it will be held fraudulent and void.

If at the time of its execution the wrong was intended, the fraud is positive and active, and attaches to the act at that moment. If, however, no wrong was then intended, and the conveyance becomes injurious to creditors afterwards, because at some future time the grantor's property has failed to meet the just demands of the creditors, whose claims existed at the time of the deed, then a passive and legal fraud is developed, which, attaching to the deed, renders it void, not from the beginning, but at that moment. This must be so, because until it is legally ascertained that it requires the property embraced in the deed to respond to the demands of creditors, the rights of the grantee are unassailable. Even the deed of one absolutely insolvent would be good, if he should be so fortunate as to accumulate enough afterwards to meet the claims of creditors in time for their executions. Hence, it has been often held that a creditor, before attempting to assail the conveyance of his debtor, must not simply be apparently unable to secure payment otherwise, but must absolutely fail to do so after exhausting all legal effort to that end, by judicially establishing his debt and

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having a \*return of nulla bona by the sheriff upon an execution issued thereon.

Now, in such case (which is the case here), the important questions are presented: What

is the cause of action, and when does it arise? And, consequently, When does the currency of the statute begin? A cause of action has been held in brief to be a legal right of the plaintiff invaded by the defendant, and it arises when the invasion takes place. Or, as stated by Mr. Angell: "Both in courts of equity as well as in courts of law, a cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief." Did the appellant have the right, at the date of the deed in controversy, to apply to the courts for relief with the view to have the proceeds of the property therein embraced applied to his debt? He certainly did not, because at that time his debt had not been judicially established, nor was he able to furnish the necessary evidence that his debt could not be paid without the aid of this property. Having no such right at that time, there was no invasion, as a right having no existence cannot be invaded.

All the elements of a cause of action at that time were wanting, and no right of action accrued. So the currency of the statute did not then begin. But the appellant did afterwards reduce his note to judgment, and failed by his execution to find property other than this land to satisfy his debt. Then, and not till then, his right attached to seize this property and make it available, and then, and not till then, did the defendants invade this right by retaining possession and refusing to allow it to be sold. Up to that time their possession was legal and beyond the reach of attack, and it was only at that time that the appellant had the right to apply to the courts for relief, because his right of action had never accrued before.

If, then, the statute of limitations is inert and inoperative until the right of action accrues, as announced in the first general principle laid down in the beginning of this opinion, the time of computation here must begin on October 1st, 1879, the day on which the return of nulla bona was entered on appellant's execution. *Jones v. Read*, 1 *Humph.* 345; *Marr v. Rucker*, *Id.* 347. This action was commenced the next day, to wit, October

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\*2d, 1879. This was certainly in time to satisfy the demands of any of the statutes, and it will be hardly necessary therefore to discuss the questions whether it required four, six or ten years to bar this action.

But even admitting that the plaintiff's right of action accrued at the date of the deed in 1869, and that the statute of force then requiring only four years is applicable, it cannot be contended that he could then have applied to any court either of law or equity for relief. His hands were completely tied. He was laboring under disabilities far greater than infancy, coverture or absence beyond the seas (the savings in the statute), for such persons have a right to commence

their actions, notwithstanding their disabilities, and if commenced the courts will regard them, and grant proper relief. But had appellant commenced his action, it would have been dismissed on the ground that he had no cause of action. It would have been fatal on demurrer because it did not state facts sufficient to constitute a case of action.

Can it be that, notwithstanding this, the statute was running against him because he was not asserting his right when the doors of all the courts were hermetically sealed in his face, and he was denied the privilege of appealing to them? This would be a stigma too great to be admitted, and a court of equity never ought to permit a defendant to shield himself under such a plea, when surrounded by such circumstances. To legitimate such an effort would be a wrong as great and as repulsive as the fraud which it protects. To prevent this, the court should seize upon the analogies arising from other cases, even though no authority directly in point can be found.

Upon what principle has it been decided that the statute does not commence to run until the discovery of the fraud in cases of active fraud, and that when the plaintiff avers in his complaint that the fraud was not discovered within the four or six years, it devolves upon the defendant to prove the contrary? It is upon the principle that the plaintiff could not have commenced action sooner. He had no knowledge of the wrong. Is not this precisely analogous to the case at bar? The appellant here had no knowledge that the deed to the defendants was in his

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\*way until he found no other property available by the return of nulla bona. He had no cause of complaint, until he found it necessary to make that property available. Upon what principle has it been held, that if the debtor is absent from the State and beyond the reach of the court at the time the right of action accrues, the statute is suspended until he returns? It is because the plaintiff could not have sued sooner. So, too, the statute is suspended for nine months after the death of the debtor. And upon what principle is it that infants, feme coverts and parties beyond the seas have been saved in the statute itself? It is because they are not in condition to sue.

This principle, unless authority beyond question the other way can be found, ought to control in a case like this. It is claimed that these principles cannot apply in the face of the positive decision in this State that the statute commences at the discovery of the fraud. This doctrine is not denied, but it must be taken in connection with that other principle, also held in this State, that to give currency to the statute there must be a plaintiff who can sue and a defendant who can be sued. *Bugg v. Summer*, 1 McM. 333. The discovery of the fraud by a party who cannot

sue on account of it, amounts to no discovery. There are cases where an action can be commenced the moment the fraud is discovered, and to such cases this doctrine is properly applicable, but in those cases where this discovery gives no right of action at the time, the reason of its application entirely fails.

It is conceded that this question has never been distinctly decided in this State, except in the recent case of *McGowan v. Hitt*, to which reference will be had subsequently. In the absence of controlling authority, it does seem that a court, in administering equity, should have some regard to the principles upon which the Court of Equity has always acted, and should decline, in a case like this, to give its aid to a party to escape from the consequences of a fraudulent act, by interposing the bar of the statute. These principles were well expressed in *McLure v. Ashby*, 7 Rich. Eq. 430, by Chancellor Johnstone, where he said: "In matters of an equitable nature, the statute not extending to them, this court is not imperatively bound to apply it, and only applies it by analogy to the prac-

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tice at law, and that \*it does not apply it where a sound conscience would be offended by its application." So, too, as was said by Chancellor Dargan, in the same case, in drawing a distinction as to the statute in courts of law and the Court of Equity: "They are not obligatory upon this court, and do not apply to proceedings in equity, except so far as the court has thought it conducive to the ends of justice to apply them in analogy to the rules which prevail in a court of law. And as the court only acts on this analogy because of its subserviency to the ends of justice, it withholds such action when it would be obviously subversive of equity."

The respondents, while impliedly admitting the correctness of the positions hereinabove, yet contend that in this case they should not apply, for the reason that appellant allowed five years and more to elapse after the execution of the deed which he now assails, before he attempted to put himself in place to attack it. The deed was executed in 1869, and defendant did not bring action upon his note until 1874. We do not see that this fact has any bearing upon the question involved. The appellant's note was under seal, and he had the right to indulge his debtor for five years, or more, if he saw proper, and why should he be punished for this? non constat that he knew or had any suspicion that Chandler would not be able to pay it, when demanded, or that the tract of land conveyed to the defendants would have to contribute to that end. There was no law which required that he should hasten proceedings in another and independent matter, in order to create a cause of action against the defendants, and we can see no reason why the five years between the deed and the action on the note, which the appel-



lant, under the law, had a legal right to extend them, should now be converted into a limitation to another action, the right to which has not long since accrued, and which at that time he had no knowledge would ever accrue.

The judgment which we propose to announce is directly in conflict with McGowan v. Hitt, 16 S. C. 602 [42 Am. Rep. 650]. That case was decided by a divided court, Mr. Justice McIver having dissented. It is a very recent decision. Judge Pressley, delivering the opinion of the majority, stated that in several of the States cases were found holding that the statute was suspended in

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cases \*like that. See Jones v. Read, 1 Humph. 345; Marr v. Rucker, Id. 347, where the court expressly held that the statute did not begin to run until judgment by the creditor, and that some of the court had grave doubts on the question. Under these circumstances, and upon examination, finding that it has no sufficient support, either in principle or authority, in our opinion it should be overruled and it is so ordered.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

#### 18 S. C. 534

STATE, ex relatione JONES, v. BOLES.

(November Term, 1882.)

#### [1. Trial $\hookrightarrow$ 139.]

There being some evidence in plaintiff's favor upon the only point made by the pleadings, the Circuit judge erred in granting a non-suit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig.  $\hookrightarrow$  139.]

#### [2. Sheriffs and Constables $\hookrightarrow$ 122, 157.]

Section 60 of the sheriffs' act of 1839 (11 Stat. 38), applies only to judgments upon which no executions have been lodged in the sheriff's office, but where an execution is filed and entered upon the sheriff's books, although not referred to in the index, the sheriff has actual notice or notice sufficient to put him upon the inquiry.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 225, 367; Dec. Dig.  $\hookrightarrow$  122, 157.]

Before Fraser, J., Edgefield, October, 1880. The opinion states the case.

Mr. J. P. Carroll, for appellant.

Mr. J. C. Sheppard, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was brought by the relator, Lewis Jones, upon the official bond of Isaac Boles, formerly sheriff of Edgefield county, against the said Isaac Boles and his surviving sureties to the said bond, and the personal representatives of such of his sureties as have died. The substance of the complaint is that the rela-

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tor, Lewis Jones, in 1868, \*held the oldest judgment against Edward J. Mims; that, under executions to enforce junior judgments against the said Edward J. Mims, his lands were sold, in December of that year, by the said Isaac Boles, as sheriff of Edgefield county, and that the entire proceeds of that sale were wrongfully applied by him towards the satisfaction of said junior judgments, leaving a large balance due upon the judgment of the relator unpaid.

The answer of Isaac Boles denied that he was sheriff of Edgefield county, in December, 1868, but that one John H. McDevitt, having been elected to that office, on November 15th, 1868, demanded and obtained possession of said office, and that thereafter all the funds that went into the said office were received and disbursed by the said John H. McDevitt; that no part of the proceeds of the land sold on sales day in December, 1868, ever came into the hands of the said Boles, but that the same was disbursed by an order of the court, and arranged between the parties interested in the same. And he further denied that the cause or action mentioned in the complaint accrued to the plaintiff within four years before the institution of the same, and the plaintiff's action in that regard was barred by the statute of limitations. The other defendants answered that they knew nothing of the facts, and relied upon the answer of the defendant Boles.

The case was tried before Judge Fraser and a jury. The plaintiff proved the sheriff's bond, and his judgment and execution, that John H. McDevitt did not take possession of the sheriff's office until December 15th, 1868, the entry of the sales, on January 4th, 1869, in the handwriting of Paul, the clerk of Boles, and signed "Isaac Boles, S. E. D." The lands were sold on December 4th, 1868, and Isaac Boles, as sheriff of Edgefield county, executed conveyance to E. A. Mims, on December 6th, 1868, which acknowledges the receipt by Isaac Boles, as sheriff, of the sum of \$8,920, the purchase-money of the lands of the said Edward J. Mims, sold on December 6th, 1868. The execution book of the sheriff contained the following entry: "Lewis Jones, bearer, v. John Lyon, John Leigh, Samuel F. Goode and Edward J. Mims, Fi. Fa., November 12th, 1858." The entry of the execution on the index is as fol-

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lows: "Lewis Jones, \*bearer, v. John Lyon, John Leigh et al." In clerk's office the case was referred to in the "abstract of judgments," and also in "the index and cross-index to judgments," as the case of "Lewis Jones, bearer, v. John Lyon et al."

The presiding judge granted a non-suit upon the ground that there was "no proof of actual notice to the defendant, Boles, in accordance with the terms of section 60 of

the act of 1839 concerning the office, duties and liabilities of sheriffs, and no proof of any fact affecting the said defendant with the necessary notice."

The plaintiff appealed upon the following grounds:

1. "That the defendant, Isaac Boles, as sheriff of Edgefield district, was bound by law, out of the proceeds of sale made by him of the lands of Edward J. Mims, to satisfy the senior judgment at the suit of the relator, Lewis Jones, against the said Edward J. Mims, which was entered in the execution book in his office, even though it were shown that no actual notice was given him, Boles, of the said judgment before his application of the said proceeds of sale to the payment of the junior judgments against said Mims, and it is respectfully submitted that his Honor erred in ruling otherwise.

2. "That the facts and circumstances, as established by the evidence, furnished reasonable proof that the defendant, Boles, before applying the said proceeds of sale to the junior judgment against Edward J. Mims, had actual notice of the said prior judgment of the relator, Lewis Jones, and it is respectfully submitted that his Honor erred in ruling to the contrary.

3. "That the evidence furnished at the least, presumptive proof that such notice was had by the defendant, Boles, and the determination of that fact ought therefore to have been referred to a jury.

4. "That the defendant, Boles, must be held to have had constructive notice of the aforesaid judgment at the suit of the relator, Jones, because the said judgment was duly recorded in the office of the clerk of said district, now county of Edgefield, and was duly entered in the book of abstract of judgments in said office.

5. "That constructive notice had by the

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defendant, Boles, of \*the said judgment at the suit of Jones, prior to his, Boles', application of the proceeds of said sale to the aforesaid junior judgments, rendered him liable to the demand of the complaint in this action, and it is respectfully submitted that his Honor erred in ruling to the contrary.

6. "That it is respectfully submitted that his Honor erred in ruling that the notice required by the sixtieth section of the act of 1839, was requisite in the case of the relator, Jones, against Edward J. Mims, when the judgment had been rendered and entered in the clerk's office, and the execution to enforce its payment lodged in the sheriff's office of the district in which the land was sold."

The rule is well settled that if there is no evidence at all to sustain the plaintiff's case, the judge may order a non-suit; but if any such evidence is given, the case must go to the jury. Except the plea of the statute of limitations, the only issue of fact made by

the answer, was, whether the defendant, Boles, was sheriff on December 4th, 1868, when the land of Edward J. Mims was sold. Upon this issue, there was proof tending to show that McDevitt did not take possession of the office until December 15th, and that the sale of December 4th was not only made, but the purchase-money received by him, as stated in the deed executed to the purchaser. There was no lack of evidence upon the only point made by the pleadings.

But the judge granted it on another ground, viz., that it was not shown that Boles, the sheriff, had actual notice in accordance with the terms of section 60 of the sheriffs' act of 1839 (11 Stat. 38): "The sheriff shall pay over the proceeds of any real estate sold by him to any judgment having a prior lien thereon, which may have been entered in the clerk's office of any district, whether an execution on such judgment may have been lodged in his office or not; provided, notice of such judgment be given to the sheriff before such proceeds shall have been otherwise paid," &c.

The judgments referred to in this section providing for special notice to the sheriff, it seems to us, must be understood as meaning judgments upon which no executions have been issued and lodged in the sheriff's office, including, especially, those rendered

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\*in some other judicial district than that in which the sheriff's sale is made. In such cases the sheriff, having no record in his office, it is manifestly proper that he should have actual notice brought home to him. But in this case the execution was lodged in Boles' office and entered in full upon the sheriff's books: "Lewis Jones, bearer, v. John Lyon, John Leigh, Samuel F. Goode and Edward J. Mims." This was actual notice, or, at least, such notice as to put him upon the inquiry. The sheriff is bound to take notice of all records in his office.

The judgment of this court is that the judgment of the Circuit Court be set aside, and the case remanded for a new trial.

18 S. C. 538

STATE, ex relatione HAGOOD, v. THOMPSON.

(November Term, 1882.)

[1. Taxation ⇨847.]

Before real estate can become forfeited to the State under our statutes, the following facts must concur: first, the land must appear properly upon the tax duplicate assessed; second, there must be a failure to pay the taxes; third, the land must be exposed to sale under the regulations prescribed for the sale of delinquent lands; and, fourth, there must be a failure to sell for the want of bidders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1662, 1663, 1666; Dec. Dig. ⇨847.]



[2. *Taxation* ⚡431.]

Under the assessment act of 1878 (16 Stat. 777), the board of assessors are required to assess the value of all real estate, "and certify their assessment back to the said auditor to be entered upon his duplicate." *Held*, that this required the board to certify in writing, and parol evidence by a clerk to the board, that he had made entry of the assessment by their direction upon the taxpayer's return was properly excluded, it not being the best evidence of their action.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 742; Dec. Dig. ⚡431.]

[3. *Taxation* ⚡789.]

The auditor's deed for delinquent land is prima facie evidence of good title under the express terms of section 116 of the act of 1874 (15 Stat. 772), but there being no such provision in the next succeeding section relating to forfeited lands, the court cannot supply it, and in such case the State must prove its title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1556; Dec. Dig. ⚡789.]

Before Wallace, J., Richland, April, 1882.

Action by the State at the relation of Johnson Hagood as governor, and others constituting the commissioners of the sinking fund, against Ann F. Thompson. The opinion states the case.

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\*Mr. J. D. Pope, for appellant.

Mr. Wm. H. Lyles, contra.

February 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought by the plaintiffs, appellants, to recover a tract of land which, as commissioners of the sinking fund, they alleged they were entitled to take possession of, because forfeited to the State for non-payment of taxes, having thereby become assets of the State in charge of said sinking fund under the provisions of the act of December 23d, 1879, the second section of which transferred all such lands to said sinking fund commissioners.

Before real estate can become forfeited to the State under our statutes, the following facts must concur: first, the land must appear properly upon the tax duplicate assessed; second, there must be a failure to pay the taxes; third, the land must be exposed to sale under the regulations prescribed for the sale of delinquent lands; and, fourth, there must be a failure to sell for the want of bidders. The first link in the chain is the assessment preliminary to being placed upon the tax duplicate by the auditor. This is regulated by act of assembly, approved December 29th, 1878, entitled "An act to further provide for the assessment of real estate for the purposes of taxation." 16 Stat. 777.

That act provides that the county auditors in the several counties shall, before the time fixed for the assessment of property, appoint for each township a board of assessors con-

sisting of three intelligent freeholders, who, after organizing by the election of a chairman and taking the necessary oaths, shall constitute a board of assessors for the purpose of assessing the value of real estate in their township for the purposes of taxation. The third section of this act provides: "That before entering the value of any real estate upon his duplicate, the county auditor shall submit a description of the same to the board of assessors appointed as aforesaid, \* \* \* and the said board shall thereupon, without delay, assess the value

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of the same, and certify their \*assessment back to the said auditor to be entered upon his duplicate."

The main question in this case arises under this act. The plaintiffs, without producing a certificate from the board of assessors that the property in question had been assessed by them, and by the authority of which the auditor had placed the land upon his tax duplicate, proposed to prove by Joseph Muller that he acted as clerk of the board of assessors, that the board of assessors assembled in the auditor's office in 1879, that the description of the property of the defendant was put before this board in the shape of an original return taken by the auditor, with the column for valuation left blank, that the valuation was then entered therein by the witness, in his handwriting, but by the direction of the assessors; and that the paper so filled up by the witness was turned over to the auditor, who filed the same away, transferring the value so assessed to the duplicate lists. This testimony was objected to by defendant upon the ground that the valuation could be fixed alone by the board of assessors, and that the action of the board could not be proved by parol. The presiding judge sustained the objection and ruled the testimony inadmissible.

It was then urged by the plaintiffs that as, under the 116th section of the tax act of March, 1874, the deed of the county auditor for any real estate sold at delinquent land sale shall be prima facie evidence of a good title, so under the 117th section of the same act, where the land became forfeited to the State, the forfeiture carried with it a prima facie title to the State. As to this, the presiding judge held that as the words prima facie, which were found in section 116, as to the deed of the auditor for delinquent lands sold by him, did not appear in section 117 where forfeiture to the State took place, he could not supply them by construction. He therefore overruled the position of the plaintiffs, holding that the onus probandi rested with the State to establish a good title.

The plaintiffs, therefore, determined to take a non-suit, with leave to set the same aside if so advised, which was ordered on motion of plaintiffs' attorneys. The plain-

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tiffs then appealed \*upon two grounds. First, "Because his Honor erred in holding that the assessment of defendant's property for taxation could only be proved by a written certificate signed by the assessors to comply with the provisions of the act of December 24th, 1878." Second, "Because his Honor erred in holding that while under the one hundred and sixteenth section of the act of 1874, the auditor's deed to the purchaser of real estate purchased at a delinquent land sale, shall be prima facie evidence of good title to the grantee, the same rule would not apply under the one hundred and seventeenth section of the same act, where the title passed to the State for the want of bidders at such sale."

We concur with the presiding judge, that the testimony of Muller was inadmissible. The act of 1878, supra, expressly provides that the assessment for taxation shall be made by the board of assessors, and that this board shall certify their assessment back to the auditor to be entered upon his duplicate. It not only directs the assessment to be made, but it specifies the mode by which that assessment is to be authenticated, upon which authentication the assessment is to be placed upon the tax duplicate, to wit, the certificate of the board. It was necessary, therefore, in this case for the plaintiffs to prove, as the first link in their chain of title, that the land in dispute had gone upon the tax duplicate in accordance with the regulations prescribed by the act. This they attempted to do by the introduction of Muller.

It is a general rule of evidence that the best evidence of which the fact in issue is susceptible must be offered to prove it. In the unavoidable absence of this, secondary evidence may be resorted to. The question here was, Had the board of assessors made and certified an assessment upon the real estate of the defendant so as to authorize the county auditor to place it upon the duplicate for taxation? Muller did not propose to prove that the board of assessors had certified their assessment back to the auditor as required by the act, but simply that he, as their clerk, had entered a valuation upon the original return, which paper had been handed to the auditor and by him filed away.

Inasmuch as the act of 1878 made the

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certificate of the \*board a part of its duty in the assessment as authority for the auditor to enter the valuation upon his duplicate, the fact of that certificate was a necessary fact in the case, and under the general rule requiring the best evidence of which it was susceptible, the certificate itself should have been produced, or, if lost or destroyed, then secondary evidence of its existence and contents would have been admissible. As has

already been said, the witness Muller was not offered to prove an assessment of the board authenticated by its certificate, or the contents of such certificate as a lost paper, but he was offered as an eye-witness to the proceeding of the board to prove its action. This, we think with the presiding judge, was incompetent. The board under the act is an organized body consisting of three members with a chairman. They are required by the terms of the act under which they are constituted to certify their assessments, and the best evidence of their action in this respect is their certificate made in some form in writing attesting their action as an organized body. *Dent v. Bryce*, 16 S. C. 1; *People v. S. F. Union*, 31 Cal. 132; *Blackw. Tax T.* 113. The testimony offered was foreign to this point. It was an effort to prove an assessment in a mode different from that prescribed by the act, and was properly excluded.

As to the second point, we also concur with the presiding judge. The General Assembly in its wisdom saw proper to make the deed of the auditor prima facie evidence of title as to delinquent lands sold by him in express terms as found in the one hundred and sixteenth section of the act of 1874. They also saw proper to leave those words out in the one hundred and seventeenth section, where the land was forfeited to the State for the want of bidders. We have the power to construe and interpret doubtful and analogous phrases or words in an instrument brought before us, so as to reach its true intent and meaning, but we have no power to interpolate or insert words not used; especially should we be restrained in a case like this, where the words in question are expressly incorporated in the one section and left out in the other. We must suppose that the legislature intended, for some good and sufficient reason, that the purchasers at delinquent land sales should stand prima

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facie \*upon the deed of the auditor, while in the case of the stringent doctrine of forfeiture it was the intention that the State should be required to make out its case.

It is the judgment of this court that the order below be affirmed.

18 S. C. 543

SAWYER, WALLACE &amp; CO. v. MACAULAY.

(November Term, 1882.)

[1. *Trial* ⇨ 255.]

To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the "Case" should show that he was requested so to charge.

[Ed. Note.—Cited in *Hume, Small & Co. v. Providence-Washington Ins. Co.*, 23 S. C. 199.

For other cases, see *Trial*, Cent. Dig. § 627; *Dec. Dig.* ⇨ 255.]



[2. *Appeal and Error* ⇐671.]

The "Case" is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2867-2872; Dec. Dig. ⇐671.]

[3. *Bills and Notes* ⇐245.]

Under the law of North Carolina, which makes an endorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorser co-sureties with their prior endorser for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 558, 559; Dec. Dig. ⇐245; *Principal and Surety*, Cent. Dig. § 29.]

[4. *Gaming* ⇐19.]

It is too sweeping a proposition that notes are illegal if they "arose directly or indirectly out of transactions in futures," and the Circuit judge committed no error in refusing so to charge.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 39-43; Dec. Dig. ⇐19.]

[5. *Appeal and Error* ⇐757.]

Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[6. *Limitation of Actions* ⇐2.]

Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.

[Ed. Note.—Cited in *Dennis v. Atlantic Coast Line R. R.*, 70 S. C. 259, 260, 49 S. E. 869, 106 Am. St. Rep. 746.

For other cases, see *Limitation of Actions*, Cent. Dig. § 4; Dec. Dig. ⇐2.]

[7. *Bills and Notes* ⇐489.]

Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1587-1642; Dec. Dig. ⇐489.]

[8. *Contracts* ⇐144, 325.]

[Cited in *Rosemand v. Southern Ry.*, 66 S. C. 96, 44 S. E. 574, and *Morrow v. Atlanta & C. A. L. Ry. Co.*, 84 S. C. 241, 66 S. E. 186, to the point that the interpretation of contracts is governed by the *lex loci contractus*; remedies, by the *lex fori*.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 724-727, 1558-1562; Dec. Dig. ⇐144, 325.]

Before Cothran, J., March, 1882.

Action commenced February 5th, 1881. The opinion states the case.

Mr. S. P. Hamilton, for appellant.

Mr. T. C. Gaston, contra.

February 16th, 1883. The opinion of the court was delivered by

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\*Mr. Chief Justice SIMPSON. This was an action on three notes executed by Stenhouse, Macaulay & Co., merchants doing

business in Charlotte, N. C. The first was executed on July 28th, 1876, to the plaintiffs and payable at Merchants and Farmers National Bank, Charlotte, eighteen months after date. The second was dated October 24th, 1877, executed by the same parties and payable at the same bank, and the third bore date October 25th, 1877, executed by same parties and payable at same bank. All three of the notes were endorsed by the defendant by simply placing his name, "D. Macaulay," on the back of each. Each note also had the following endorsement by the plaintiffs: "Pay to J. H. McAden, president, or order. Sawyer, Wallace & Co." This endorsement, at the trial, had on each been canceled by pen marks drawn through them; also on each was found at the trial, "Pay Patterson & Gaston, or order, for collection. Sawyer, Wallace & Co." Patterson & Gaston were the attorneys who brought the action in the name of the plaintiffs.

At the close of plaintiffs' testimony, the defendant moved for a non-suit on the ground that, it appearing that the notes had been endorsed to Patterson & Gaston, the plaintiffs were not entitled to sue. The judge refused this motion, holding that plaintiffs having alleged ownership in their complaint, and this not being denied in the answer, the ownership must be taken as admitted. The verdict was for the plaintiffs, the amount of the notes, to wit, \$1,720.62.

The defendant is now before this court upon six exceptions, four of which assign error in the refusal of the judge to charge certain propositions; the fifth, because his Honor did not allow J. E. Stenhouse, one of the firm, to testify as to the character and business of buying and selling futures and the custom of trade in connection with such transactions generally, and the sixth, because his Honor erred in not deciding that the note for \$645.10 (the first note mentioned), being barred in North Carolina before the commencement of this action, the plaintiffs could not recover; and, also, in arrest of judgment, because the three notes being endorsed by Sawyer, Wallace & Co., the

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plaintiffs, \*to Patterson & Gaston, for collection, the plaintiffs could not maintain an action in their own names as owners and holders.

As to the first four and sixth exceptions, which involve errors of omission to charge, we do not find anywhere in the "Case" or "Brief" that the questions there raised were brought to the attention of the judge by request to charge. This, under our decisions, was absolutely necessary so as to permit this court to consider them, and especially does it become the duty of the court to deny consideration when the objection is interposed by the respondent claiming his legal rights. In *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C.

29. Mr. Justice Willard said: "The third ground of appeal is insufficient so far as it is based upon the failure of the judge to charge certain propositions therein set forth for want of a request to charge, as was the case in reference to the second ground. If counsel desire to bring any view of the law of a case to the attention of the jury, they must make such view the subject of a request to charge, and, failing in this, they cannot allege error. The maintenance of this rule is essential to a correct and careful administration of justice when the appellate court is limited to a consideration of exceptions on points of law, and cannot look into the whole case to see that substantial justice has been done between the parties."

In *Abrahams v. Kelly and Barrett*, 2 S. C. 238, the same justice, speaking for the court, said: "It does not appear that the second proposition was brought to the notice of the Circuit judge at the trial. It was not touched upon in the charge, nor was there any request to charge made in respect to it. The presiding judge is not bound to submit any particular proposition of law unless his attention is called to it and a request made to that effect. However important to the case such a proposition may be, error cannot be alleged unless, after request, he has refused to submit it. Nor is a misstatement of the law error unless his attention is called to it and he neglects or refuses to correct it. It is the office of exceptions to bring before this court only such matters of law as were the subject of contest upon the trial."

In *Fox v. Railroad Co.*, 4 S. C. 543, it was

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held that a failure \*to charge a particular proposition of law could not be assigned as error unless the judge on request declines so to charge, and the court said, when such an objection is insisted upon on behalf of the respondent, the court must necessarily regard it.

The same principle was held and enforced in the late case of *Sullivan v. Jones*, 14 S. C. 365, where Mr. Justice McIver said: "All of these grounds except the first, second and third complain of omission to charge upon points which, so far as the 'Case' discloses, were not brought to the attention of the judge during the trial, either by request to charge or otherwise, and therefore are not properly before us."

Neither do we find anything in the "Case" to sustain the fifth exception. If the presiding judge limited or curtailed J. E. Stenhouse "in his testimony as to the character and business of buying and selling futures, or the custom of trade in connection with such transactions generally," the "Case" submitted fails to show it and it is not admitted by respondent. In fact it is denied in respondent's argument. The only statement we have is found in the exception raising the question. This the court cannot regard.

The "Case" is the source of our information as to what occurred below; its very object is to inform the court authoritatively of the legal questions contested below, and of the facts pertaining thereto. This court has held that as to these matters it confines itself to the "Case." *Sheriff v. Welborn*, 14 S. C. 480. And it cannot consider statements in exceptions not found in the "Case." The defects in an appeal herein are fatal, especially where the respondent not only fails to admit the statements in exceptions, but denies their existence and demands the legal consequences applicable.

The court, however, could not but regret that an appeal should terminate in this way if there was merit therein which, if otherwise presented and in accordance with the rules in such cases, might have been successful. We have therefore, ex gratia, considered the exceptions so far as to be satisfied that no injustice will be done, or the rights of parties lost or defeated by enforcing the principles which the cases cited require.

The first two exceptions complain that the presiding judge failed to charge that under

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the law of North Carolina, where \*the notes were executed, D. Macaulay, the defendant, and Sawyer, Wallace & Co. were joint sureties by virtue of the endorsements made respectively on said notes, and therefore no action could be sustained by the plaintiffs against defendant, except for his aliquot portion of the amount paid by plaintiffs. The statute of North Carolina referred to, provides that "whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it shall be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note, and no demand on the maker shall be necessary previous to an action against the endorser; provided, that nothing herein shall in any respect apply to bills of exchange, inland or foreign." The character of the endorsements by these parties has already been stated. The endorsement of the defendant was his name on the back without more; that of the plaintiffs was a direction to pay the president of the bank at which the notes were made payable, which was afterwards canceled.

While no doubt the act above referred to made the defendant a surety to the makers, dispensing with notice of demand, we do not think it had this effect upon the plaintiffs. The character of their endorsement excludes this idea, and, in the language of the act, "otherwise plainly expresses" its purpose. The notes were payable at the bank of which McAden was president, and the object of the plaintiffs' endorsement was to enable Mr. McAden to collect them. There was no evidence that they were discounted by the bank, or that the ownership was ever changed. It



would have been error therefore for the judge to have charged as suggested.

The third exception assigns error, "because his Honor refused to charge that if the jury believes the cause of the losses which are the consideration of the notes, arose directly or indirectly from the transactions in futures, such transactions are illegal and the plaintiffs cannot recover, and that he did charge that contracts in futures, so called, may be legitimate." Even upon the assumption that contracts in what are known in commercial circles as "futures" are illegal, as gambling transactions or against public policy, or violative of the North Carolina act

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of \*1788, yet the judge could not have legally charged in the broad terms indicated in this exception, that if the notes arose "directly or indirectly," &c. This would cover any and all connection, the most immediate as well as the most remote, the guilty as well as the innocent. This would have been too sweeping.

As to the latter part of this exception, "that the judge did charge, that contracts in futures, so called, may be legitimate," we do not know in what connection this was said. The charge of the judge is not set out in the case, either in whole or in part, and in the absence of explanation or connection, and all information as to its application, it would be unjust to the Circuit judge for this court to attempt to pass upon a detached fragment of his charge like this. Besides, the necessary information is not before us. We do not intend, however, to intimate that contracts based on the sale or purchase of futures, would be legal. But we do not think that this distinct question has been sufficiently raised in this case to authorize us to consider it, and therefore it has not been adjudged.

The fourth exception involves a question of fact, to wit, the force and effect of testimony, which was a matter for the jury and not the judge.

As to the fifth, as has been stated, we are not informed of the precise ruling of the judge upon this subject; nor does the "Case" show what connection a general history "of the character and business of buying and selling futures, and the custom of trade in connection with such transactions," had with the case at bar. The object of testimony is to evolve facts pertinent to the issue in contest, and within the knowledge of the witness as applicable thereto. How far the general business of buying futures was involved in this case, we can not tell, and, if involved, whether Mr. Stenhouse was a sufficient expert to be authorized to speak generally upon the subject, we are not informed. We must leave this exception, therefore, as we find it. Any special fact bearing on the case and within the knowledge of Mr. Stenhouse, he was competent to prove, but testimony by him on the subject of futures and the usage

and custom of trade therein "generally," it appears to us would have been irrelevant.

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\*Sixth. "Because his Honor erred in not deciding that the note for \$645.10, being barred in the statutes of North Carolina before the commencement of this action, the plaintiffs could not recover on the third cause of action." Even if the proposition of law contained in this exception was correct, yet the judge before charging it was required to assume that the facts upon which it rested had been proved. This he could not do, as the facts are alone for the jury. But is the proposition a sound one? In *Levy v. Boas*, 2 Bail. 217 [23 Am. Dec. 134], the court held generally, that the limitation of actions is of the *lex fori*, not of the *lex loci contractus*, and in that case where the debt had not been barred in Pennsylvania, the place of the contract, yet in this State where the period of limitation was shorter, that period having elapsed, it was held barred. We can see no reason, where the facts are reversed, why the same rule should not prevail. The underlying principle is that the *lex fori* shall govern as to the remedy and its enforcement, and if in either case the *lex fori* is invoked, the same principle should control.

If the statute paid or destroyed the debt, then when once barred in any State, it would be gone forever and in all places; but this is not the theory of the statute of limitations. It does not pay the debt; it only suspends the remedy. This may take place in one State, while in another the active energy of the remedy may not be impaired in the least. The case of *Morton & Co. v. Naylor*, 1 Hill 439, does not touch the question. There the point was as to the effect of a judgment in another State, whether it could be regarded in this State as a debt of record, and, like judgments here, not subject to the plea of the statute. The court held that it would rank here in that respect as in the State where obtained, and if the statute could not be pleaded there it could not here.

Mr. Angell on Limitations, page 69, section 65, says: "Equally well settled is the doctrine that remedies on contracts are to be regarded and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made." He states further that upon the question being made before

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Lord Ellenborough, in *Williams v. Jones*, 13 East, 439, that learned jurist said: "It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they are contracted, and, generally speaking, that is so—that is, if the rights of the contracting parties be extinguished by the foreign law by the happening of certain events. But here there is only an extinction of the remedy in the foreign court according to the

law stated to be received there, but no extinction of the right: and there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different."

Mr. Justice Story, in *Leroy v. Crowninshield*, 2 Mason 151 [Fed. Cas. No. 8,269], stated the inclination of his mind to be the other way, on the supposition that where the debt was barred by the *lex loci*, this amounted to a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity; but this learned judge admitted that the current of authority was too strong against him to be resisted. In *Townsend v. Jemison*, 9 How. 407 [13 L. Ed. 194], found cited in a note to Angell, page 76, the question underwent thorough examination, with the inclination of Judge Story's mind above referred to before the court, and pressed upon it, the direct question being, whether the cause of action having accrued in Mississippi and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana. The court said: "The rule in the courts of the United States in respect to pleas of the statute of limitations has always been that they strictly affect the remedy and not the merits." See, also, *McElmoyle v. Cohen*, 13 Pet. 312 [10 L. Ed. 177]. Under these authorities it would have been error for the Circuit judge to have charged as suggested in this exception.

As to the matter relied on in arrest of judgment, we are satisfied with the reasoning of the Circuit judge when he refused the motion of non-suit made on the same ground at the trial. The ownership of the note was a question of fact; this was alleged in the complaint to be in the plaintiffs and not de-

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denied in the answer; this, we think, was sufficient, and could not be overthrown by the qualified endorsement to the attorneys for collection.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

## 18 S. C. 551

### GILMORE v. ROBERTS.

(November Term, 1882.)

#### [1. *Trespass* ¶20.]

Under the former system of pleadings, a party not in the actual occupation of land trespassed upon, but having title and in possession of a part of the same tract, or having made entry thereon, might maintain action of trespass *quare clausum fregit* against a trespasser in possession of the portion upon which the trespass was committed; and since the adoption of the code of procedure, a party having title

to property may recover damages for a trespass upon it without regard to the possession.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 40; Dec. Dig. ¶20.]

#### [2. *Appeal and Error* ¶997.]

An order refusing a motion for non-suit not disturbed, there having been some evidence against defendant, and the jury having found for plaintiff.

[Ed. Note.—Cited in *Wallace v. Columbia & G. R. Co.*, 37 S. C. 342, 16 S. E. 35.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4023, 4024; Dec. Dig. ¶997.]

Before Witherspoon, J., Richland, July, 1882.

This was an action by E. D. Gilmore against Wm. T. Roberts and J. C. Shirar, commenced February 28th, 1882. The charge of the judge to the jury and the opinion of this court constitute a full statement of the case. The charge was as follows:

The plaintiff must recover either on his possession or on his title. If he is not in possession at the time of the alleged trespass, he must show a legal title to the land to enable him to recover. But if by metes and bounds he has possession of a large tract of land to which he has a legal title, and any one obtrudes upon a part of that tract, such obtruder is properly sued in this form of action. If the plaintiff here has a legal title to the whole tract of land with actual entry, he may maintain the action of trespass *quare clausum fregit*, as it was formerly called, against any one who obtrudes himself into the actual possession of a part of the land. The facts are for the jury. What do these facts prove? Have these defend-

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ants made themselves liable under the law as laid down? Has the plaintiff satisfied the jury that the land in dispute is a part of the larger tract to all of which he has legal title? That is the question to be solved. If the jury find for the plaintiff, he is entitled to some damages. If the jury believe that the plaintiff was not in possession, as explained by the law already cited, and had not a good legal title to the land in dispute as that law requires, their verdict must be for the defendants. Gilmore's title as a good legal title to the Mill tract is admitted. Is this a part of that tract?

Thereupon the jury rendered the following verdict: "We find for the plaintiff, and one dollar damages."

Mr. W. S. Monteith, for appellants.

Mr. Andrew Crawford, contra.

February 28th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover damages for a trespass on the lands of the plaintiff. It was conceded that the plaintiff had the title to a tract of land known as the Patterson Mill tract, and the



principal contest below seems to have been as to the true location of the lines of that tract, whether they embraced the land where the trespass was alleged to have been committed. The jury, under a charge from the Circuit judge, to which no exception was taken, found for the plaintiff, and the defendants appeal upon three grounds, but as the third has been abandoned it need not be stated here. The remaining grounds of appeal are as follows: First, "Because his Honor erred when he refused to charge the jury at the request of the defendants, as follows: If the jury believe that Shirar, defendant, is in possession of the land in dispute, either himself, or by his tenant Mims, the plaintiff cannot recover in this form of action, and the verdict must be for the defendants. Second. Because his Honor erred in refusing the motion for nonsuit as to the defendant, William T. Roberts."

We do not think there was any error in refusing the request as submitted. While it may have been true formerly, when it

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\*was necessary to preserve the distinctions between the different forms of action, that the action of trespass *quare clausum fregit* could not have been maintained against a defendant in possession of the land upon which the alleged trespass was committed where the plaintiff, though having title, was not in the actual occupation of the land and had not made entry thereon, yet it never was true that the simple fact that the defendant was in possession was sufficient to deprive the plaintiff, who had title, of his right to bring this form of action, because if he too had actual possession of a part of the tract his title would draw to it possession of the whole, and he could maintain the action, or if he had made entry thereon the same result would follow. *Grimke v. Brandon*, 1 N. & McC. 356; *Amick v. Frazier*, Dud. 341; *Pearson v. Dansby*, 2 Hill 466; *McColman v. Wilkes*, 3 Strob. 465 [51 Am. Dec. 637]; *Cleveland v. Jones*, 3 Strob. 479, note; *Watson v. Hill*, 1 Strob. 78.

The case of *Vance v. Beatty*, 4 Rich. 104, relied on by the appellants, does not conflict with these views, but on the contrary it expressly recognizes the authority of some of the cases above cited, and simply decides that where the plaintiff has title but has never had any actual possession, the constructive possession derived from his title is not sufficient to enable him to maintain the action of trespass *quare clausum fregit* against one who is in actual possession.

It would have been error, therefore, to have charged the jury in the unqualified form demanded by the defendants' request, especially where, as in this case, there was direct testimony that the plaintiff had been in the actual occupation of the land for many years, by his tenants, and had been in the continuous use of it, holding it adversely, as

he said, ever since he bought it in 1860, until these defendants, in 1879, intruded themselves into the possession of a part of it. The Circuit judge seems to have been aware of the distinction indicated, for he framed his charge in conformity to it. So that even under the law as it stood prior to the adoption of the code of procedure, the request in its unqualified form was properly refused, for if the plaintiff was in the actual possession of a part of the land, having title to the whole, at the time the defendants intruded

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upon him, the \*action could have been maintained, even under the former practice, although the defendants might have been in the actual possession of that portion where the trespasses were committed, at the time the action was commenced.

But since the distinction between the various forms of action has been abolished, it may well be questioned whether there would be any foundation for the proposition contained in the request to charge, even if qualified, as we have suggested. If a plaintiff has title to a piece of property, whether real or personal, and also shows that another has trespassed upon it, by any unlawful use of or interference with it, we see no reason why he should not now be permitted to recover damages for such trespass. The wrong done is to the property of the plaintiff, and whether that property is, at the time, in his possession, or has been seized upon by a trespasser, would seem to be a matter of small consequence, so far as the substantial rights of the parties are concerned. While, therefore, under the former system of pleading, there may have been good reason why the distinctions between the different forms of action should have been rigidly observed, and the action of trespass *quare clausum fregit*, which was designed to afford redress for damages to the possession, should have been confined to cases where his possession was intruded upon, we see no reason now for observing any such distinction, and, therefore, where a plaintiff shows that his legal rights have been invaded, he ought to be entitled to redress from the wrongdoer, in the only form of action which he is now permitted to bring. We do not see, therefore, how, in any view of the case, the first ground of appeal can be sustained.

As to the second ground of appeal, which complains of error in refusing the motion for a non-suit as to the defendant Roberts, we are at a loss to discover upon what ground the non-suit was claimed. None is stated in the "Case," and none is suggested in appellants' argument. If we are left to presume that it was because there was no evidence connecting Roberts with the alleged trespasses, we can only say, as was said by O'Neill, J., in *Watson v. Hill*, *supra*: "Whatever might have been the doubt before, after the jury have held that the evidence satis-

fied them that the defendant committed the trespass, there can surely \*be no room to say that the judge below ought to have ordered a non-suit." But in addition to this the plaintiff distinctly testified to the trespasses by both of the defendants, for he said, in speaking of the land, "Shirar and Roberts trespassed upon it, as I have stated, in 1879," and this, of course, was sufficient to go to the jury.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

### 18 S. C. 555

#### BRATTON v. MASSEY.

(November Term, 1882.)

##### [1. *Costs* ⇨243.]

On appeal from a Circuit decree overruling a demurrer, with costs to be paid out of certain proceeds of sale, this decree was reversed and the complaint dismissed. *Held*, that the direction for the payment of costs fell with the decree, although not mentioned in the exceptions nor in the opinion of this court.

[Ed. Note.—Cited in *Padgett v. Cleveland*, 37 S. C. 516, 16 S. E. 481.]

For other cases, see *Costs*, Cent. Dig. § 938; Dec. Dig. ⇨243.]

##### [2. *Costs* ⇨4.]

Costs in equity causes, after the act of February 20th, 1880, (17 Stat. 303.) were governed by the former practice under rule 72 of the Circuit Courts, and, therefore, followed the event of the suit, if not otherwise ordered in the judgment.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 2, 3, 109; Dec. Dig. ⇨4.]

##### [3. *Costs* ⇨13.]

Costs being in the discretion of the Circuit judge, his direction concerning them will not ordinarily be disturbed, and in this case is approved.

[Ed. Note.—Cited in *Dendy v. Waite*, 36 S. C. 575, 15 S. E. 712; *Brown v. Brown*, 44 S. C. 383, 22 S. E. 412.]

For other cases, see *Costs*, Cent. Dig. § 24; Dec. Dig. ⇨13.]

Before Cothran, J., Chester, April, 1882.

Action by John S. Bratton against B. H. Massey et al., commenced in August, 1879, heard by Kershaw, J., in June, 1880; an appeal from his decree was heard by this court, November term, 1880. See 15 S. C. 277. The opinion states the case.

The decree from which this appeal was taken, was as follows:

At common law, costs were not given either to plaintiffs or defendants. But as a matter of statutory regulation (and it is purely such), it is of great antiquity. For a time, beginning with 6 Edward I., costs were allowed only to plaintiffs succeeding, or "demandants," as the parties were styled in the

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statutes. \*Afterwards by the Statute of Marlbridge, in the time of Henry III. they were allowed to the defendant prevailing;

and so to this day. When one brings his action and succeeds, it is difficult to perceive upon what grounds of justice or equity the party sued and who is obviously in default, should be relieved from the payment to the prevailing party of the expenses of the suit, by what name soever such expenses should be denominated. Upon the other hand, and upon grounds of equal justice, the defendant (should the plaintiff's action fail) must be entitled to be repaid the expenses he has incurred in defending a wrongful claim. This seems to me to be the bed-rock, the very foundation-stone, of the just and rudimentary principle, that costs should follow the event of the suit.

I am not, however, so blindly devoted to this principle as to hold it to be of universal application. Like all general rules, it is not without exceptions. But in the case presented here, within the exceptions to the rule, it is as certain now as anything can be made, that a false claim was raised against the defendant, Massey (I do not mean this offensively), and that his land, descended from Mrs. Gilmore, was not liable to the debts of W. Taylor Gilmore, excepting that the plaintiff stands acquitted here of all imputations of bad faith. So far as the result is, he might as well have selected any other parcel of land in Chester county for the satisfaction of his debt.

It is contended, however, by the plaintiff's counsel (1) that the Circuit judge ordered the costs to be paid out of the proceeds of the land; (2) that from this portion of the decree there was no appeal; (3) that the Supreme Court left that portion of the Circuit decree untouched, and thereby affirmed so much of it as decreed costs against the defendants. Admitting the facts as stated, is this a legal sequence? I think not. It will be seen, by reference to the brief in the cause, that the defendant "appeals from the decree made," &c. What part of the decree? The answer would naturally be, from the whole decree. Certainly not from any particular part of it.

True, specific grounds of appeal are set out, bringing properly to the attention of the court of review the precise views which the appellant had of his case, and which he

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sought to impress \*upon the minds of the justices, regarding the matter of costs as an incident of the Circuit judge's view of the case, and only as an incident, and as such, in my opinion, it has followed the case through its various stages. Abiding the final determination of the cause, the following authorities were cited by the defendants' counsel, which I think sustain his view of the case. *Woodson v. Palmer*, Bail. Eq. 96; *Muse v. Peay*, Dudley Eq. 236; *Cleveland v. Cohrs*, 13 S. C. 402; 3 *Wait's Pr.* 454.

It is necessary, however, in order to com-



plete this decree, to pass upon certain other allowances of costs which appear in the itemized taxation made by the clerk; that is to say: J. & J. Hemphill, attorneys, \$35; A. G. Brice, attorney, \$30. These attorneys represented others of the defendants than B. H. Massey, and the items above were allowed to them, and charged upon the proceeds of the land, which it will be borne in mind was sold by consent of parties pending the litigation hereinbefore referred to.

Having determined that this fund is not liable for the costs in controversy, how shall they be paid? The plaintiff's proceeding in this cause was not for the benefit of all who would join him in the suit and contribute to the expenses thereof. The attorneys above named represented creditors of W. Taylor Gilmore, whose claims were assailed by the plaintiff, and his complaint having been dismissed, and the assault rendered thereby futile, I know of no rule, equitable or otherwise, that can relieve him from liability to them for these costs. It is true that the plaintiff brought them into court. He invited them to go upon the voyage, but not for the purpose of sharing with him the pleasure or the profit of the round trip; for he gave them to understand most distinctly, in paragraph VII, of his complaint, that he would throw them overboard, if he could. The bark which sailed forth under such auspicious circumstances has been wrecked, and, hard as it may be, the inevitable consequence must follow the event of the suit.

Wherefore, it is ordered, adjudged and decreed as follows:

I. That the itemized taxation of costs, as made by the clerk, be and the same is hereby affirmed.

II. That the decision of the clerk, that said costs be paid from the proceeds of the sale

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of the lands sold in accordance \*with the decree of his Honor, J. B. Kershaw, be and the same is hereby reversed.

III. That the defendant B. H. Massey, and the defendants represented by Messrs. J. & J. Hemphill and A. G. Brice, have leave to enter up judgments for the several amounts of costs allowed to them in the clerk's taxation against the plaintiff, John S. Bratton, with leave to issue executions for the same.

IV. That the three last items, to wit: Printing notice of sale of land twice, \$17.50; taxes on property sold, \$25.00; Clerk Curtis, commissions on sales, \$27.30; total, \$69.80, and any other expenses incident to the said sales, if there be any, be deducted from the proceeds of the sale, according to the proportionate interest of B. H. Massey and his cotenant, Mobley, therein.

V. And that the costs of this appeal be taxed by the clerk of the court against the respondent, John S. Bratton, and that the several parties interested herein have leave to issue executions for the same.

Mr. Giles J. Patterson, for appellant.

Messrs. W. B. Wilson, R. E. Allison, J. & J. Hemphill, A. G. Brice, contra.

February 28th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The action in this case was brought by the plaintiff, as a creditor of one W. T. Gilmore, against the defendant, Massey, who claimed the land in question under a deed from said Gilmore, the other creditors of Gilmore and his heirs-at-law, for the purpose of subjecting certain real estate to the payment of the debts of Gilmore. The real contest was as to the true construction of the deed under which Massey claimed, and Judge Kershaw, who heard the case on its merits, held that the land was subject to the payment of Gilmore's debts and ordered it sold for that purpose, the costs of the case to be paid out of the proceeds of the sale. From this decree Massey appealed, and the Supreme Court reversed the

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decree of Judge \*Kershaw and dismissed the complaint. *Bratton v. Massey*, 15 S. C. 277.

Subsequently the costs of the case were taxed by the clerk of the court, who held that they should be paid out of the proceeds of the sale, which had been made by consent, pending the appeal. This decision of the clerk was excepted to by Massey, substantially upon the ground that the clerk erred in deciding that the costs should be paid out of the proceeds of the sale, he contending that the costs should follow the event of the suit in the absence of any special provision to the contrary. Judge Cothran sustained the exceptions to the clerk's decision and adjudged that the defendant Massey, as well as certain of the creditors of Gilmore, whose claims were alleged by plaintiff to have been paid or otherwise discharged, and the defendant Annie McLure, an infant, the only one of the heirs-at-law of Gilmore who answered the complaint, were entitled to tax their costs against the plaintiff; that the costs and other expenses incident to the sale of the land should be paid out of the proceeds of the sale, and that the costs of the appeal from the clerk's decision should be paid by the plaintiff.

From this judgment the plaintiff appeals upon various grounds which may be stated substantially as follows: First. Because the Circuit judge erred in holding that the decree of Judge Kershaw, so far as it related to costs, was reversed. Second. Because of error in holding that, in the absence of any special provision to the contrary, the costs followed the event of the suit. Third. Because costs were adjudged against the plaintiff in favor of some of the defendants who concurred in the prayer of the complaint. Fourth. Because, under all the circumstances of the case, the costs should be paid out of the proceeds of the sale.

It is quite clear that the first ground cannot be sustained. The appeal was not from any particular portion of Judge Kershaw's decree, but the appeal was from the decree—meaning, of course, the whole decree—and the judgment of the Supreme Court was "that the judgment of the Circuit Court be reversed and that the complaint be dismissed." This, of course, operated as a reversal of the whole decree. It is very true that in the former appeal that portion of the Circuit

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decree relating to costs \*was not specially attacked, but the provision as to costs was a mere incident to the judgment on the merits, and when that was ascertained to be erroneous and was reversed, and the complaint was dismissed, the provision as to costs was likewise reversed and fell with the judgment on the merits.

The judgment of the Supreme Court not having made any provision as to costs, they would necessarily be governed by the general rule upon the subject. The inquiry then is, What was the rule upon the subject at the time this case was determined? Prior to the adoption of the code of procedure the well settled rule was, that in cases of the class to which this belongs, in the absence of any special provision in the decree as to costs, they followed the event of the suit. *Woodson v. Palmer*, Bail. Eq. \*95; *Muse v. Peay*, Dud. Eq. 236; *Higginbottom v. Peyton*, 4 Rich. Eq. 316; *Brown v. Wood*, 6 Id. 360. It is true that by section 332 of the code of procedure, as originally adopted, other provision was made as to costs, in cases like this, where the relief sought was such as, prior to the code, could only be obtained in a court of equity (*Mars v. Conner*, 9 S. C. 79), but that section of the code was repealed by the act of February 20th, 1880, (17 Stat. 303.) prior to the hearing of this case, and that act contains no provision upon the subject. Hence, at the time judgment was rendered in this case, there was no statute or rule of court prescribing which of the parties should pay costs in a case like this, and hence, under rule 71 (now known as rule 72) of the Circuit Court, "the practice, as it has heretofore existed in the courts of law and equity of this State," must govern. We do not see, therefore, how the second ground of appeal can be sustained.

As to the third ground, which questions the propriety of the decision of the Circuit judge as to the costs of certain of the defendants; and the fourth ground, which claims that, under all the circumstances of this case, the Circuit judge should have directed that the costs should be paid out of the proceeds of the sale of the land, it is sufficient to remark that, under the practice governing at the time this case was heard, costs in an equity case were in the discretion of the Circuit judge, and, therefore, the manner in which that dis-

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cretion has been exercised is not \*ordinarily a subject-matter of appeal. *Singleton v. Allen*, 2 Strobb. Eq. 174; *Hext v. Walker*, 5 Rich. Eq. 7; and we may add that we think, in this case, the Circuit judge has fully vindicated the propriety of his conclusions.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

18 S. C. 561

KAMINER v. HOPE.

(November Term, 1882.)

[1. *Appeal and Error* ⇨552.]

It not appearing that the question presented by this appeal was ever brought to the attention of the Circuit Court, the well settled rule forbids its consideration by this court; but, under the circumstances of this case, the rule was relaxed and the point adjudicated.†

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2458; Dec. Dig. ⇨552.]

[2. *Executors and Administrators* ⇨537.]

A decree against an administrator of an administrator at the suit of an administratrix pendente lite of the first intestate for an accounting, is sufficient to sustain an action against the sureties on such defendant's administration bond.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2453, 2485–2581; Dec. Dig. ⇨537.]

[3. *Executors and Administrators* ⇨122.]

While the authority and power of an administrator pendente lite is much more limited in its nature than that of a general administrator, yet he may bring actions to recover debts due his intestate's estate. Cases reviewed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 495; Dec. Dig. ⇨122.]

[This case is also cited in *De Walt v. Kinard*, 19 S. C. 286, 295, and distinguished therefrom.]

Before Cothran, J., Lexington, September, 1881.

The case is fully stated in the Circuit decree, which was as follows:

This cause came on for trial before the court and a jury, at the fall term, 1881, of

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the court of Lexington county. By \*agree-

†This rule was here relaxed, as stated in the syllabus, and in the case of *Sawyer, Wallace & Co. v. Macaulay*, ante p. 543, exceptions having no proper foundation in the Case submitted to this court, were considered *ex gratia*. But in both cases, the result reached was the same as if the technical rule had been applied. It is not probable that such exceptions would be considered, the appellee objecting, if they led the court to a reversal of the judgment below.

The principal case shows the necessity of having it to appear in the brief that points made on circuit and not alluded to in the decree of the Circuit judge, were so made. Where this is not shown by exceptions to a master's or referee's report, it can be accomplished by a simple statement to that effect.—REPORTER.



ment of parties, the question as to the amount of the penalty of the bond signed by defendant's intestate, John C. Hope, as surety of Levi Gunter, the administrator of Martin T. Leaphart, was alone submitted to the jury, upon which they were required to find a special verdict, all other questions being reserved for the judgment of the court. The jury having found that the penalty of the administration bond signed by defendant's intestate was \$20,000, it devolved upon me to ascertain and fix the liability of the defendant's intestate as the surety of Levi Gunter.

The facts of the case, in so far as they are necessary for the proper understanding of this question, are as follows: Simon A. Leaphart, late of the county of Lexington, departed this life intestate some time during the year 1853, leaving as his only heir-at-law his widow, Mary Leaphart, and an only child, Polly Leaphart. Shortly thereafter his brother, Martin T. Leaphart, administered upon his estate, and reduced the same into his possession, reporting, on January 1st, 1854, a balance in hand of \$4,894.50.

On April 24th, 1855, Mary Leaphart and Polly filed their bill in the Court of Equity for said county, against said Martin T. Leaphart, as administrator of Simon, praying an account of the estate of his intestate. The rights of the said Mary and Polly to claim, as heirs of Simon, were contested upon the ground of the illegality of the marriage of Mary with Simon, and the consequent illegitimacy of Polly.

Martin T. Leaphart died in the month of May, 1860, never having accounted; and thereafter Levi Gunter administered upon his estate, giving bond to the ordinary of Lexington county for the faithful discharge of his duty, with John C. Hope, defendant's intestate, as surety on said bond. Prior to his death, to wit, on April 9th, 1860, Martin made a deed of assignment to Gunter for the payment of his debts, under which Gunter sold the property of the said Martin, amounting to \$15,164.57, out of which he paid Martin's debts, as directed in the assignment. Martin died before the sale. Gunter administered upon his estate, and sold the balance of his personal estate for about \$150, and in his account with the

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ordinary, \*as administrator, in January, 1861, showed a balance in hand of \$11,125.

On March 28th, following, the said complainants filed their bill of revivor against Levi Gunter, as administrator of Martin T., with whom were joined, as defendants, George J. Leaphart, James E. Drafts and Sarah, his wife—the other heirs-at-law and next of kin of the said Martin T. By the several answers to this bill of revivor, like issues as to the legality of the marriage of Mary with Simon and the legitimacy of

Polly, were raised, which had to be settled before an accounting could be had.

These questions being decided favorably to the complainants, (Leaphart v. Leaphart, 1 S. C. 199,) the other issues, both of law and fact, were, on January 5th, 1871, referred to Francis W. Fickling, Esq., who, on March 1st, 1871, reported in favor of the plaintiff Mary the sum of \$4,047.68, and in favor of the plaintiff Polly the sum of \$8,095.37, against the said Levi Gunter, being the amount due the estate of Simon by Gunter's intestate, Martin T., and in favor of the plaintiff Polly the further sum of \$2,048.60, as one of the distributees of the said Martin T.

This report having been confirmed by the court, judgment was thereupon, on October 30th, 1873, entered up in favor of said complainants against the said Levi Gunter, and his entire estate advertised and sold by the sheriff of Lexington county. After applying the proceeds of such sale to the satisfaction of the judgment, there remained still due and unpaid by the said Levi Gunter the sum of \$15,490.48. Mary Leaphart died intestate some time during the year 1872, and thereafter, to wit, on September 2d, 1872, Thomas L. Kaminer, one of the plaintiffs herein, administered upon her estate.

Upon the judgment of the court thus rendered against the said Levi Gunter, this action was instituted against the said John C. Hope (who was then living), one of the sureties upon Gunter's administration bond, for the balance due on said judgment. The cause was brought to a trial before the Honorable Thompson H. Cooke, one of the judges of this court, and a jury, at Lexington, in July, 1876, and upon a full submission of the cause to the jury the following

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verdict was rendered: "We find \*that the penalty of the bond executed by Levi Gunter, as administrator of Martin T. Leaphart, with John C. Hope, the defendant herein, as surety, was for the sum of \$20,000. We find that the amount now due by Levi Gunter, as administrator of Martin T. Leaphart, to the plaintiff by reason of his devastavit of the estate of said Martin T. Leaphart, and for which John C. Hope is liable in this action, is the sum of \$15,498.48, with interest thereon from October 5th, 1874." A motion was thereupon made for a new trial, which having been refused, an appeal was prosecuted to the Supreme Court, the order of the Circuit Court reversed and a new trial granted. *Kaminer v. Hope*, 9 S. C. 253.

This cause is now to be considered in the light of that judgment; and it having been therein held "that the plaintiff could not recover in this action the amount due the estate of Simon A. Leaphart by the late Martin T. Leaphart, as administrator, in the absence of an administrator de bonis non

of Simon's estate," the pleadings were amended by adding William J. Assman, who had been in the meantime appointed administrator de bonis non of Simon A. Leaphart, as one of the plaintiffs. John C. Hope having also in the meantime died, the pleadings were further amended by adding as a party defendant, James C. Hope, as the administrator of John C. Hope. As thus amended, the cause is again presented for trial.

The plaintiffs claim that the defendant's intestate is liable for the full amount of the judgment rendered against his principal, Levi Gunter, by the Court of Equity. The defendant sets up three defenses: First. He denies the execution of the bond set forth in the complaint. Second. He denies the liability of his intestate upon the administration bond for a devastavit committed by Martin of the estate of Simon, and avers that the sureties upon the administration bond of Martin are alone answerable for such devastavit. Third. He denies that the sum of \$4,047.68 and \$8,095.37 were found to be due respectively in favor of Mary Leaphart and Polly Leaphart against the said Levi Gunter as administrator of Martin T. Leaphart, and chargeable upon the administration bond of Levi Gunter as a devastavit of the estate of the said Martin T. Leaphart.

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\*The first defense has been settled by the verdict of the jury in favor of the plaintiffs. The remaining defenses involve the questions reserved for the court, which I shall now proceed to consider:

It is urged by the defendants that as to the devastavit of Martin T. Leaphart, these plaintiffs should proceed against the sureties upon his official bond. True, they may elect so to do; but why, when it appears that he (Martin) left an estate ample for the payment of debts, which passed into the hands of his administrator, Gunter? The demands of the plaintiffs against Gunter is for the payment of a debt due by Martin to the estate of his intestate, Simon. I say a debt due the estate of Simon upon the death of Martin—for any sum which he was in arrears to Simon's estate was a debt due by the former to the latter. *Davis v. Wright*, 2 Hill 567; *Gill v. Douglass*, 2 Bail. 387.

Gunter admits assets, but in the proceedings before the Court of Equity fails to account for them. I am, therefore, unable to see upon what principle his surety can avoid responding to his default, according to the condition of his bond. The liability of the surety is to make good the injury which may be sustained in consequence of the misconduct of the principal. *Ordinary v. Shelton*, 3 McC. 417; *Davis v. Wright*, 2 Hill 567; *Wiley v. Johnsey*, 6 Rich. 358; *Ordinary v. Mortimer*, 4 Rich. 275.

These authorities furnish an ample exposition of both the responsibility and the liability

of the surety. Martin having converted the entire estate of Simon, the only right which remained to the administrator de bonis non was to demand of the personal representative of Martin an account, and ask judgment for such balance as may be ascertained to be due by the latter to the estate of his intestate. *Villard v. Robert*, 1 Strobb. Eq. 402.

Such accounting being had and balance ascertained against the administrator, it is the well recognized practice for the administrator de bonis non, upon the decree of the ordinary or Court of Equity, to sue the administrator of the former administrator upon his bond in an action at law, and, when necessary, to join in the action the sureties upon his bond.

Governed by the rule laid down in *Ordinary v. Carlile*, 1 \*566

\*McC. 100, the defendant's intestate can be discharged only by showing that his principal, Levi Gunter, received no assets which were liable for the payment of the devastavit committed of the estate of Simon A. Leaphart, or by otherwise pointing out in what particular it would be improper to charge him in this action with the entire amount of the judgment against Gunter in the former suit. *Kaminer v. Hope*, 9 S. C. 257. This he has not done, though full opportunity was allowed. This, in fact, he could not do, since it appears from the returns of Gunter before the ordinary in January, 1861, that there remained in his hands, after the payment of all the debts of Martin T. Leaphart, an amount largely in excess of that due the estate of the said Simon A. This Gunter should have applied in payment of the claim of Martin's intestate, or, pending the litigation, he should have paid the fund into court or otherwise invoked the aid of the court, and sought the appointment of some one to whom he would be authorized to pay the same. He, however, saw fit to join in the controversy raised by the Leaphart family, who were all in antagonism to plaintiffs, and to assume the risk, pending the litigation, of holding and controlling the fund. That it has been lost is the result of his own voluntary act, and the obligation to secure parties in interest against just such risk the sureties assumed by the very condition of his bond.

But suppose, as is urged by the defendant, that the plaintiffs be required in the first instance to proceed against the sureties of Martin. Would they not, having been required to respond to Martin's default, have the right to proceed against Martin's estate, in the hands of Gunter, his administrator, and to hold him and his sureties for the default of Martin by them paid? This being true, why insist upon such diversity of action? The sureties of Martin would be subrogated to any right of the creditor of Martin whose claim they had been required



to pay. *Hampton v. Levy*, 1 McCord Eq. 116; *Lowndes v. Chisolm*, 2 Id. 455 [16 Am. Dec. 667]; *Perkins v. Kershaw*, 1 Hill Eq. 344; *Rhame v. Lewis*, 13 Rich. Eq. 330, 332.

It is further urged by the defendant that he can, under no circumstances, be held for

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a greater sum than that found by the referee in favor of the plaintiff Polly, against Levi Gunter, as administratrix of Martin T.; and he denies that the sums of \$4,047.68 and \$8,095.37 were found to be due respectively in favor of Mary Leaphart and Polly Leaphart against the said Levi Gunter, as administrator of Martin T. Leaphart, and chargeable upon the administration bond of the said Levi Gunter as a devastavit of the estate of said Martin T.

This defense is bottomed upon the judgment of the referee, which is as follows: "I therefore find for the plaintiff Mary, the sum of \$4,047.68, and for the plaintiff Polly, the sum of \$8,095.37, against the defendant, Levi Gunter, on account of the estate of Simon A. Leaphart; and for the plaintiff Polly, the sum of \$2,048.60, against the defendant, Levi Gunter, as administrator of the estate of Martin T. Leaphart." The argument of the defendant is that in respect to these two amounts the judgment is against Gunter personally—not against him as administrator of Martin, and, therefore, his surety cannot be held liable.

It must be observed that the manner in which the referee has stated the account was a necessary consequence of the separate interests of the plaintiffs, Mary and Polly, and should not be construed as indicating a liability of Gunter in different capacities. The bill was wide in its scope, seeking in the outset an account alone of the estate of Simon A. in the hands of Martin T., his administrator. Upon the death of Martin T., pending the suit, the bill had to be revived against Gunter, his administrator, and thenceforward involving the additional interest of Polly as one of the distributees of Martin.

The referee adopted a convenient and proper mode of expressing the separate interest of each of the plaintiffs; but I cannot see that it operates to charge Gunter in any other capacity than as administrator of Martin. The proceeding throughout, so far as it operated against him, was in his representative capacity, and a judgment could only be rendered against him as such, except, however, that as for any devastavit adjudged against him satisfaction may be ordered out of his individual estate. The amounts adjudged, as appears by the referee's report, in favor of Mary and Polly, respectively,

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were due by Martin to the estate of Simon, his intestate, and assets sufficient for the payment of same having come into the hands of Gunter, he and his sureties are liable therefor.

But, further, in support of the view I feel constrained to take of the defenses now under consideration, I regard the judgment of the Supreme Court heretofore rendered in this case (9 S. C. 253) conclusive of the proposition. The defenses herein set up were all before the court in the former trial and before the Supreme Court upon the appeal. After deciding that the refusal on the part of the Circuit judge to charge upon certain propositions of law as requested by the defendant was sufficient ground for a new trial, Kershaw, acting Associate Justice, speaking for the court, says: "Other questions are made by the appeal which it will be proper to settle in order that the new trial may be conducted in the light of a decision of the points of law involved."

The very questions now under discussion were then considered, and in holding that the judgment against Gunter could only be prima facie evidence against his surety, the court say: "The appellant has, therefore, a right to look into the decree and point out in what particulars it would be improper to charge him in this action with the entire amount of judgment against Gunter in the former suit. Of that amount the sum of \$12,143.05 was for a liability of Gunter to the estate of Simon A. Leaphart. This arose from the sale and conversion of assets of the estate of Simon, which were in the hands of Martin as administrator, and by him assigned to Gunter, together with the bulk of his own estate, upon a trust to pay certain debts of the assignor from the proceeds. The decree against Gunter was for the residue of the fund left after performing the trust. This residuum, it is here claimed, was an asset in the hands of Gunter, as administrator of Martin, to be accounted for by him in that capacity. He himself so treated it in his accounts. The plaintiffs, also, have so treated the funds, and thereby ratified, so far as they are concerned, the conversion by Martin of Simon's assets. The fund derived from such conversion is, therefore, for the purposes of this decision, to be treated as vested in Martin's estate and to be accounted for by his administrator."

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\*To whom, then, assuming this view of the argument as most favorable to the plaintiffs, is he, Gunter, to account for the fund? Evidently to the creditors of his intestate in the first instance, and afterwards to his distributees. Of the amount decreed against Gunter, \$12,143.05 was due the estate of Simon A. Leaphart, for devastavit of Martin as administrator. Can this fund be recovered of the defendant in this case by the distributees of Simon A. Leaphart without an administration of the estate of Simon? Simply stated, the question is whether distributees can sue for and recover debts due their intestate's estate. Put in this form the affirmative would hardly be contended for. "It follows

that the plaintiffs cannot recover in this action the amount due the estate of Simon A. Leaphart by the late Martin T. Leaphart, as administrator, in the absence of an administrator de bonis non of Simon's estate." 9 S. C. 257, 259.

Undoubtedly this amount was regarded by the court as a debt due by Martin to the estate of his intestate, for which Gunter, his administrator, was liable to account to the proper representative of Simon's estate. This party is now properly before the court, in the person of William J. Assman, as administrator de bonis non of Simon A. Leaphart, and I fail to see in the several grounds urged by the defendant anything to relieve his intestate from the liability of his principal.

The defendant further sets up the plea of "plene administravit præter," and files with his answer certified copies of the inventory and appraisement, and also of his return before the Probate Court for the year ending December 31st, 1880, by which it appears that the defendant possessed assets of his intestate to be administered, amounting only to the sum of \$961.06. No effort was made on the part of the plaintiffs to impeach these returns, nor to charge the defendant with more. This admission must, therefore, be taken as true, and the defendant can only be chargeable with the amount thus admitted, unless other assets of the intestate shall hereafter come into his hands to be administered as suggested in his answer.

There is no conflict between the plaintiffs in respect to their respective interest in the amounts sued for; but, in view of the judgment of the Supreme Court, I deem it proper

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to settle by \*the judgment now to be delivered these respective claims for the protection of the administrator de bonis non. In the course of the argument, the defendant, while urging the proposition that he could not be held liable for the amounts adjudged by the referee against Gunter on account of Simon's estate, contended that the amounts heretofore collected from Gunter should be credited wholly upon the recovery in behalf of Polly, as one of the distributees of Martin. In the view I have taken of the liability of the defendant's intestate as the surety of Gunter, it is a matter of no consequence to him in what manner this application is made; and while to the plaintiffs it is also a matter of minor importance, I adopt the ratable application of such collections as the most proper.

It is therefore adjudged that the plaintiff William J. Assman, as administrator de bonis non of Simon A. Leaphart, recover against the defendant, as administrator of John C. Hope, deceased, the sum of \$13,277.56, with interest from October 5th, 1874; and the plaintiff Polly Leaphart recover against the said defendant, as administrator as aforesaid, the sum of \$2,212.92, with interest from Oc-

tober 5th, 1874; said debts, interests and costs to be levied of the goods and chattels which were of the said John C. Hope at the time of his death, in the hands of the said James C. Hope as administrator as aforesaid to be administered, and which may hereafter come into the hands of the said administrator to be administered, and of the lands, tenements and hereditaments which were of the said John C. Hope at the time of his death.

From this decree the defendant appealed upon the following exceptions:

1. Because it is respectfully submitted that the learned judge in his able opinion erred in the said judgment in this: That he has entirely overlooked the important point, earnestly pressed upon the court, that by the proceedings in equity (to which John C. Hope was not a party) referred to Francis W. Fickling as referee, and introduced as evidence in this case to show the amount of the liability of Levi Gunter as principal, and thereby to fix the liability of John C. Hope as surety,

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it appeared that \*the accounting was had at the suit of the administratrix pendente lite of Simon A. Leaphart, and not at the suit of an administrator de bonis non.

2. Because, this being true, until there was an accounting by the principal at the suit of an administrator de bonis non, there was no breach of the condition of the administration bond legally ascertained, and no verdict could be legally rendered and no judgment could be legally predicated on such verdict.

3. Because, this being a correct conclusion of law, the Circuit judge erred in ordering judgment in any amount whatever, under any finding as to the penalty of the bond, before the breach of the condition had been legally ascertained in the suit against the principal, and, a fortiori, in a suit against the surety.

Mr. J. D. Pope, for appellant, cited 1 Strobb. Eq. 402, 414; 2 Bail. 373, 387; 1 Rich. Eq. 123; Rice 350; 16 S. C. 432.

Mr. W. A. Clark, contra.

March 2d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case are so fully and clearly stated in the Circuit decree, that it is not necessary for us to do more than to make such a brief statement as will be necessary to indicate the single point raised by this appeal, especially as the case, in different forms, has been before this court on two former occasions when it was reported—first, under the title of Leaphart v. Leaphart, 1 S. C. 199, and, next, under the title of Kaminer v. Hope, 9 S. C. 253, where a full history of the litigation between these parties may be found.

The present action was brought against John C. Hope, as surety upon the bond of Levi Gunter, administrator of Martin T. Leaphart, and, upon his death, continued



against the present defendant as his administrator, to recover the amount found due by Gunter as such administrator, as well to the estate of Simon A. Leaphart, of whom his intestate, Martin T., was administrator, as to the plaintiff, Polly Leaphart, as one of the distributees of said Martin T. The proceeding under which these amounts were found due by Gunter, as administrator of Martin T.

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Leaphart, was a bill in equity originally filed by Mary Leaphart and Polly Leaphart, claiming to be distributees of Simon A. Leaphart, against Martin T. Leaphart as his administrator. Upon the death of Martin T., Levi Gunter was appointed administrator of his estate, and a contest arising as to who was entitled to administration upon so much of the estate of Simon A. as was left unadministered by Martin T., letters of administration pendente lite were granted to Mary Leaphart. A bill of revivor was then filed, making Gunter, as administrator of Martin T., and the heirs-at-law of Martin, parties, and under this bill the account was taken which forms the basis of the present action.

The appellant contends that inasmuch as the account was taken in a proceeding in which the estate of Simon A. Leaphart was represented, not by an administrator de bonis non, but only by an administrator pendente lite, it was without authority and not binding, and, therefore, constituted no sufficient foundation for the present action, because the only person who could demand from the administrator of Martin an account of his actings and doings, as administrator of Simon, was an administrator de bonis non of the latter, and that such accounting could not be had at the instance of Mary Leaphart as administratrix pendente lite.

The respondent, however, makes a preliminary objection to the hearing of this appeal, which must first be disposed of. The objection is, that it nowhere appears in the "Case," as prepared for argument in this court, that the question now presented by this appeal was ever made or considered in the Circuit Court, and that according to the well-settled rule, we are precluded from considering such question. That such is the rule has been so often declared by this court that it is scarcely necessary to refer to the numerous cases in which it has been announced. It is only necessary, therefore, to ascertain whether it is true as matter of fact that the "Case" fails to show that such a question was made in the court below. We have examined the "Case" carefully and are unable to discover any evidence that such a question was ever presented to the Circuit judge for decision. His decree presents the facts of the case clearly, and discusses the legal questions presented fully and satisfactorily, and there is no intimation whatever that any such ques-

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tion as \*that now presented was ever brought

to his attention. The grounds of appeal do not assail the correctness of any of the legal propositions laid down in the decree, but simply complain that the Circuit judge "overlooked" the point now relied upon. It is true that in the first ground of appeal it is distinctly asserted that the point was earnestly pressed upon the court below; but, as we have frequently had occasion to say, we are not at liberty to accept any statement of fact incorporated into the exceptions or grounds of appeal, unless such statement appears also in the "Case," and have found it necessary by a recent amendment of the rules of this court, to distinctly and formally declare the proper practice in this respect.

But this court is always reluctant to dispose of a case upon merely technical or formal grounds, and as the evidence incorporated in the "Case" shows clearly that the accounting relied upon as the basis of the present action was taken in a proceeding to which the administrator de bonis non of Simon A. Leaphart was not a party, but that his estate was represented in that proceeding by Mary Leaphart, as administratrix pendente lite, and as the question has been fully argued at the bar, we are disposed to relax the rule in this instance, and consider the question made by the appeal, as if there were no technical objection in our way.

It does not appear, nor is it suggested, that when the accounting relied upon was taken, Gunter, who was a party to that proceeding, interposed any objection on the ground of a want of proper parties, or in any way questioned the right of an administrator pendente lite of the estate of Simon A. Leaphart, to demand an account from him of the administration by his intestate, Martin T. Leaphart, of the assets of the estate of Simon A., and therefore Gunter would scarcely be in a position now to question the result or effect of such accounting; nor is it clear that Hope, as his surety, could question it on that ground, even though not himself a party to the proceeding in which such accounting was had, especially when the person who is admitted to have had the right to demand such accounting, the administrator de bonis non

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of Simon A., is now before the court \*recognizing and adopting, and thereby being bound by, such accounting.

But waiving this, let us consider the main question presented, whether the administratrix pendente lite of the estate of Simon A. could maintain an action against Gunter as administrator of Martin T., to recover the amount due by him as administrator of Simon A., or could this be done only by an administrator de bonis non of the estate of Simon A.? It is quite true that Gunter, by virtue of his administration on the estate of Martin, was not the administrator of Simon, and that whatever balance which may have been due to the estate of Simon by the es-

tate of Martin, was nothing more than a debt due by the one estate to the other. Hence, as was held at the former hearing of this case, (*Kaminer v. Hope*, 9 S. C. 253,) such a debt could not be recovered by the distributees of Simon, but must be sued for by a proper representative of his estate, and none such being then before the court, Mary Leaphart, who had been administratrix pendente lite, having died before the commencement of this action, it was necessary that the proceedings should be amended by making the administrator de bonis non of the estate of Simon, a party; which was subsequently done.

But the question still recurs, whether the administrator pendente lite was not such a proper representative of the estate of Simon, as that she could maintain an action to recover the debt due to her intestate's estate by the estate of Martin, or could the action be brought only by an administrator de bonis non? It seems to be well settled, both upon principle and authority, that while the authority and power of an administrator pendente lite is much more limited in its nature than that of a general administrator, yet he may bring actions to recover debts due his intestate's estate. The leading case upon the subject, which has been repeatedly recognized since, is the case of *Walker v. Woollaston*, 2 P. Wms. 576, in which the doctrine above stated was distinctly laid down, and in the argument of counsel in that case, which seems to have been adopted by the court, but which is too long to be transcribed here, it is conclusively shown to be fully supported both by reason and authority, and absolutely necessary to effect the objects of such a limited

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administration. See also the cases of *Knight v. Duplessis*, 1 Ves. Sr. 325; *Ball v. Oliver*, 2 Ves. & B. 97; *Gallivan v. Evans*, 1 Ball & B. 192; *Wills v. Rich*, 2 Atk. 285.

In our own State, we do not think that the question has ever been distinctly decided, the authorities relied upon by the appellant not being in our judgment directly in point. They are all cases in which the question was, whether the action could be maintained by creditors or distributees, and we are not aware of any case in which the distinct question made by this appeal has been raised. It is true that in some of the cases strong language is used implying that such an action as this could only be maintained by an administrator de bonis non, but those expressions must be taken with reference to the facts of the cases in which they occur, and signify that, as between creditors or distributees and an administrator de bonis non, the action can only be maintained by the latter.

In *Gill v. Douglass*, 2 Bailey 387, (which, however, has been qualified by the subsequent case of *Ford v. Dangerfield*, 8 Rich. Eq. 110,) the action was by the escheator of Lancaster district to recover a balance due

by the estate of the defendant's intestate on his administration of the estate of Dr. Clancy, who had died intestate, leaving no one entitled to claim as next of kin. The court held, that the escheator stood as a distributee and could not maintain the action, which should be brought by a legal representative of the first intestate; but whether such legal representative must necessarily be an administrator de bonis non, or whether an administrator pendente lite would not answer as such representative, is not even hinted at in the case.

In *Easterling v. Thompson*, Rice 346, an effort was made by creditors to reach the assets of the first intestate through an administrator of the deceased administrator of such intestate, and the court held that they could only proceed against an administrator de bonis non, whose duty it would be to require an account from the administrator of the first administrator, and no question was raised as to what would be the rights or duties of an administrator pendente lite.

In *Stevenson v. Wilcox*, 16 S. C. 432, the action was brought by the creditors of an in-

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testate against the sureties of an administrator pendente lite, and the court held that such an administrator was accountable only to the general administrator, and not to the creditors or distributees, as he had no authority to pay debts or distribute the assets; but the question, whether an administrator pendente lite could maintain an action to recover a debt due his intestate's estate, was not, and could not have been, raised in the case.

In *Villard v. Robert*, 1 Strobb. Eq. 393, the question was whether a settlement, made by the representatives of an executor, on an accounting had with an administrator de bonis non cum testamento annexo, for assets of the testator, converted into money by the executor in his life-time, was a bar to an action by the legatees against the representatives of such executor; and the court held that it was, because the administrator de bonis non had a right to demand such accounting from the executor, practically overruling what was said in *Smith v. Carrere*, 1 Rich. Eq. 123, on this point; but nothing was said as to the right of an administrator pendente lite to bring an action for such accounting.

From this review of the authorities, it seems to us that the English cases establish the proposition, that an administrator pendente lite may maintain an action to recover a debt due the estate of his intestate, and that there is no controlling authority in this State to the contrary; and inasmuch as to deny this right to such an administrator would, in many cases, practically defeat the object of appointing a limited administrator, by delaying the collection of the assets of an intestate, and thereby, perhaps, incurring the hazard of their entire loss, pending a



controversy in the Court of Probate, we think that the doctrine established by the English cases has not only the support of authority, but is well founded in reason. We must, therefore, conclude that, outside of any mere technical objection, this appeal cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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\*WILLIAMS v. WALKER, FLEMING & CO.

(November Term, 1882.)

[1. *Appeal and Error* ⇨1022.]

A finding of fact by referee and Circuit judge approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

[2. *Contracts* ⇨128; *Mortgages* ⇨79.]

A note and mortgage given by a wife for the amount of a debt due by her husband, in consideration of her release from arrest and imprisonment under a charge of selling goods covered by a lien without notice, and of a discontinuance of such criminal prosecution, are illegal, and in action brought by her, the note and mortgage were ordered to be canceled and surrendered.

[Ed. Note.—Cited in *Bleckley Co. v. Goodwin*, 51 S. C. 366, 29 S. E. 3.

For other cases, see *Contracts*, Cent. Dig. § 633; Dec. Dig. ⇨128; *Mortgages*, Cent. Dig. § 183; Dec. Dig. ⇨79.]

[3. *Contracts* ⇨128.]

[Cited in *Booker v. Wingo*, 29 S. C. 122, 7 S. E. 49; *State v. Robinson*, 70 S. C. 470, 50 S. E. 192; *Bankhead v. Shed*, 80 S. C. 256, 61 S. E. 425, 16 L. R. A. (N. S.) 971, to the point that a contract based on the consideration of settlement of criminal proceedings is void.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 633-653; Dec. Dig. ⇨128.]

[This case is also cited in *Groesbeck v. Marshall*, 46 S. C. 538, 22 S. E. 743, and distinguished therefrom.]

Before Fraser, J., Spartanburg, July, 1881.

Action by A. J. Williams and Diana, his wife, against Walker, Fleming & Co. The Circuit decree was as follows:

This case came before me on the report of the special referee, C. P. Wofford, Esq., and exceptions thereto by the defendants. The action was brought to set aside a note and mortgage given by Diana Williams, one of the plaintiffs, to the defendants, on the grounds: First, that she was forced to execute the same by threats and intimidations; and, second, that there was no consideration for the same.

The real estate covered by the mortgage was the property of Diana Williams, derived by her from the estate of her first husband, her two children being entitled each to one-third of the tract of land, and her one-third only being mortgaged. It appears from the testimony that Diana Williams intermarried with A. J. Williams, her present

husband, over sixteen years ago, and, of course, before the adoption of our present State constitution. The mortgage in this case is signed by her alone, and her husband did not join, neither is there any renunciation of inheritance by her. Perhaps, for some good reason which these proceedings do not reveal, no question has been made as to the right of Diana Williams to make any valid conveyance of her land in the mode adopted in the execution of this mortgage.

It is unnecessary to consider whether the failure of the plaintiffs to except to the report of the referee on the ground that the

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\*referee found that there was no duress, can prevent this court from coming to a different conclusion, if, on examining the testimony, it appears that for any reason the referee did not err in the language of second exception, "in finding that the said note and mortgage are void," or of the fourth, "in refusing to dismiss the complaint."

The husband and wife had both been arrested on a charge of selling property under a lien without giving notice to the purchaser. The husband was in jail and the wife was informed that she must find bail in the sum of five thousand dollars (\$5,000), or go to jail. The only other alternative left to her was to sign the note and mortgage of this land for an amount sufficient to pay her husband's debts to the defendant, except a small deduction of \$40. For these debts she was in no way liable, and a large part of the indebtedness was an old debt not even covered by the lien held by defendants on the husband. It may be that both plaintiffs might have been convicted if the prosecution had been pressed against them.

I am satisfied, however, that whatever benefit or advantage the defendants expected to derive from the transaction, or whatever other incidental advantages in the way of a deduction of \$40, and an extension of time, may have accrued to A. J. Williams, the husband, no such benefit accrued directly to Diana Williams. She had no pecuniary interest in the arrangement or settlement of the debts of A. J. Williams. The only consideration moving to her was the release from arrest and the discontinuance of the prosecution. The clearer her guilt, the stronger the motive. "Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside." 1 Story Eq., § 239.

The general rule is that agreements for compromise of public prosecutions are illegal and void. This doctrine was conced-

ed in *Corley v. Williams*, 1 Bail. 588, and the only exception contended for was that it did not apply to assaults and batteries, and other misdemeanors of a private nature. The reason for this exception is given by

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Judge O'Neill, in *Mathison & Kingsby v. Hanks*, 2 Hill 625, in these words: "This double remedy (in assaults and batteries) is unnecessary, for the universal practice in England, and in this State, is, when the prosecutor is the party injured, and the defendant makes adequate reparation to him, to impose only a nominal fine."

The analogy between the offense charged against these plaintiffs and cases of assault and battery fail in at least two very important particulars: First. The least punishment that a judge can inflict on a person convicted under the act of 1873 (15 Stat. 332) is imprisonment for not less than ten (10) days and a fine not less than ten (10) dollars. I do not regard this as nominal. Second. In assault and batteries the very act which is the gist of the prosecution in the criminal action is the gist of the action in the Common Pleas, or the civil side of the court.

The injury done to the person who holds a lien over property, which is sold without notice, is the non-payment of his debt, and unless this is the result there is no injury done to him. The public offense in law is the same where the property sold is the last or only resource for the payment of his debt, or whether there is ample left to meet all demands on the property. The act is in itself no private wrong, and, unless an injury should follow, there is nothing to redress but the public wrong, which can be redressed only by a criminal action.

The practice of using the criminal process of the courts to redress private wrongs is not to be encouraged; and I am especially unwilling to lend the aid of the court to private parties who use the criminal process of the court to enforce against parties in no way liable for them, their claims against another person, and which, as in this case, have no connection whatever with the act which is the subject of the criminal action.

It is, therefore, ordered and adjudged: First. That the exceptions be overruled, and that the report of the referee be confirmed. Second. That the defendants and each of them be forever enjoined from collecting or attempting to collect and enforce the payment of the note or foreclosure of the mortgage described in the pleadings in this case. Third. That the defendants do deliver, the

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said note and mortgage to the clerk of \*this court, to be by him canceled and delivered to the plaintiff Diana Williams. Fourth. That the defendants pay the costs of this action.

Defendants appealed.

Messrs. Bobo and Carlisle, for appellants. Mr. J. S. R. Thomson, contra.

March 3d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff Diana owns an undivided one-third interest in a certain tract of land in Spartanburg county, derived from the estate of her former husband, prior to her marriage with her present husband, and her two children by her former marriage own the remaining two-thirds. The family live upon this tract of land and work it together. In the year 1879, A. J. Williams gave a lien on the crop to defendants for fertilizers, and in the fall of that year C. E. Fleming, one of the members of the firm of Walker, Fleming & Co., sued out a warrant against A. J. Williams and Diana Williams for selling property covered by the lien without giving notice to the purchaser of the existence of such lien, in violation of the provisions of the act of February 12th, 1873, (15 Stat. 332.)

Under this warrant the plaintiffs were arrested and required to give bail in the sum of five thousand dollars, the maximum of the pecuniary penalty prescribed in said act, and A. J. Williams, in default of bail, was committed to jail. While Diana Williams was under arrest, but before she was actually committed to jail, negotiations were opened for a settlement of the whole matter, which resulted in an arrangement whereby Diana gave her note to the defendants, dated November 20th, 1879, payable twelve months after date, with interest from date, for \$323.05, in satisfaction of the amount due under the lien, and also of an old note due to Walker & Fleming, by A. J. Williams, upon which a deduction of \$40 was made, and also paid the costs of the criminal proceeding. Thereupon the plaintiffs were discharged from arrest and imprisonment and the criminal proceedings were discontinued.

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\*Soon afterwards this action was commenced for the purpose of having said note and mortgage declared void, and the same delivered up to be canceled. By consent the case was referred to a referee, "to take testimony, pass upon all issues of law and fact arising herein, and report the same to court with his recommendations thereon." The referee took the testimony, which is set out in the "Case," and made a report in which, while he failed "to find such circumstances of duress as will, of themselves, avoid the note and mortgage, if the arrest was legal and regular," he did find as matter of fact "that the whole consideration of the note and mortgage in this case, was the release of the plaintiff from arrest and the stopping of the prosecution." And as matter of law he found "that the said note and mortgage are void \* \* \* and should be delivered up to be canceled, and that the defendants



should be forever restrained from proceeding to enforce them."

To this report the defendants excepted, alleging error in the findings both of fact and law. The Circuit judge overruled the exceptions and confirmed the report, and from his judgment defendants appeal upon various grounds, which may be stated substantially as follows: 1st. Because the Circuit judge erred in overruling the exceptions to the referee's report. 2d. Because of error in holding that a consideration to support a contract must import some advantage to the promisor. 3d. In holding that the testimony showed no legal consideration for the contract of the plaintiff Diana Williams, evidenced by the note and mortgage, except the discontinuance of the criminal prosecution against her. 4th. In holding that said contract was thereby rendered void.

The question as to what was the real consideration of the note and mortgage, was one of fact, and that question has been answered adversely to the appellants, both by the referee and the Circuit judge, and so far from their being any lack of evidence to support their findings, we think it must be clear to every unprejudiced mind, from the testimony in this case, that the sole moving cause which induced the plaintiff Diana to sign the note and mortgage was to secure release from arrest and imprisonment, and a discontinu-

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ance of the criminal proceeding. She \*was in no way responsible for the debts of her husband, and although she may, as the referee says, have participated in the benefit accruing from the money advanced under the lien, and perhaps in the money or supplies which were the consideration for the old note, yet this is nothing more than what might be said in most, if not all, cases in which a husband living with his wife obtains money or supplies upon his own credit, or upon the faith of a lien on his crop. She was not bound, either legally or morally, to pay such a debt, and the creditor who chooses to extend credit to the husband alone, must look alone to him for payment. There was no evidence whatever tending to show that A. J. Williams had leased the land upon which the crop was made, from his wife and her children by a former marriage, and thereby acquired a right to give a lien on it, but, on the contrary, the referee says that "they all worked the place together, and the plaintiff A. J. Williams shared in the proceeds of the crop." It may well be questioned, therefore, whether he had any right to give a lien upon the crop.

Assuming, then, as matter of fact, as we are bound to do, not only from the concurrent findings of the referee and the Circuit judge, but also from our own view of the testimony, that the true consideration of the note and mortgage was the release of the plaintiff from arrest and imprisonment, and a discontinuance of the criminal proceeding,

the next inquiry is, whether such a consideration was sufficient to support the contract evidenced by the note and mortgage. The general rule is that such a consideration is illegal, and the only exception seems to be in cases of assault and battery, and other misdemeanors of like nature, where it has been held that a note given to the party injured by the person who has inflicted the injury may be sustained upon the ground that the real consideration is the compensation due to the one by the other for the personal injury which he has sustained, the amount of which has been ascertained by an agreement of the parties, instead of by the verdict of a jury; and inasmuch as it is the settled practice in this state to impose only a nominal punishment under a conviction for assault and battery where the party injured has also sought re-

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dress by a civil action \*for damages, a note given in compromise of a prosecution for assault and battery has been sustained.

But where a note is given by a person not liable for the damages sustained by the party injured, for the purpose of stopping a prosecution even for assault and battery, it will be held void as based upon an illegal consideration, because, in such a case, the consideration cannot be referred to the compensation due by the one to the other, for there is nothing due in such a case from the maker to the payee of the note, and the consideration must be referred to the stopping of the prosecution, and is, therefore, illegal. These views are fully supported by the following cases: *Corley v. Williams*, 1 Bail. 588; *Mathison v. Hanks*, 2 Hill 625; *Banks v. Searles*, 2 McM. 356; *Gray v. Seigler*, 2 Strob. 117.

Now, even conceding, what may well be questioned under the circumstances of this case, that Diana Williams might have been made liable, in a civil action for damages, for disposing of property covered by the lien, yet, as we have seen, she was never liable for the debts which the note and mortgage were given to secure, and there is no pretense that the note was given as a compensation for such damages. If she had been arrested for burning a house of the defendants, and the prosecution had been stopped upon her executing a note and mortgage to secure the payment of debts due by her husband, for which she was in no way liable, it might well be said that, as she would be liable for the damages done to the defendants by the destruction of their house, such liability would constitute a sufficient consideration to support the note, as it can be said, in this case, that her liability for damages in disposing of property covered by the lien in favor of the defendants, constitutes a valid consideration for the note and mortgage here in question.

A court of equity will not readily sanction or recognize a contract which one has been induced to enter into for the purpose of se-

curing immunity from a criminal prosecution. Such a use of criminal process violates every consideration of public policy, and whoever resorts to it should meet with condemnation rather than encouragement. It is quite manifest, from all of the circumstances of this case, and, indeed, is openly avowed by the

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\*defendant, who was the active agent in the whole proceeding, that the real purpose of the criminal proceeding was, not to promote the ends of public justice, but to secure the payment of a debt. Such a mode of collecting debts is certainly not entitled to the favorable consideration of a court of justice.

The second ground of appeal is taken under a misconception of the decree of the Circuit judge. We do not understand him to lay down the proposition, that a consideration to support a contract must necessarily import some advantage to the promisor, or to deny that forbearance or a release of part of a debt may constitute a sufficient consideration to support a promise to pay the debt of another. Under the view which he took of the testimony, such a question could not arise, and, therefore, it was not necessary for him to express any opinion upon it, nor did he undertake to do so.

We concur, therefore, in the view taken of the case by the Circuit judge, and are unable to see any ground upon which this appeal can be sustained. The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 18 S. C. 584

## PATTERSON v. PAGAN.

(November Term, 1882.)

## [1. Parties ⇨63.]

A party brought in as defendant because the real claimant of the property in dispute, may put in issue the plaintiffs' capacity to sue.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 99; Dec. Dig. ⇨63.]

## [2. Parties ⇨76.]

Plaintiffs' incapacity to sue, not clearly appearing from the statements of the complaint, this defense could not be taken by demurrer; it was, therefore, properly made by answer and proof of the facts.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. ⇨76.]

## [3. Executors and Administrators ⇨524.]

The proper probate of a will in another State, with letters testamentary there duly issued to the executors, and an exemplification of these proceedings marked by a probate judge in this State, "filed and admitted to probate," do not authorize such executors to bring action in this State, no letters testamentary being here issued.

[Ed. Note.—Cited in *Cochran v. Fillans*, 20 S. C. 245; *Pollock v. Carolina Interstate Building & Loan Ass'n*, 48 S. C. 75, 25 S. E. 977, 59 Am. St. Rep. 695.

For other cases, see Executors and Administrators, Cent. Dig. § 2330; Dec. Dig. ⇨524.]

[This case is also cited in *Jerkowski v. Marco*, 56 S. C. 242, 34 S. E. 386, and distinguished therefrom.]

Before Witherspoon, J., Fairfield, September, 1882.

The opinion states the case.

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\*Mr. Jno. S. Reynolds, for appellant.  
Mr. T. C. Gaston, contra.

March 6th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by the plaintiffs, as executors of the will of Robert Patterson, deceased, late of Pennsylvania, originally brought against John D. McCarley, sheriff of Fairfield county, to recover the proceeds arising from the sale of certain crops seized and sold by him as sheriff under a warrant to enforce an agreement for rent of land executed by James Pagan to Robert Patterson, deceased. More than "thirty days" had elapsed between the said sale and the commencement of this action. By an order of June, 1882, James Pagan was interpleaded as a defendant, and answered.

The trial was had at the September term, 1882. The complaint alleged that "Robert Patterson, then a resident of the State of Pennsylvania, departed this life, leaving in full force his last will and testament, wherein the said Robert E. Patterson, W. Heyward Drayton and Henry P. Smith, the plaintiffs, were appointed his executors, and that said will having been admitted to probate in the State of Pennsylvania, was duly admitted to probate and filed in the office of Probate judge of Fairfield county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." The defendant answered, denying that the plaintiffs had legal capacity as executors to sue in this State.

It appeared by an exemplification of the proceedings that the will of Robert Patterson was duly admitted to probate in the proper office of the city and county of Philadelphia, in the State of Pennsylvania, and that letters testamentary thereon had been granted to the plaintiffs, as executors, on August 12th, 1881. A full copy of the proceedings in Philadelphia in probating the will had been recorded in the office of judge of Probate for Fairfield county, South Carolina, endorsed, "Filed and admitted to probate December 29th, 1881," but no further proceedings were taken. The

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persons named as executors never \*qualified as such or received letters testamentary in this State. The sheriff testified that James Pagan had never filed an affidavit denying that the amount claimed was due on the lien for rent mentioned in the complaint, but before the sale of the cotton he had served written notice claiming that the cotton was his property, not subject to Patterson's lien.

The plaintiffs here rested and the defend-



ant moved for a nonsuit on the ground that the plaintiffs had not established their legal capacity to sue. The motion was refused, a verdict rendered for the plaintiffs, and the defendant appeals to this court upon the following grounds: First. For that his Honor held that upon proving the testator's will in the office of the judge of Probate, the plaintiffs become legally capable of suing in this State. Second. For that his Honor held that under section 1875 of the general statutes, the plaintiffs, as executors, are authorized to prosecute this action to judgment. Third. For that his Honor did not hold that to enable the plaintiffs, as executors, to prosecute this action, they must have qualified in this State according to the form prescribed in the general statutes. Fourth. For that his Honor did not hold, in order to enable the plaintiffs, as executors, to prosecute this action to judgment, they must have received letters testamentary from the Court of Probate in this State. Fifth. For that his Honor did not hold that the plaintiffs have not legal capacity to sue, and dismiss the complaint.

The plaintiffs contend that the defendant Pagan has no right to make the objection of want of capacity on their part to sue, for the reason that no claim was made against him—that he was not originally sued, but the sheriff for money in hands, and Pagan claiming the same money was brought in by interpleader and thereby merely allowed to support his own claim to the money, but not to dispute others. We find Pagan on the record as the defendant, and we know of no rule of law which limits his rights as defendant on account of the manner in which he was brought in. No authority was cited to sustain the view suggested. It does not appear at whose instance he was made a defendant, but we suppose that he was substituted for the party originally sued, under the authority

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of the last paragraph of \*section 145 of the code, which provides, that at the instance of a defendant against whom a claim is made for the property in controversy, by a person not a party to the action, the "court may grant an order to substitute such person in his place," &c.

The plaintiffs also claim that Pagan could only avail himself by demurrer of the defense of want of capacity in the plaintiffs to sue. The defendant is authorized to demur when the facts which constitute the defense appear upon the face of the complaint; but if it does not show the facts upon its face, the objection can only be made by answer and proof of the facts. Code, § 170; 2 Wait Pr. 448. In this case, the fact upon which the defense rested did not clearly appear upon the face of the complaint, which stated that, "the said will, having been proved and admitted to probate in the State of Pennsylvania, was duly admitted to probate, and filed in the office of the Probate judge in Fair-

field county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." Without explanation, this statement might be construed to mean that the executors had qualified and entered upon their duties in South Carolina. From the context this would seem to be the proper meaning, and a demurrer (which admits the facts as stated) might have failed to make the point intended and defeated the defense, as the proof showed that the plaintiffs never qualified and entered upon the discharge of their duties in the State of South Carolina.

The main question in the case is, whether the plaintiffs had legal capacity to sue as executors of Robert Patterson's will, upon which they had qualified and received letters testamentary in the State of Pennsylvania, but not in South Carolina. There is no doubt that the right to make a will gives the right to dispose of testator's personal property wherever it may be situated, but before there is a will at all, there must be conformity to the law of the domicile which, in most of the States, requires that the will must be in writing—free and voluntary—attested by a certain number of witnesses, and proved in an office established for that purpose. Although the power of disposal may be general, the sanction of these local laws, which

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are necessary to give it effect \*as a will, does not extend beyond the limits of the State which enacts them.

So also as to the authority of executors, which is a very different matter from the probate of the will. Even after a will has been probated, it cannot execute itself, and some agency must be created to carry it out. The testator has the right to appoint his own executors, and while undoubtedly their general authority is derived from the will, they cannot enter fully upon the discharge of their trust until they have complied with certain statutory regulations upon the subject, such as taking the prescribed oath, in some of the States giving bond, and receiving letters testamentary; and before these requirements are complied with, an executor named can exercise no power as such further than to pay funeral charges, and perhaps do such other acts as are necessary for the preservation of the estate. These requirements are necessarily local in their nature, and of course their operations are limited to the State which makes them, unless other States, from convenience or comity, adopt them as to wills executed in that State.

The rule and the reasons for it are clearly stated by Chief Justice Marshall, in the case of *Dixon's Executors v. Ramsay's Executors*, 3 Cranch 319 [2 L. Ed. 453], as follows: "The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his

own country. It is contended that this case differs from that of an administrator, which was formerly decided in this court, because the administrator derives his power over the estate of his intestate from the grant of administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be. This distinction does certainly exist; but the consequences deduced from it do not seem to follow. If an executor derived from the will of his testator a power to maintain a suit and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintain the suit by virtue of his letters testamentary, he can only sue in courts to which the power of

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these letters extends. \*It is not and cannot be denied, that he sues by virtue of his letters testamentary; and consequently in this particular he comes within the principle which was decided by this court in the case of an administrator. All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No one can sue in the courts of any country, whatever his rights may be, unless in conformity with rules prescribed by the laws of that country," &c. See, also, *Murrell v. Dicky*, 1 John. Ch. 153; *Peterson v. Chemical Bank*, 32 N. Y. 40; *Noonan v. Bradley*, 9 Wall. 400 [19 L. Ed. 757], and *Reynolds' Executors v. Torrance*, 2 Brev. 59.

It is clear, then, both from principle and authority, that the plaintiffs had no legal capacity to sue in this State by virtue of their letters testamentary granted in the State of Pennsylvania, but it is insisted that the foreign appointment has been confirmed by the law of this State, and therefore they had the right to sue here. This might be possible. As said by Chief Justice Simpson, in the case of *Dial v. Gary*, 14 S. C. 579 [37 Am. Rep. 737]: "If the decedent has left a will, upon its being established under the *lex domicilii*, it will usually be confirmed under the jurisdiction where the property is found, and the title of the executor, as well as the disposition of the property therein appointed and directed, will be recognized here. But this confirmation must take place and be had in accordance with the laws of the *rei sitæ* before even an executor under such testament can intermeddle with the property," &c.

Is there any law in South Carolina which "confirms" the appointment of these executors, and makes them executors in this State? Section 1875 of the general statutes of 1882, relied upon by the plaintiffs and the Circuit judge, provides, that "If a will be regularly proved in any foreign court, an exemplifica-

tion of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the Court of Probate, and the exemplification shall also be evidence of the devise of lands in this State when the title of lands comes in question," &c. The object of this provision manifestly

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was to avoid the \*great inconvenience of producing the original will in this State for the purpose of being used in evidence, as appears by the original act of 1759 (4 Stat. 102), which recites, that "said probate or copy so proved and attested as aforesaid, shall be deemed and held to be as good and sufficient evidence in any court of law or equity in this Province as if said original will had been produced," &c. It may be conceded that under this law the will of Robert Patterson has been admitted to probate in Fairfield county of this State, but no mention whatever is made as to the qualification of the executors, and, as we understand it, the probate did not ipso facto involve their appointment or the confirmation of the foreign appointment in this State, so as to enable them to sue here.

The qualification of the executors is a matter entirely separate and distinct from the probate of the will and supplemental thereto. The oath required of executors in Pennsylvania is not identical with that required of them in this State. Section 1882 of the general statutes requires that every executor, at the time of proving the will, shall take the oath there prescribed, "that the writing contains the last will of the deceased so far as he knows or believes, and that he will well and truly execute the same, by paying first the debts and then the legacies contained in the said will, so far as his goods and chattels will thereunto extend and the law charge him; and that he will make a true and perfect inventory of all such goods and chattels," &c. These plaintiffs never took this oath or received letters testamentary in this State, and as was said in *Reynolds v. Torrance*, supra: "The opinion of the court is, that the authority derived from the probate of a will and letters testamentary in another of the United States, will not extend to this so as to empower the executor to meddle with the effects or credit of the deceased within this State. \* \* \* An authenticated copy of a will and probate coming from another State, may be received in this, as sufficient evidence of such will and probate, but will not authorize the executor, acting by virtue of letters granted in another State, to meddle with property in this State, without first applying for and obtaining letters testamentary in this State, because the ordi-

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naries [judges of Probate] within their several precincts, are bound to see to the due application of the assets of persons deceased and ought to have a correcting power over those entrusted with the administration of



such assets, for the safety and interest of creditors and others within this State."

It is the judgment of this court that the judgment of the Circuit Court be reversed.

18 S. C. 591

COLEMAN v. DUNLAP.

(November Term, 1882.)

[1. *Executors and Administrators* ⚡221; *Witnesses* ⚡144.]

A holder of a note secured by a mortgage of indemnity, with a written assignment to him from the mortgagor endorsed on the mortgage, may not testify to his purchase of the note from the mortgagor, who at the time of trial is deceased, but may testify that he is the owner of the note; and this will be sufficient to sustain the action against the representative of the deceased.

[Ed. Note.—Cited in *Stoddard v. Hill*, 38 S. C. 392, 17 S. E. 138; *Barrett & Co. v. Still*, 86 S. E. 206.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. ⚡221; *Witnesses*, Cent. Dig. §§ 625-643; Dec. Dig. ⚡144.]

[2. *Bills and Notes* ⚡440.]

This mortgagor was the endorser of the note, and at maturity had waived protest and paid off the note, and afterwards re-issued it. *Held*, under the proof, that the holder could recover from such endorser.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1223-1232, 1260, 1261, 1304; Dec. Dig. ⚡440.]

[3. *Bills and Notes* ⚡395.]

Notice of non-payment by the principal was probably rendered unnecessary by the taking for indemnity of a mortgage of property nearly equal in value to the amount of the debt.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 996-1021; Dec. Dig. ⚡395.]

[4. *Bills and Notes* ⚡411.]

If reasonable notice was necessary, a suit by the assignee for foreclosure of the mortgage, was demand upon the principal and constructive notice to the endorser.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1129-1195; Dec. Dig. ⚡411.]

[5. *Bills and Notes* ⚡394.]

The re-issue of the note for value after dishonor, without the endorsement erased, made the endorser liable as the drawer of a new bill, and demand upon the maker of the note and notice of non-payment were unnecessary.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1009; Dec. Dig. ⚡394.]

Before Cothran, J., Laurens, June, 1882.

The opinion states the case. The Circuit decree was as follows:

I agree with the master in his findings of facts; also in his rulings upon section 415 of the code; also, that Dunlap, the endorser, upon taking up the note, was invested with the rights of the bank to enforce payment from Fuller, and that the transfer of the note by Dunlap to the plaintiff, for value, was a re-issue of it, with a revival of his liability as endorser.

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"I cannot, however, agree with the master, that it was necessary for the plaintiff to show that he had pursued the maker (James Fuller) to insolvency. R. S. Dunlap was not a guarantor of the note; his liability upon re-issuing the note was certainly as high as that of a surety, if, indeed, it did not become the unqualified liability of the maker of a new note; and in either event, the plaintiff had the right to demand payment of Dunlap alone, if he chose to do so. Dunlap, as has been already said, transferred the note to the plaintiff, after it was due, and for value, and by neglecting to erase his name from it, which he had the unquestionable right to do before parting with it, he gave to the note renewed currency, certainly with revived (and I am inclined to hold with unqualified) liability on his part.

What may have been the real intention of the parties in the matter of the transfer can never be known. Death has sealed the lips of the one, and the rule of evidence those of the other, and in this condition of things the true intention can be gathered only from the law itself which governs the naked and unexplained transaction. Written instruments importing an obligation must be construed most strictly against those who make them. R. S. Dunlap had the right to erase his name from the note. He neglected, it may be purposely declined, to do so. Its remaining there must bind him to the legitimate consequences of his neglect or refusal to erase it, and the most obvious consequence of his act is liability to make good the endorsement.

"It is a well established principle of commercial law, that if the last of several endorsers were to pay the note to his endorser, he could re-issue the note with or without his endorsement remaining upon it, and recovery could be had under this second transfer from all prior parties who remain liable to him, and from him also, if his endorsement were upon the instrument." 2 Dan. Neg. Inst., § 1238. "If an endorser who pays a bill re-issues it, he is bound by his first or second endorsement according to intention; if as one already fixed, he need not have notice." Id., § 1242. "If the acceptor retire a bill, he takes it out of circulation, the bill is paid; but if an endorser retire it, he only withdraws it from circulation so far as he is concerned." Id., § 1243.

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"Wherefore it is ordered and adjudged, that the exceptions to the master's report be sustained; that the appeal to this court be dismissed; and that the decree of the trial justice be affirmed. It is further ordered, that the plaintiff have judgment for his costs against the defendant.

Messrs. Ball & Watts, for appellant.  
Mr. B. D. Cunningham, contra.

March 6th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. On May 22d, 1875, James Fuller made his promissory note for \$125, payable to one R. S. Dunlap, at the bank of Newberry, five months after date. Dunlap endorsed the note in blank, and, upon receiving the note, the bank paid the money to Fuller, the maker, who, in order to secure Dunlap, his endorser, executed and delivered to him a chattel mortgage of a mule valued at \$120. When the note fell due, October 25th following, Dunlap, waiving protest in writing over his signature, took up the note and some time afterwards formally assigned the mortgage of the mule to the plaintiff Coleman, and doubtless transferred to him at the same time for value the note, although there is no formal assignment upon it as on the mortgage. The mule was sold by the plaintiff under legal proceedings, and the proceeds applied as a credit on the note, which, with another payment, reduced the note to a small balance, for which he brought this suit before Trial Justice Watts against the administrator of Dunlap, who had died in the meantime.

The trial justice decreed for the plaintiff, and the defendant appealed to the Court of Common Pleas, and the matter was there referred to the master "to hear and determine the issues of law and fact involved," and he dismissed the complaint, saying: "There is no evidence that the balance due upon the note can not be made out of the maker and there is no evidence at all of demand upon him and non-payment and notice thereof to the endorser, which was necessary to make him or his estate liable to the plaintiff. It does not appear that this plaintiff

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has \*made any effort whatever to collect the balance due upon the note from the maker. I think, therefore, and recommend that the case should be dismissed with judgment against the plaintiff for all costs of these proceedings." &c.

Exceptions were taken to this report and the Circuit judge reversed it and confirmed the judgment of the trial justice for the plaintiff. From this judgment the defendant appeals to this court upon two grounds:

"1. That his Honor erred in holding that the plaintiff was the owner of the note sued on. 2. That he erred in holding that the defendant's intestate was liable therefor."

The plaintiff had possession of the note as well as the mortgage, which latter had been regularly assigned to him by Dunlap, and which he enforced by having the mule sold, and crediting the proceeds upon the note. Coleman testified that he "was the owner of the note; bought it from R. S. Dunlap and paid him the money for it," &c. As Dunlap was dead at that time, it was not competent for Coleman to testify as to

"transactions" had with him in his life-time, but we see no reason why he could not state that "he was the owner of the note," and that was all that was necessary to sustain the action, especially as he had possession of both the note and mortgage, which itself was prima facie evidence of ownership.

Being the owner of the note, having upon it the blank endorsement of Dunlap, with waiver of protest, is there any reason why Coleman cannot recover upon it against the administrator of Dunlap, the endorser, from whom he received it, without exhausting James Fuller, the maker of the note? When delivered to Coleman, the obligation was either on the old note endorsed by Dunlap with waiver of protest, or on a new bill drawn by him in favor of Coleman, and in either case we think that the holder could recover the balance of the note from the estate of Dunlap, upon the proof made.

In the view that Dunlap still remained endorser after he paid the bank and re-issued the note, he was the endorser of a note past due for value. Notice of protest was expressly waived in writing, on the paper itself, but if that could not refer to the revived liability made after the paper was due,

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all the notice that \*Dunlap could require was reasonable notice of non-payment, and probably even that was rendered unnecessary by his taking a mortgage, for his indemnity from the maker, of property nearly equal in value to the amount of the debt. See *Charleston Bank v. Barrett*, 2 McM. 194, where Judge Evans, in speaking for the court, says: "It seems to me that Barrett, having taken what he considered ample security against his liability on his endorsement, and in the absence of any proof to the contrary, we must suppose it an ample security, has waived his right to insist on notice of non-payment by the maker," &c.

But if there was no waiver as to the balance of the debt, which remained after the proceeds arising from the sale of the mule was applied, the assignment of that mortgage to the plaintiff, and his suing the maker, Fuller, to foreclose the mortgage, was at least constructive notice of non-payment. "In the case of negotiable notes transferred after due and guaranteed by the endorser, demand of payment from the maker and notice to the endorser, either actual or constructive, within a reasonable time, must be proved. The bringing of suit on the note against the maker, is a sufficient demand, and, if known to the endorser, would be sufficient notice." *Benton v. Gibson*, 1 Hill 56.

But we incline to the view that the circumstances make this one of the cases in which the endorser is held to be the drawer of a new bill, and that demand upon the maker and notice of non-payment to the endorser were not necessary. The endorser took up the note from the bank and re-issued



it for value. He might have stricken out his own name on the back, but he did not do so, and he probably left it there to give the note value. "It is a well established principle of commercial law, that if the last of several endorsers were to pay the note to his endorser, he could re-issue the note with or without his endorsement remaining upon it, and recovery could be had under this second transfer from all prior parties who remain liable to him, and from him also if his endorsement were upon the instrument." 2 Dan. Neg. Inst., § 1238.

It was said by Judge O'Neill, in the case of Gray v. Bell, 3 Rich. 72: "According to our cases of Eccles v. Ballard, 2 McCord 388; Barrett v. May, 2 Bail. 1; Benton v. Gibson, 1

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\*Hill 56, the endorser of a note after due is to be regarded either as the guarantor of its payment or as the drawer of a new bill. Both stand upon the same principles, and it is hardly necessary to distinguish in what precise character he is to be charged. I am prepared, however, to go much farther and to hold that the endorser of a note negotiable after due, is to be regarded either as a new maker, or as the drawer of a bill on a man without funds (the maker who has failed to pay), in neither of which cases is demand of payment or notice at all necessary."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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\*No. 1275. AYER v. CHASSEREAU.

April Term, 1882.

[*Appeal and Error* ⇨93.]

This was a motion to dismiss an appeal from an order of Judge Hudson, refusing leave to defendant to file his answer, because unverified, and giving plaintiff a judgment by default. The motion here was based upon the ground that defendant had no right of appeal. *Held*, that the order of the Circuit judge involved a legal right and was, therefore, appealable under section 11 of the code of procedure.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 644; Dec. Dig. ⇨93.]

[This case is also cited in *Cureton v. Stokes*, 22 S. C. 584, and distinguished therefrom.]

Motion refused. Order PER CURIAM, October 6th, 1882.

No. 1276. THE STATE, ex relatione COUNTY COMMISSIONERS OF ABBEVILLE COUNTY, v. COUNTY COMMISSIONERS OF EDGEFIELD COUNTY. April Term, 1882.

This was a petition presented to the court in behalf of the relators to require the respondents to levy a tax upon the property within certain limits of Edgefield county, and to pay the proceeds into the hands of the county treasurer of Edgefield, to be held subject to the order of relators; and for damages and costs. The facts stated in the petition were admitted by the respondents, and legal issues only were raised by the return. This application was based upon the act of 1880 (17 Stat. 412), which authorized the citizens of a designated section of Edgefield county, adjoining the county of Abbeville, to fence in their territory, and which extended to such territory the provisions of the stock law then in force as to Abbeville and other counties. 16 Stat. 689. For the purpose of keeping this fence in repair, the county commissioners of Edgefield were to procure from the county commissioners of Abbeville the per centum annually levied as a tax in Abbeville for keeping fences in repair, and to levy

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upon the \*property within the said territory of Edgefield the same tax, and not to exceed such per centum of Abbeville, and the proceeds of such tax to place in the hands of their county treasurer, subject to the order of the county commissioners of Abbeville. *Held*—

[1. *Counties* ⇨133.]

That the necessary inference was that the duty of keeping this fence in repair was charged upon the county commissioners of Abbeville county; that the fence was not for the benefit of Edgefield county, and the tax was not a county tax, but the proportion properly chargeable upon that territory of Edgefield which, at their own request, was included within the benefits enjoyed by the county of Abbeville, and none of the rights or powers given by the constitution to the county commissioners of Edgefield were delegated to the county commissioners of Abbeville.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 200, 201; Dec. Dig. ⇨133.]

[2. *Counties* ⇨197.]

That this was not a claim against the county of Edgefield, and therefore to be audited, but an application to require the county commissioners of that county to perform a specific duty imposed upon them by an act of the legislature.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 309-311; Dec. Dig. ⇨197.]

[3. *Fences* ⇨4.]

That the duty to be performed by the county commissioners of Edgefield did not involve the exercise of judgment or discretion, but was purely ministerial, and therefore enforceable by mandamus.

[Ed. Note.—For other cases, see *Fences*, Cent. Dig. § 6; Dec. Dig. ⇨4.]

4. The relators are entitled to neither damages nor costs. *State, ex rel. Bull, v. County Treasurer*, 10 S. C. 40.

Petition granted, except as to damages and costs, and writ ordered. Opinion by Mr. Justice McIVER, October 7th, 1882. T. P. Cothran, for relators. B. W. Bettis, F. H. Wardlaw, contra.

No. 1277. CHARLES v. JACOBS. April Term, 1882.

[*Executors and Administrators* ⇨454; *Judges* ⇨24.]

Money was, in the hands of the sheriff, realized from the sale of lands of C., under an execution of A., as administrator of B., against the executrix of C. D. held an execution against A., as administrator of B., and, claiming this money, took out a rule against the sheriff, entitled A., as administrator of B., v. Executrix of C., requiring him to show cause why he did not apply this money to D.'s execution. The sheriff made return that the money was claimed by A.,



as administrator of B., as applicable to ex-

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penses \*of his administration, including counsel fees. Judge Kershaw decided that the money was applicable to expenses of the administration and to such counsel fee as should be allowed by the Probate Court, and discharged the rule. The Probate judge made report of a proper counsel fee, and added that the estate of B. had not been finally settled, and that there were other costs and expenses of administration unpaid. On hearing this report, which was entitled D. v. A., as administrator of B., Judge Fraser, not knowing of Judge Kershaw's order, directed the counsel fee to be paid and the balance paid to D. *Held*, that Judge Fraser's order was in part inconsistent with Judge Kershaw's, and, therefore, to that extent, erroneous, one Circuit judge having no power to reverse a judgment of another Circuit judge. *Held*, further, that Judge Kershaw's order was right: money received by a sheriff on an execution in favor of an administrator, not being applicable to an execution in the office upon a judgment obtained against the administrator after the death of intestate, especially where prior claims against the estate remain unpaid. This case, therefore, differs from Haynsworth v. Frier-son, 11 Rich. 476.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1926; Dec. Dig. ⚡454; Judges, Cent. Dig. § 93; Dec. Dig. ⚡24.]

Appeal sustained. Opinion by Mr. Justice McIVER, October 7th, 1882. G. G. Wells, T. H. Cooke, for appellant. W. E. Earle, contra.

#### No. 1278. CLEVELAND v. COHRS.

April Term, 1882.

This was an appeal from a decree of foreclosure and sale passed by Judge Kershaw. The case has twice before been heard on appeal in this court, and will be found reported in 10 S. C. 224 and 13 Id. 397. The following points were here decided:

1. A finding by the Circuit judge, from written testimony reported to him, that a bond had not been paid, sustained.

[2. *Mortgages* ⚡583.]

Where a mortgagee purchases the mortgaged property at a foreclosure sale, for less than the amount due, the mortgage debt is not thereby extinguished; and the mortgagee is the purchaser where she receives titles from the master under a transfer of the highest bidder's bid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1681; Dec. Dig. ⚡583.]

[3. *Mortgages* ⚡496.]

The judgment under which such sale was made having been set aside by this court, on

the motion of the mortgagor, he cannot now claim any benefit from a sale made under such annulled judgment. The effect of such

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reversal upon a stranger \*purchaser not considered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1468; Dec. Dig. ⚡496.]

Judgment affirmed. Opinion by Mr. Justice McIVER, October 7th, 1882. McCrady & Sons, for appellant. Campbell & Whaley, contra.

#### No. 1279. CHRISTOPHER v. CHRISTOPHER. April Term, 1882.

This was an action by plaintiff, a freed-woman, against defendant, a freedman, for support and maintenance, the plaintiff alleging that defendant had deserted her. The answer denied the marriage. The cause was heard before Kershaw, J., who referred the issues to a jury, and upon their finding favorable to the plaintiff, gave judgment for the payment of a certain sum of money, annually, by defendant to plaintiff. Defendant appealed. *Held*—

[1. *Marriage* ⚡22.]

In charging the jury that if defendant was not married to plaintiff, or any other woman of color, under the terms of the act of 1865 (13 Stat. 290), and was living with plaintiff as husband and wife on March 12th, 1872, and in any way they so recognized each other, that this would make them man and wife under the terms of the act that day approved, the Circuit judge correctly stated the terms and operation of the act of 1872 (15 Stat. 183).

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. ⚡22.]

[2. *Appeal and Error* ⚡1005.]

A finding of fact by jury and judge sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ⚡1005.]

[3. *Husband and Wife* ⚡285½.]

A wife may file a complaint against her husband for support and maintenance, as a distinct, substantive relief.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1074; Dec. Dig. ⚡285½.]

[4. *Judgment* ⚡252.]

The form of the verdict was of no consequence, as the judgment was rendered by the court; and where answer is put in, the judgment is not necessarily limited by the prayer for relief, but the court may grant "any relief consistent with the case made by the complaint and embraced within the issue." Code, § 299; Pom. Rem., § 580.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. ⚡252.]

Judgment affirmed. Opinion by Mr. Justice McIVER, October 7th, 1882. W. M. Thomas, for appellant. Wright & Polite, contra.

No. 1287. MILLER v. EDWARDS. April Term, 1882.

This case involved the same points as those decided in Miller v. Hall, ante 141, and they were similarly decided, the CHIEF JUSTICE dissenting. The two cases were heard together by referees, Circuit judge and this court. The following points were also decided here:

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\*1. The condition of the bond differing slightly from the aggregate of the three installments, and both of these differing from the price of the land, as ascertained by multiplying the number of acres by the price per acre, the Circuit judge committed no error in construing the bond and agreement together, and thus ascertaining the true amount of the debt.

[Ed. Note.—Cited in Baum v. Raley, 53 S. C. 40, 30 S. E. 713.]

[2. *Appeal and Error* ⇨1054; *Evidence* ⇨441.]

The referees erred in receiving parol testimony on the subject of the interest agreed to be paid, but as the Circuit judge did not base his conclusions upon such testimony, this furnishes no ground for remanding the case.

[Ed. Note.—Cited in Arnold v. Bailey, 24 S. C. 497.]

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4185, 4186; Dec. Dig. ⇨1054; *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. ⇨441.]

Judgment affirmed. Opinion by Mr. Justice FRASER (sitting in the place of Mr. Justice McGOWAN), October 21st, 1882. E. G. Graydon, for appellant. W. H. Parker, contra.

No. 1289. FOOT & SON v. WILLIAMS. April Term, 1882.

[*Appeal and Error* ⇨356; *Justices of the Peace* ⇨160.]

This case was commenced in a trial justice's court, and judgment rendered for plaintiff March 25th, 1881. Defendant's attorney at that time gave verbal notice of appeal, and prepared written notice and grounds of appeal and handed them to his clerk to be served on both the attorney for plaintiffs and the trial justice. The clerk served this notice upon plaintiffs' attorney within the five days but failed to serve the trial justice. On December 21st, 1881, a written notice of appeal was served upon the trial justice, who signed a certificate that a verbal notice of such intention had been served upon him by defendant's attorney on or about March 30th. Judge Pressley dismissed the appeal

because not perfected within the time required by law. This court sustained the ruling below upon the authority of the code of procedure, sections 370, 371, 353. Cases cited, Davis v. Vaughan, 7 S. C. 343; Scott v. Pratt, 9 S. C. 83; Russell & Co. v. Follin, MS. Dec. No. 799, January 8th, 1880. The act of 1880, 17 Stat. 368, has no application to an appeal from a trial justice, and, even if it did, could not remedy the defect here.

[Ed. Note.—Cited in Bigham v. Holliday, 52 S. C. 529, 30 S. E. 485.]

For other cases, see *Appeal and Error*, Cent. Dig. §§ 1926, 1927; Dec. Dig. ⇨356; *Justices of the Peace*, Cent. Dig. § 584; Dec. Dig. ⇨160.]

Opinion by Mr. Justice McGOWAN, October 21st, 1882. O. L. Schumpert, for appellant. F. Werber, Jr., contra.

No. 1298. SYMMES v. SYMMES. April Term, 1882.

[1. *Appeal and Error* ⇨107; *Continuance* ⇨7.]

A refusal to continue or recommit a case is not appealable. "These are matters of

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administration which arise in the progress of a cause, and must from the necessity of the case be left to the prudent and wise discretion of the Circuit judge."

[Ed. Note.—Cited in Hubbard v. Camperdown Mills, 26 S. C. 588, 2 S. E. 576; Halk v. Stoddard, 62 S. C. 571, 40 S. E. 957.]

For other cases, see *Appeal and Error*, Cent. Dig. § 738; Dec. Dig. ⇨107; *Continuance*, Cent. Dig. § 17; Dec. Dig. ⇨7.]

[2. *Judgment* ⇨634.]

A matter involved in a cause and finally disposed of by a circuit decree, from which no appeal is taken, becomes *res adjudicata*, and cannot be again stirred in the further progress of the cause.

[Ed. Note.—Cited in Sloan v. Hunter, 65 S. C. 237, 43 S. E. 788; Hughes v. Southern Ry., 92 S. C. 14, 75 S. E. 214.]

For other cases, see *Judgment*, Cent. Dig. § 1150; Dec. Dig. ⇨634.]

Judgment of Fraser, J., affirmed. Opinion by Mr. Justice McGOWAN, November 14th, 1882. E. F. Stokes, for appellant. T. Q. Donaldson, M. F. Ansel, contra.

No. 1306. WHALEY v. HOUSER. April Term, 1882.

1. A finding of fact by referee, overruled by the Circuit judge, sustained.

2. A matter material to the issues and not passed upon below, left open for further investigation.

[3. *Judgment* ⇨675.]

One not a party to the cause, even if examined as a witness at the hearing, is not bound by a judgment therein.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. ⇨675.]



Circuit decree of Mackey, J., reversed. Opinion by Mr. Justice McGOWAN, November 27th, 1882. Glover & Glover, Izlar & Dibble, for appellant. J. D. Pope, Rion & Barron, contra.

[For subsequent opinion, see 22 S. C. 247.]

**No. 1307. CHRISTIAN v. LEBESCHULTZ.**  
April Term, 1882.

A cestui que trust brought action against her nominated trustee (who declined to serve) and her infant children, who were also beneficiaries under the trust deed, for the purpose of having a trustee appointed, and for a sale of the trust property and a re-investment of the proceeds. Under this proceeding, a new trustee was appointed and directed to sell the land held in trust, which he did. The papers were all entitled the "Court of Common Pleas," and were regular in all respects, except that the case nowhere appeared upon the dockets of the court, the records were not filed in the clerk's office until after this action was brought, and the Circuit decree bore date at a time when the court for that county was not in session. The mother died, and this action was instituted by her children against the purchaser for possession of the land and rents and profits. The complaint was dismissed by Judge Aldrich, and plaintiffs appealed. *Held*—

[1. *Courts* ⇨32.]

That the objection to the introduction of the decree in the former action upon the ground that it did not appear upon its face that the court had jurisdiction, was not well taken.

[Ed. Note.—Cited in Connor v. McCoy, 83 S. C. 171, 65 S. E. 257.

For other cases, see Courts, Cent. Dig. §§ 134, 137, 139; Dec. Dig. ⇨32.]

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[2. *Equity* ⇨346.]

\*If such decree had been passed at chambers it would have been invalid, but in the absence of all testimony (except as above stated) it must be assumed that the cause was heard in open court. The failure to file the decree did not affect its validity.

[Ed. Note.—Cited in Connor v. McCoy, 83 S. C. 171, 65 S. E. 257.

For other cases, see Equity, Cent. Dig. § 725; Dec. Dig. ⇨346.]

[3. *Trial* ⇨68.]

Unless it is manifest that some surprise has been taken or injustice worked, the admission by the Circuit judge of further testimony after the parties had announced that they had closed their evidence and the argument had commenced, is within his discretion and will not be disturbed.

[Ed. Note.—Cited in Woody v. Dean, 24 S. C. 502.

For other cases, see Trial, Cent. Dig. §§ 158-163; Dec. Dig. ⇨68.]

Opinion by Mr. Chief Justice SIMPSON, November 29th, 1882. Glover & Abney, for appellant. J. C. Sheppard, contra.

**No. 1310. THE STATE, ex relatione WILLIAMS, v. SIMS.**

November Term, 1882. This was an order dismissing an application for a writ of mandamus to require the State board of canvassers to canvass the votes and declare the election of the relator as clerk of the court for Edgefield county. The case is identical with that of State, ex rel. Anderson, v. Sims, ante 460, and the opinion in this case simply refers to the decision in that. Order PER CURIAM, December 2d, 1882. Butler & Simkins, for relator. Youmans, attorney general, contra.

**No. 1319. Ex parte BLAKE.** November Term, 1882.

This was a petition by Julius A. Blake and others for a rehearing of the case of Annelly v. DeSaussure, 17 S. C. 389, based principally upon the ground that the opinion of Chief Justice Willard, in 12 S. C. 488, was the judgment of the court upon all the points therein discussed. The court held that so far as the question of improvements was concerned, there was no concurrence by the associate justices with the views of the then Chief Justice. Petition refused. Order PER CURIAM, January 24th, 1883. Campbell & Whaley, for petitioners.

**No. 1322. STATE v. SIMS.** November Term, 1882.

Application to reduce bail, upon the affidavit of the prosecutrix, who was the wife of the prisoner. Application refused, the facts stated in the original affidavit upon which the warrant was issued, not being denied. PER CURIAM, January 27th, 1882. D. Johnson, Jr., for petitioner. Gantt, solicitor, contra.

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**\*No. 1335. SIMONDS v. HAITHCOCK.**  
November Term, 1882.

Action by plaintiff against defendant, for damages caused by the erection of a dam, and for injunction against its maintenance, tried by Wallace, J. The right of plaintiff and the question of damages were referred to a jury. Defendant offered to prove a parol license from a former tenant at will of the injured land; upon objection, the presiding judge refused to admit the testimony, and there being no evidence of defendant's right to flood the plaintiff's land, he charged the jury that their verdict must be for plaintiff. The jury found for plaintiff.

without damages, and the judge then signed an order enjoining the defendant from longer maintaining the dam. Defendant appealed. *Held*, that in the refusal of the testimony offered, in the charge to the jury, and in the order of injunction, the Circuit judge committed no error; that as to the order of injunction, the facts of this case brought it within the rule laid down in *Ad. Eql. \*210, \*217, \*218; Bird v. Railroad Company, 8 Rich. Eq. 54 [64 Am. Dec. 739]; Klinck v. Black, 14 S. C. 246.*

[*Ed. Note.*—Cited in *Emory v. Hazard Powder Co., 22 S. C. 482, 53 Am. Rep. 730.*]

Opinion by Mr. Justice MCGOWAN, February 15th, 1883. U. R. Brooks, John Bauskett, for appellant. W. H. Lyles, contra.

#### No. 1336. JOHNSON v. HARRELSON.

November Term, 1882.

[*Ejectment* ⇨ 139.]

Where parties in possession of land, under claim of title, make improvements upon such land after action brought against them for the possession of the land and denying their right thereto, they have no right to the value of the improvements so erected. The principles discussed upon which tenants in possession are allowed their improvements.

[*Ed. Note.*—Cited in *Re Covin's Estate, 20 S. C. 475; Buck, Hefflebower & Neer v. Martin, 21 S. C. 593, 53 Am. Rep. 702; Johnson v. Pelot, 24 S. C. 265, 58 Am. Rep. 253; Annely v. DeSaussure, 26 S. C. 505, 2 S. E. 490, 4 Am. St. Rep. 725; Cain v. Cain, 53 S. C. 353, 31 S. E. 278, 69 Am. St. Rep. 863.*]

For other cases, see *Ejectment, Cent. Dig. § 479; Dec. Dig. ⇨ 139.*

Opinion by Mr. Chief Justice SIMPSON, February 15th, 1883. C. D. Evans, for appellant.

#### No. 1337. LONG v. SCHMIDT. November Term, 1882.

Action against defendant, a married woman, as acceptor of a bill of exchange. The complaint alleged that defendant, "by her husband, accepted the draft in writing." Defendant demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the Circuit Court (Wallace, J.,) and defendant appealed. *Held*—

[1. *Husband and Wife* ⇨ 213.]

A married woman can be sued on her own contracts.

[*Ed. Note.*—For other cases, see *Husband and Wife, Cent. Dig. §§ 787-790; Dec. Dig. ⇨ 213.*]

[2. *Husband and Wife* ⇨ 229.]

That the authority to accept was substantially involved in \*the allegation of the fact

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of acceptance.

[*Ed. Note.*—For other cases, see *Husband and Wife, Cent. Dig. § 822; Dec. Dig. ⇨ 229.*]

Judgment affirmed. Opinion by Mr. Justice MCGOWAN, February 15th, 1883. A. B. Sawyer, for appellant. J. M. McMaster, contra.

#### No. 1339. STATE v. WILLIAMS. November Term, 1883.

A failure to charge propositions of law which were not requested cannot be assigned as error on the part of the Circuit judge. Moreover, the judge's charge here was in accordance with the law as claimed by appellant in his exceptions. Judgment of the Circuit Court (Kershaw, J.,) affirmed. Opinion by Mr. Chief Justice SIMPSON, February 15th, 1883. G. T. Graham, Meetze & Muller, for appellant. Bonham, solicitor, contra.

#### No. 1340. ROSS v. LINDER. November Term, 1882.

This was an action on a contract for the payment of board. By consent, the case was referred to a referee to hear and determine all the issues, and report the same to the court with his recommendations. He reported in favor of plaintiff. On defendant's exceptions, the Circuit judge (Fraser) dismissed the complaint, upon the ground that the evidence did not support any contract, or, if any, that it was a joint contract made by defendant and the wife of the plaintiff, and that the action must be brought jointly against those two. On appeal. *Held*—

[1. *Appeal and Error* ⇨ 1008.]

That the case being strictly a law case tried by the court, findings of fact by the Circuit judge cannot be disturbed by this court. In this connection the court say: "A question might arise in such case whether a Circuit judge could do more than apply the law to the facts as found by the referee—whether the referee has not been substituted for the jury, his finding being in the nature of a special verdict, with the power on the part of the Circuit judge to hear a motion for a new trial as in ordinary cases of jury trial, or to pronounce judgment as the law might demand. But these questions are not raised. In fact, the consent to the reference may in this case preclude them, as that consent embraced the condition that the referee should report his findings, with his recommendations, to the court, thereby, impliedly at least, agreeing that the court should be the final arbiter below."

[*Ed. Note.*—Cited in *Gaffney v. Peeler, 21 S. C. 66; Meetze v. Charlotte, C. & A. R. Co., 23 S. C. 16.*]

For other cases, see *Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⇨ 1008.*

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[2. *Parties* ⇨ 84.]

\*The contract being joint, the dismissal of the complaint followed as a necessary conse-



quence. The objection of a want of parties could not be taken by demurrer, for the defect of parties did not appear on the face of the complaint, nor was it necessary by answer to do more than meet the case stated in the complaint.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. ⚡84.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, February 15th, 1883. Bobo & Carlisle, for appellant. J. S. R. Thompson, contra.

No. 1350. KIBLER v. LUTHER. November Term, 1882.

Plaintiff conveyed a strip of land for valuable consideration to a municipal corporation, with a warranty in words following, to wit: "and I hereby bind myself, &c., to warrant and forever defend all and singular the said premises unto the said in-tenant and wardens, and their successors in office, as public lands, not to be occupied by any building or obstruction of any kind, but to be kept open at all times for the use of the public," &c. Plaintiff brought this action alleging that defendant had built upon and now occupied a portion of said land, and demanded its possession and damages. A demurrer that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties defendant, the town council of the corporation, was sustained by the Circuit Court (Pressley, J.) Plaintiff appealed. *Held*—

[1. *Deeds* ⚡168.]

That the concluding words of the warranty imposed a duty upon the town, but it was doubtful whether they created a condition, but, if a condition, the grantor could not maintain an action for the land until he had made entry upon it after condition broken, or made claim, if entry was impossible. *Hammond v. Railroad Company*, 15 S. C. 34.

[Ed. Note.—Cited in *McLeod v. Tarrant*, 39 S. C. 274, 17 S. E. 773, 20 L. R. A. 846; *Lavender v. Daniel & Harmon*, 58 S. C. 135, 36 S. E. 546.

For other cases, see *Deeds*, Cent. Dig. §§ 526-533; Dec. Dig. ⚡168.]

[2. *Deeds* ⚡168.]

The town council was a necessary party.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 526-533; Dec. Dig. ⚡168.]

Judgment affirmed. Opinion by Mr. Justice McGOWAN, March 6th, 1883. Moorman & Simkins, for appellant. Geo. Johnstone, contra.

No. 1351. McGRATH & BYRUM v. BARNES. November Term, 1882.

[*Bills and Notes* ⚡489.]

Action on note stated in the complaint and admitted in the answer. The defense was, that the note was a mere memorandum given

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under a certain agreement, and testimony was introduced to prove this agreement. This was held error on a previous appeal in this case, reported 13 S. C. 328 [36 Am. Rep. 687]. At the second trial, without any amendment of the pleadings, defendant offered to prove that the account for which the note was given contained overcharges, and that there was nothing due thereon when this note was given. The presiding judge (Aldrich) ruled that this testimony was incompetent. *Held*, that this ruling was correct, the testimony offered not being pertinent to any issue raised in the pleadings.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1591; Dec. Dig. ⚡489.]

Opinion by Mr. Chief Justice SIMPSON, March 6th, 1883. Moore and Murray & Murray, for appellant. Harrison & Broyles, contra. Mr. Justice McGOWAN, having been of counsel, did not sit.

No. 1352. FOSTER v. FOWLER. November Term, 1882.

1. A finding of fact by referee and Circuit judge approved.

[2. *Husband and Wife* ⚡12.]

If a wife, prior to 1868, waived her equity in favor of her husband, the proceeds of the sale of her inheritance paid to him would be a good payment, and such waiver established by the circumstances in this case.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 66; Dec. Dig. ⚡12.]

Judgment of the Circuit Court (Pressley, J.) affirmed. Opinion by Mr. Justice McGOWAN, March 6th, 1883. J. W. Ferguson, for appellant. Holmes & Simpson, contra.

No. 1355. JOWERS v. STANSELL. November Term, 1882.

Order of Judge Hudson refusing a motion for non-suit in action for trespass upon land, not disturbed, there being evidence of possession, both actual and constructive, by plaintiff, and of defendant's trespass, and the verdict being for plaintiff. Opinion by Mr. Chief Justice SIMPSON, March 8th, 1883. H. M. Thompson, for appellant. Robert Aldrich, contra.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and indexes













# REPORTS OF CASES

HEARD AND DETERMINED BY

# THE SUPREME COURT OF SOUTH CAROLINA

## VOLUME XIX

CONTAINING CASES OF NOVEMBER TERM, 1882, AND APRIL TERM, 1883

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.

FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS

1884

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ANNOTATED EDITION

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(19 S.CAR.)

# JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

---

## JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

## CIRCUIT JUDGES.

FIRST	CIRCUIT,	HON. BENJAMIN C. PRESSLEY.
SECOND	"	" ALFRED P. ALDRICH.
THIRD	"	" THOMAS B. FRASER.
FOURTH	"	" JOSHUA H. HUDSON.
FIFTH	"	" JOSEPH B. KERSHAW.
SIXTH	"	" ISAAC D. WITHERSPOON.
SEVENTH	"	" WILLIAM H. WALLACE.
EIGHTH	"	" JAMES S. COTHRAN.

## ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

## SOLICITORS.

1st Circuit—W. ST. J. JERVEY.

5th Circuit—R. G. BONHAM.

2d Circuit—F. H. GANTT.

6th Circuit—T. C. GASTON.

3d Circuit—J. J. DARGAN.

7th Circuit—D. R. DUNCAN.

4th Circuit—H. H. NEWTON.<sup>1</sup>

8th Circuit—J. L. ORR.

## CLERK OF THE SUPREME COURT.

A. M. BOOZER.

<sup>1</sup> Appointed by the Governor, and qualified January 20th, 1883, as successor to G. W. Dargan, who had been elected a Member of Congress.





# LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA  
DURING THE YEAR 1883

ALSBOOK, J. D.....	Manning.	LYON, J. FULLER.....	Abbeville.
BACOT, JULIUS M.....	Charleston.	MACKEY, THOMAS J.....	Chester.
BATES, GEO. H.....	Barnwell.	MARSHALL, GEO. O.....	Charleston.
BEATY, THOS. W.....	Conwayboro'.	MAZYCK, ARTHUR.....	Charleston.
BOUCHIER, T. W., Jr.....	Bennettsville.	MCINTYRE, R. A.....	Bennettsville.
BREAZEALE, JOHN E.....	Anderson.	MCMASTER, JOHN.....	Columbia.
BROOKER, N. W.....	Edgefield.	MCMASTER, M. BROWN.....	Winnboro.
CALLISON, JAMES.....	Edgefield.	MOSS, B. H.....	Orangeburg.
CLYDE, LEONARD K.....	Greenville.	NETTLES, CLARENCE S.....	Darlington.
DIAL, N. B.....	Laurens.	NEWTON, J. H.....	Pickens.
DINKINS, BENJAMIN S.....	Manning.	NIX, JOSEPH J.....	Hampton.
DONALDSON, A. H.....	Greenville.	O'BRYAN, L. B.....	Allendale.
FITZSIMONS, W. HUGER.....	Charleston.	ORR, C. H.....	Greenville.
FOOT, M., Jr.....	Newberry.	PERRY, JENNINGS W.....	Summerville.
FRASER, T. B., Jr.....	Sumter.	RANKIN, A. M.....	Cheraw.
FRIERSON, W. H.....	Anderson.	REED, J. P.....	Anderson.
HART, JOS. S.....	Berkeley.	REYNOLDS, MARK.....	Sumter.
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HENRY, J. K.....	Chester.	ROBINSON, T. C.....	Pickens.
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HUNT, W. H., Jr.....	Newberry.	SHUMAN, B. W.....	Hampton.
HYDE, SIMEON, Jr.....	Charleston.	SIMMS, CHARLES CARROLL.....	Barnwell.
JOHNSON, J. T.....	Laurens.	TIGHE, MATTHEW F.....	Summerville.
KIRK, ROBERT J.....	Charleston.	VANDIVER, JAMES R.....	Anderson.
LATHROP, ABIAL.....	Orangeburg.	WILKINS, GOUV'N M., Jr.....	Greenville.
LONG, EZEKIEL W.....	Anderson.		





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# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED  
IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.

HON. HENRY McIVER, ASSOCIATE JUSTICE.

HON. SAMUEL MCGOWAN, " "

### 19 S. C. \*1

#### \*GEDDES v. BOWDEN.

(November Term, 1882.)

#### [1. *Mechanics' Liens* ⇨106.]

A sub-contractor of a sub-contractor is not entitled under chapter CXN., § 7, of the Gen. Stat. of 1872, to a lien for labor performed and materials furnished upon the building erected.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 138; Dec. Dig. ⇨106.]

#### [2. *Mechanics' Liens* ⇨99.]

The owners of the property cannot be said to have given their "consent," within the meaning of this section, to the furnishing of such labor and material, nor did the contractors, as such, have any authority from, nor were they acting for, the owners, in making their contracts with workmen and others.

[Ed. Note.—Cited in *Builders' Supply Co. v. North Augusta Elec. & Imp. Co.*, 71 S. C. 374, 376, 384, 51 S. E. 231; *Metz v. Critcher*, 83 S. C. 405, 407, 65 S. E. 394.

For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. ⇨99.]

#### [3. *Mechanics' Liens* ⇨3.]

Sections 8 and 10 of this chapter do not create any right, but relate, simply, to the enforcement of the lien declared in section 7.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 4; Dec. Dig. ⇨3.]

#### [4. *Appeal and Error* ⇨1178.]

On application, here made, leave was granted to petitioner, on terms, to amend the character of his proceeding against the owners of the premises.

[Ed. Note.—Cited in *Metz v. Critcher*, 83 S. C. 410, 65 S. E. 394.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. ⇨1178.]

### \*2

\*Before Fraser, J., Spartanburg, July, 1881.

Petition by John Geddes against R. L. Bowden and others, for the enforcement of a lien on the Merchants' Hotel property in Spartanburg city. The Circuit decree, omitting the statement of such facts as are repeated in the opinion, was as follows:

No notice was given by the "owners" to petitioner that they would not be responsible for the work done or material furnished until after the statement was filed. The "owners" never gave any authority to Maxwell, Lyman & Land, or Maxwell & Lyman, to make any contract with petitioner for them; and while their consent may be assumed that the contractors and sub-contractors should employ others, there is no evidence of their consent to be bound by or become a party to any such agreement.

The agreement between petitioner and Maxwell & Lyman was by parol, and it does not appear clearly at what times the petitioner was to be paid, and I incline to the opinion and find that he was entitled to be paid when his work was done. All that part of the building in which the rock work was used has been finished, and the money paid to Maxwell, Lyman & Land by the "owners" pro tanto, leaving still a sufficient balance when the building is completed to pay petitioner's claim.

The contract between the "owners" and "contractors" was a joint contract, and is in writing, and only one or two of the "owners" were present when the contract was made between Maxwell & Lyman and petitioner; and it is not claimed that all of the "owners" ever gave an actual, personal consent to this contract, and there is no evidence of



any authority given by the "owners" to either of those who are said to have been present to make any new agreement for them. There was no copartnership between the "owners" in reference to this matter.

In the absence of sufficient proof that there was any contract or agreement on the part of the "owners," or any of them, to pay the petitioner for the rock work, as I understand, his claim relies on the fact that he did this work, or furnished this "labor and materials," under an agreement between himself

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and Max\*well & Lyman, who were themselves sub-contractors under Maxwell, Lyman & Land, and that the "owners" knew of this contract and his compliance with its terms, and never made any objection, but that he was urged by some of them to go on with his work. It is not claimed that this was a good contract to pay the debt of another, because there was no written evidence of it, and we have found above that there was no contract actually made by the "owners," or any of them. Do these facts, therefore, furnish the evidence of the allegation, that in making the agreement with petitioner, Maxwell, Lyman & Land, or, as appears, Maxwell & Lyman "rightfully acted for and by the consent of the 'owners'?"

There being in fact no such contract on the part of the owners, or authority to bind them, did the authority grow out of the relations of the parties, and the consent follow from the facts as above established? Or, in other words, can a sub-contractor, or, as in this case, a sub-contractor under a sub-contractor, have a lien on the property of the owners in the absence of any positive agreement between himself and the owners? If so, then the claims on this building will be at least four-fold: 1. To Maxwell, Lyman & Land; 2. Maxwell & Lyman; 3. John Geddes; 4. The laborers who were employed by John Geddes, and paid by him.

In the absence of the complete texts of the acts of the various States on the subject of mechanics' liens, the text-writers give us very little aid in construing the act, and it has had very little judicial interpretation in this State. Resort must be had, therefore, to the words of our act, Gen. Stat. 550, et seq. The lien is created by section 7, and the subsequent sections only control and limit or provide for its enforcement. They do not profess to create any new right.

If the labor or materials are furnished by virtue of an agreement with the owner, there is no difficulty in the way. What is consent in the sense of the act? There must be a debt by consent of the owner. "Consent is an agreement to something proposed, and differs from assent."—Bouvier's Law Dic. "Consent—We generally use this word in cases where power, rights and claims are concern-

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ed. We give consent when we \*yield that

which we have a right to withhold."—Webster's Dic. It seems to me, therefore, that in this section the word "consent" is used in the sense of agreement or contract, if not express, at least implied. Any other construction of the act would seem to be injurious to the interest of those whom the law was intended to protect, and work great hardships to those who are making improvements on their lands.

Such a construction is intimated by the court in *Murray v. Earle*, 13 S. C. 87; and the case of *Watson v. Columbia Bridge Company*, 13 S. C. 433, is not inconsistent with it, because in that case the contract was made with Neagle, who was really the owner of the property. The "owners" of the property in this case, under their written agreement with the contractors, had no right to object to any contract which the contractors saw fit to make. Their consent was unnecessary, and their interference would have been impertinent.

It is true that sections 8 and 10 seem to point to a different construction of the seventh section. Bouvier, in his Law Dictionary, under the definition of consent gives us an instance, the "implied consent" in cases of estoppel, and if the word "consent" in section 7 is used in this sense, the above construction is not inconsistent with the provisions of sections 8 and 10. However, this may be, sections 8 and 10 create no right not given in section 7, and if they cannot be reconciled by the court they can be amended by proper authorities to suit future cases.

Whatever opinions I may have entertained on this subject heretofore, I am satisfied that a proper construction of the act does not give any lien for "labor" or "materials" furnished for a building, which is not based on a debt founded on an agreement express or implied, with the owner of the land or some interest therein. It is therefore ordered and adjudged that the petition in this case be dismissed with costs.

From this decree the petitioner appealed.

Messrs. Bobo & Carlisle, for appellant.

Mr. J. S. R. Thomson, contra.

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\*March 6th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The defendants, Bowden and others, who are styled, in the title of the case, "owners," entered into a written contract with their co-defendants, Maxwell, Lyman & Land, styled "contractors," for the construction of a building on nine adjoining lots in the city of Spartanburg; the first floor of which was to be divided into nine stores, and an entrance to the hotel, which embraced the second and third floors of the building. The stores are the separate property of the several owners of the lots, while the hotel and the entrance thereto belong to them jointly. The defend-

ants, Maxwell, Lyman & Land, sub-let the contract for the brick and rock work to two of their number, Maxwell & Lyman, and they, in turn, made a sub-contract with the appellant for the rock work. Under the contract between the owners and Maxwell, Lyman & Land, the latter were to furnish all the material necessary and proper for completing the building and erect and finish the same, in consideration whereof the owners agreed to pay them the sum of \$22,500, in six installments, as the work progressed. All these installments had been paid before these proceedings were commenced, except the last, which was not then payable, as the building had not then been fully completed.

The appellant having completed his contract with Maxwell & Lyman, for the rock work, commenced these proceedings to enforce a lien upon the building and the lots upon which it is situated, under the provisions of chapter CXX., Gen. Stat., 1872, p. 550. The fundamental question raised by the appeal is, whether the appellant, who is a sub-contractor of a sub-contractor, is entitled to the lien which he is here seeking to enforce, and as we are of opinion that he is not, the other questions suggested cannot arise and need not be considered.

It is difficult to understand how a lien can be created, unless there is some debt to be secured by it, and to create a debt there must be some contract, either express or implied, between the parties. The appellant here is seeking to set up a lien upon the property of persons with whom he has made no contract, either express or implied, but, on the contrary, his claim grows out of a contract made with a third party. He

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claims, however, that \*he is entitled to this lien under the provisions of the statute above referred to. So that the practical question is, whether, under a proper construction of that statute, the appellant, who is a sub-contractor of a sub-contractor, can claim the benefit of its provisions.

Section 7, of chapter CXX., of the Gen. Stat., above referred to, creates the lien claimed, and is in the following words: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration or repair of any building or structure upon any real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owners, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, except as is provided in the following sections."

To entitle a person, therefore, to the lien provided for in this statute, two things must concur. 1st. There must be a debt due to the person claiming the lien "for labor performed" or furnished, or for materials furnished and actually used in the construction of the building upon which the lien is claimed. 2d. Such labor must be performed or materials furnished "by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials." In this case there seems to be no doubt that there is a debt due to the appellant for labor performed and materials furnished and actually used in the construction of the building, and the only question is whether such labor was performed and materials furnished "by virtue of an agreement with, or by consent of," the owners, or by virtue of an agreement with, or by consent of, "any person having authority from, or rightfully acting for, such owners." It is not pretended that there was any express agreement between the owners and the appellant, but, on the contrary, the agreement un-

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der which the labor and \*materials were furnished by the appellant was made with a third party, Maxwell & Lyman.

It is, however, contended that the labor and materials were furnished by appellant with the "consent of" the owners, and it is necessary, therefore, to determine the meaning of the term "consent" as used in this statute. The word "consent" ordinarily implies choice, and one can scarcely be regarded as giving his consent to that which he has no right to object to. In the experience of life a man is oftentimes compelled to accept results, in the sense that he makes no opposition or objection thereto, for the reason that he has no right or power so to do, but he cannot, in any proper sense of the term, be regarded as consenting to them unless he has the right and the power to exercise a choice, to consent or object thereto. As is well said by Mr. Chief Justice Simpson, in *Gray v. Walker*, 16 S. C. 147, in construing this statute: "Consent here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid." Now in this case the owners of the property, having made a contract with Maxwell, Lyman & Land to construct the building and furnish all the materials necessary and proper for the purpose, had parted with all power or right of control, and any interference on their part with those who were employed by the contractors would have been, as the Circuit judge says, impertinent. They cannot, therefore, in any proper sense of the



term, be said to have given their "consent" to that which they had no right to forbid.

Nor can it be said with any propriety that Maxwell & Lyman, in making the contract with the appellant for the rock work, had any authority from, or were rightfully acting for, the owners. The object which the owners had in view, in letting the entire contract to Maxwell, Lyman & Land, unquestionably was to relieve themselves from the trouble and responsibility of making contracts with the laborers, mechanics and materialmen for the labor and material necessary to be employed in the construction of the building; and if Maxwell & Lyman, or even Maxwell, Lyman & Land, could be regarded as their

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agents, in \*making all the contracts for such labor and materials, this object would not only be entirely defeated, but they would be placed in a much worse position than if they had made no contract at all.

It is true that some of the terms used in sections 8 and 10 of the statute do seem to point to a construction different from that which we have adopted; but, as the Circuit judge very properly remarks, these sections are not designed to create any right, but simply to control and limit, or provide for the enforcement of the right created by section 7. The terms used in these subsequent sections must, therefore, be so construed as to conform to the proper construction of the language used in section 7, where the right is created.

The authorities elsewhere do not seem to be in full accord upon the question which we have been considering, and we deem it unnecessary to enter upon a consideration of them, as the construction which we have adopted has received the sanction of this court in two cases, *Murray v. Earle*, 13 S. C. 89, where the matter was incidentally mentioned, and *Gray v. Walker*, supra, where the point was distinctly decided.

There is also another view which supports our construction, derived from the internal evidence furnished by the statute. In section 47 of the same chapter of the Gen. Stat., p. 555, providing for a lien on ships and vessels, sub-contractors are specifically mentioned, while in the section which we are called upon to construe, they are not mentioned at all. This affords a strong indication that while the legislature intended that class of persons to be protected by the lien provided for in the one case, they had no such intention in the other case.

Finally, the appellant contends that even if this court shall agree with the Circuit judge that the lien which he claims cannot be sustained, yet, under the liberal provisions of the code, his case should be retained and judgment rendered against those who contracted with him for the balance due on such contract, and that he be subrogated to such

rights as they may be able to establish against the owners. This view of the case was not presented in the Circuit Court, and, therefore, this court, which exercises appellate jurisdiction only in cases of this kind, cannot undertake to consider the case in this aspect,

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and is not \*to be understood as intimating any opinion as to the merits of appellant's claim when it is thus presented. But, under the liberal provisions of the code, we see no reason why the appellant should not be permitted to litigate his claim in the new form suggested, and, for this purpose, the case will be remanded to the Circuit Court with leave to the appellant to amend his proceedings in such way as he may be advised is necessary to present his claim in the form suggested, with leave, also, to the defendants to answer or demur to such amended proceedings, and to litigate the claim in its new form, as they may be advised.

The judgment of this court is that the judgment of the Circuit Court, in so far as it adjudges that the appellant has no lien upon the building mentioned, and the lots upon which it is situated, be affirmed; but in so far as it adjudges that the petition be dismissed, that it be reversed. It is further adjudged that the appellant pay all the costs which have accrued up to this time, including the costs of this appeal; that the costs which may hereafter accrue shall be provided for in the judgment hereafter to be rendered, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary to carry out the views herein announced.

## 19 S. C. 9

### WINGO v. PARKER.

(November Term, 1882.)

#### [1. Acknowledgment $\hookrightarrow$ 17, 19.]

The law of force in 1858 did not authorize a justice of the peace in another state to take renunciation of a wife's inheritance, and a renunciation so taken was invalid.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 83, 116; Dec. Dig.  $\hookrightarrow$  17, 19.]

#### [2. Acknowledgment $\hookrightarrow$ 37.]

A wife did not release her inheritance by a relinquishment of "all her interest and estate," the word "inheritance" being essential under the statute in 1858.

[Ed. Note.—Cited in *Williams v. Cudd*, 26 S. C. 218, 2 S. E. 14, 4 Am. St. Rep. 714.

For other cases, see Acknowledgment, Cent. Dig. § 211; Dec. Dig.  $\hookrightarrow$  37.]

#### [3. Acknowledgment $\hookrightarrow$ 10.]

A renunciation of inheritance, taken on the seventh day after the execution of the deed, did not release the interest of the surviving wife.

[Ed. Note.—Cited in *Brown v. Pechman*, 49 S. C. 547, 27 S. E. 520.

For other cases, see Acknowledgment, Cent. Dig. § 60; Dec. Dig.  $\hookrightarrow$  10.]

[4. *Acknowledgment* ⚭37.]

A renunciation of inheritance is ineffectual when not accompanied by a certificate "that the woman did declare that the release was positively and bona fide executed at least seven days before such her examination."

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. § 207; Dec. Dig. ⚭37.]

[5. *Acknowledgment* ⚭34; *Wills* ⚭793.]

A failure to record a renunciation of inheritance during the wife's lifetime, does not invalidate the instrument as to the parties, or others having actual notice.

[Ed. Note.—Cited in *Daniel v. Hester*, 29 S. C. 150, 7 S. E. 65.

For other cases, see *Acknowledgment*, Cent. Dig. § 177; Dec. Dig. ⚭34; *Wills*, Cent. Dig. § 2055; Dec. Dig. ⚭793.]

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[6. *Estoppel* ⚭38.]

\*A husband, as heir-at-law of his wife, cannot assert title to her inheritance attempted to be conveyed by him in her lifetime, by deed with general warranty.

[Ed. Note.—Cited in *Youmans v. Wagener & Co.*, 30 S. C. 305, 9 S. E. 106, 3 L. R. A. 447; *Green v. Niver*, 43 S. C. 370, 21 S. E. 263.

For other cases, see *Estoppel*, Cent. Dig. § 99; Dec. Dig. ⚭38.]

[7. *Parties* ⚭33.]

Whether a paper in form a deed in an absolute conveyance or only a power of attorney, cannot be adjudicated in the absence of the heirs of the grantee.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 50; Dec. Dig. ⚭33.]

[8. *Acknowledgment* ⚭15.]

[A notary public is ex officio a justice of the quorum, under Act 1804 (5 Stat. 479), and is therefore competent, under Act 1795, § 2, to take a married woman's renunciation of inheritance.]

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. § 94; Dec. Dig. ⚭15.]

[9. *Descent and Distribution* ⚭62.]

[Cited in *Moseley v. Hankinson*, 25 S. C. 522, and *Archer v. Ellison*, 28 S. C. 243, 5 S. E. 713, to the point that a strict compliance with statutory provisions is necessary, to bar a married woman of her estate of inheritance.]

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 150, 168, 186-189; Dec. Dig. ⚭62.]

Before Fraser, J., Spartanburg, June, 1881.

Action for partition commenced in May, 1879, by James A. Wingo and his children against M. Parker and W. F., her husband, and Elizabeth Davis. The case turns principally upon the construction of the following papers, purporting to be renunciations of inheritance, to wit:

I. State of Florida, Madison county—I, John W. Anderson, do hereby certify unto all whom it may concern, that Elizabeth Davis, the wife of the within named Noah Davis, did this day appear before me, and upon being privately and separately examined by me did declare that she did at least seven days before the examination actually join her husband in executing such release, and did then and still freely and voluntarily and without any manner of compulsion

dread, or fear of any person or persons whomsoever renounce, release and forever relinquish unto the within named James Vernon his heirs and assigns all her interest and estate of in or to all and singular the premises within mentioned and released, and further, said Elizabeth Davis did declare that the within deed or conveyance was positively and bona fide executed at least seven days before her present examination.

Elizabeth Davis.

Given under my hand and seal this 19th day of August, 1858.

(Signed.) John W. Anderson. [L. S.]

Justice of the Peace.

II. The State of South Carolina, Spartanburg county—I, Simpson Bobo, do hereby certify unto all whom it may concern, that Rachel Wingo, the wife of the within named James A. Wingo, did this day appear before me, and upon being privately and separately examined by me, did declare that she did on the fifth instant join her husband in executing the within deed, and that she did then and still does freely, voluntarily and without any compulsion dread or fear of any per-

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son or persons \*whomsoever, renounce, release, and forever relinquish unto the within named O. E. Edwards, his heirs and assigns, all her interest and estate of inheritance and also all her right and claim of dower, of in or to all and singular the premises within mentioned and released.

Given under my hand and seal this twelfth day of Nov., Anno Domini, 1859.

(Signed.) Rachel Wingo, [L. S.]  
Simpson Bobo, [L. S.]

Not. Pub.

Other facts of the case and the Circuit decree are sufficiently stated in the opinion.

Messrs. Bobo & Carlisle, for appellants.

Messrs. J. S. R. Thomson and S. T. McCravy, contra.

March 8th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This proceeding was commenced for partition of certain real estate in the possession of appellants, and thereupon a controversy arose as to the title, growing out of the following facts:

The land in question was devised by Samuel Brice to his wife, Nancy, for life, and at her death to his two children, Rachel and Elizabeth. Rachel intermarried with the plaintiff, James A. Wingo, and died intestate in 1864, leaving as her heirs-at-law her husband and her three children, who are the plaintiffs in this action. Elizabeth intermarried with Noah Davis, who died since the commencement of this action, to which he was a party defendant, but an order has been taken, by consent, that "the name of Noah Davis as defendant herein be struck



out, and that the action do proceed as though he had never been a party thereto." Nancy Brice, the life-tenant, died in 1877 and this action was commenced in 1879.

The appellants, Parker and wife, while not being able to show title in themselves, have undertaken to show that the title passed out of Rachel Wingo in her life-time, and hence that the plaintiffs, as her heirs, have no right to claim partition, and also that the title has passed out of the defendant,

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Elizabeth Davis, who \*joins in the prayer for partition, and hence that the complaint should be dismissed. For this purpose appellants rely upon two deeds, one from Noah Davis and wife, Elizabeth, to J. J. Vernon, dated June 15th, 1858, upon which is endorsed a certificate which is claimed to be a renunciation of her inheritance, taken by a justice of the peace in the State of Florida, where Mrs. Davis then resided, and the other a deed from Nancy Brice, James A. Wingo and wife, Rachel, to O. E. Edwards, dated November 5th, 1859, upon which is endorsed a certificate which is claimed to be a renunciation of Mrs. Wingo's inheritance, taken by a notary public in this State on November 12th, 1859. The evidence tended strongly to show that this last-mentioned deed, which contained the usual clause of warranty, was executed simply for the purpose of enabling Edwards to collect the rents and sell the property when an opportunity offered, the grantors being about to remove to the West, and that it was really intended to be a power of attorney rather than an absolute conveyance.

The Circuit judge held: First. That the deed to Vernon was insufficient to pass the title of Mrs. Davis, on account of two defects in the renunciation of inheritance: (1). That it was not taken by any officer authorized so to do; (2). That it did not comply with the requisitions of the statute, inasmuch as it did not purport to release "the inheritance" of Mrs. Davis, but only "all her interest and estate," and, therefore, that Mrs. Davis, her husband having died, was entitled to her share of the land. Second. He held that the deed from Nancy Brice, James A. Wingo and wife to Edwards, was not sufficient to pass the title of Mrs. Wingo on account of several defects in the renunciation of inheritance endorsed upon it: (1). Because it was taken by a notary public, who had not then any authority so to do; (2). That full seven days had not elapsed after the execution of the deed, before the renunciation of inheritance was taken, the deed having been executed on the fifth, and the renunciation taken on the 12th day of November, 1859; (3). The deed, with the renunciation of inheritance endorsed upon it, was never recorded until after the commencement of this action, and after the death of Mrs. Wingo, and of the grantee Ed-

wards, and, therefore, that such of the

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plaintiffs as are the children \*of Mrs. Wingo are entitled to share in the land. Third. That if James A. Wingo can make it appear that the deed to Edwards was intended only as a power of attorney, he is also entitled to his share, as heir of his wife; but if it shall be made to appear that said deed was intended as an absolute conveyance, then his warranty will bar his right to a share in the land, and the heirs or devisees of Edwards should be made parties for the purpose of determining this question.

From the decree Parker and wife appeal on the following grounds: That the Circuit judge erred, 1st. In holding that the deed of Noah Davis and wife to J. J. Vernon, executed in the State of Florida, and the renunciation of the wife "of all her interest and estate" before a justice of the peace in said State, was not sufficient to convey all the interest of the husband and wife in the premises. 2d. In holding that the deed of James A. Wingo and wife to O. E. Edwards, and the renunciation of inheritance by the wife, before a notary public, was not sufficient to convey all the interest of the husband and wife in the premises. 3d. In not holding that whatever interest James A. Wingo may have had in the premises was conveyed out of him by his warranty clause contained in the deed.

At the time the conveyances which are here brought into question were executed, a married woman could not convey her estate of inheritance unless she followed with scrupulous exactness the provisions of the statute conferring that power upon her. This will be seen by reference to the cases of *Brown v. Spand*, 2 Mill. Con. R. 12; *Hays v. Hays*, 5 Rich. 38; *McCreary v. McCreary*, 9 Rich. Eq. 34; *McLaurin v. Wilson*, 16 S. C. 402. As is said in *Pitts v. Wicker*, 3 Hill 199: "The right of inheritance of a married woman is protected with jealous vigilance by the law. She cannot be deprived of it but by a scrupulous adherence to the statute providing the mode in which a married woman may part with her inheritance in land."

The act of 1795, 5 Stat. 257, which was the law in force at the date of these renunciations, declared, in the most specific terms, the requisites necessary to a valid renunciation of inheritance by a married woman, and

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the question for us to determine \*is, whether the renunciations relied on in this case are in accordance with the provisions of that act.

First, as to the renunciation on the deed to Vernon. We are not aware of any statute which confers upon a justice of the peace of another State the power to take renunciations of inheritance of land in this State, and in the absence of any such statute, a renunciation taken by a justice of the peace in

Florida, has no more force and effect here than if taken by any other officer, or even by a private citizen of that State. The only officers competent to take such renunciations are those named in the act of 1795, and as a justice of the peace of another State is not there named, his act in taking such a renunciation is a mere nullity.

Another defect in this certificate is that it does not purport to release Mrs. Davis' "inheritance," but only "all her interest and estate," which may be something less than an estate of inheritance. The act of 1795 contains two distinct provisions—one by which a wife may renounce her dower, which is but a life-estate, and the other by which she may renounce and release her inheritance, the fee-simple. In the former, the words used are, "all her interest and estate, and also all her right and claim of dower," while in the latter the provision is for the release of "all her estate, interest and inheritance." We think it plain, from what is said by Nott, J., in *Brown v. Spand*, supra, and by O'Neill, J., in *Hays v. Hays*, supra, that the word "inheritance," like the word "heirs" in a deed, is a material word, necessary to be used in order to carry the fee. We agree, therefore, with the Circuit judge, that Mrs. Davis, since the death of her husband, is entitled to her share of the land.

Next, as to the alleged renunciation of inheritance by Mrs. Wingo. The first objection urged against this renunciation—that it was taken by a notary public who was not one of the officers before whom the statute provided that renunciation of inheritance could be taken—we do not think well founded. It is true that a notary public is not one of the officers mentioned in section 2 of the act of 1795, but a justice of the quorum is there mentioned, and by the third section of the act of 1804, 5 State. 479, a notary public is declared to be, *ex officio*, a justice

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of \*the quorum, and, therefore, as such, he could take a renunciation of inheritance.

The next objection, however, is more formidable, and, in fact, is, in our judgment, fatal. It appears in this case, that the renunciation was taken within seven days, after the execution of the deed, and not "after the expiration of seven days," as the statute expressly requires—the deed bearing date on the fifth, and the renunciation on the twelfth of the same month; and we are unable to see by what authority we can dispense with this positive statutory requirement, by any forced construction. The deed having been executed on the fifth, and the law taking no account of fractions of a day, the renunciation could not legally be taken until after the expiration of seven days, and this could not be until after the expiration of the last moment of the twelfth, and hence if taken at any time during that day, it

would be before, and not after, the expiration of seven days. *Bruce v. Perry*, 11 Rich. 121.

But there is still another fatal defect in this renunciation of inheritance. The statute requires that an addition to the certificate, shall "invariably" be made, to the following effect, to wit: "That the woman did declare that the release was positively and bona fide executed at least seven days before such her examination." No such addition was made to the certificate here in question, and, indeed, could not have been truthfully made, as the seven days had not expired, and certainly no court would undertake to dispense with that which a statute declares shall "invariably" be done.

As to the other objection, based upon a failure to record the renunciation of inheritance during the life-time of the married woman, we do not think it can be sustained. It is true that the language used in the statute—"Such renunciation shall not be considered as being complete or legal until the same shall be recorded"—is very strong, but not stronger than the language used in the marriage settlement act, under which it has been held that such a deed is good without being recorded, not only between the parties but also as to all persons having notice of it. *Fowke v. Woodward*, Speers Eq. 233; *Gibbes v. Cobb*, 7 Rich. Eq. 54.

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\*Hence, whatever may have been our view if the question was *res integra*, yet since the case of *Kottman v. Ayer*, 1 Strobb. 552, overruling *Hillegas v. Hartley*, 1 Hill Ch. 106, expressly recognized in the recent case of *Campbell v. Moon*, 16 S. C. 107, we think it has been conclusively settled that the object of recording is notice, and where persons have notice, as the parties to an instrument always have, a failure to record it does not invalidate the instrument. As to absolute conveyances under the act of 1785, see *Tart v. Crawford*, 1 McCord 265; *McFall v. Sherrard*, Harp. 296; *Knotts v. Geiger*, 4 Rich. 34; *Ingre v. Phillips*, 3 Strobb. 565. As to a mortgage of real estate under the act of 1785, see *Martin v. Sale*, Bailey Eq. 4. As to mortgage of personalty under act of 1698, see *Bank v. Gourdin*, Speers Eq. 439. As to renunciation of inheritance, see *Kottman v. Ayer*, supra; *Campbell v. Moon*, supra. As to a lease under the act of 1817, see *Anderson v. Harris*, 1 Bailey 315. As to marriage settlements under the act of 1785 and 1792, see *Givens v. Branford*, 2 McCord 152 [13 Am. Dec. 702]; *White v. Palmer*, McMull. Eq. 115. As to marriage settlements under act of 1823, see *Fowke v. Woodward*, supra; *Gibbes v. Cobb*, supra. As to agricultural liens under the act of 1866, see *Loyns v. Tedder*, 7 S. C. 69. These cases have so conclusively settled the rule in this State as to the object of recording, that in the face of them we do not feel at liberty to say that a



failure to record a renunciation of inheritance renders it invalid as to persons having actual notice of it.

The only remaining question is that raised by the third ground of appeal. We agree with the Circuit judge that, if the deed to Edwards was intended to be a simple power of attorney, the clause of warranty contained in it would not operate as a bar to the right of James A. Wingo to recover his share of the land as one of the heirs of his deceased wife; but that, if the deed was intended as an absolute conveyance, then such conveyance, by virtue of this warranty, would operate, by way of estoppel, as a transfer of the title subsequently acquired by him, upon the principles established by the cases of Reeder *ads.* Craig, 3 McCord 411; Harvin v. Dodge, Dudley 25, recognized in Starke v. Harrison, 5 Rich. 7.

If, therefore, the deed was intended as an

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absolute conveyance, \*although Wingo, at the time it was executed, only had an estate during coverture, yet, by virtue of the principles and authorities above stated, the estate which he subsequently acquired as an heir of his wife would pass. But if the deed was only intended as a power of attorney, it is difficult to conceive how any estate could pass under it, either the estate which he had at the time or that which he subsequently acquired as heir of his wife. We concur also with the Circuit judge that until the heirs or devisees of Edwards were made parties or released any interest they might have, it was not proper to determine the question as to the character of the deed.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 19 S. C. 17

### OLIVER v. SALE.

(November Term, 1882.)

[1. *Sheriffs and Constables* ¶67.]

The sheriff's commissions for moneys collected on execution are part of the costs of the case, and, therefore, payable by the defendant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 88; Dec. Dig. ¶67.]

[2. *Execution* ¶328.]

Where a sheriff is ruled to show cause why he has failed to pay over money collected by him on execution, and he returns that such money is the costs of plaintiff's attorney, and that such attorney is indebted to the respondent to that amount for services rendered, the rule should be discharged and the parties left to their action at law.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 987; Dec. Dig. ¶328.]

Before Aldrich, J., Charleston, July, 1882.  
The opinion fully states the case.

Mr. W. M. Thomas, for appellant.  
Messrs. Simonton & Barker, contra.

March 8th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff had two executions in the office of Hugh Ferguson, sheriff of Charleston county, against the defendant, upon which the mon-

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ey had been \*collected, but not paid over as alleged, and the proceeding below, from which this appeal comes, was a rule upon the sheriff to show cause why he should not be attached for failing to pay over \$60.50, the amount of the second judgment, and \$13.50, the amount of the first, in his hands.

The sheriff returned for answer to this rule that he held the \$60.50 because the same were the costs coming to William M. Thomas, Esq., the plaintiff's attorney, who was indebted to the respondent for certain fees and charges, as sheriff of the county, for service of papers and other work in the sheriff's office, done at the special instance and request of said Thomas; and that he retained the \$13.50 because he was entitled to receive that much commissions on the moneys he had collected for the plaintiff.

On hearing the return, the judge ordered the rule to be discharged. The plaintiff gave notice of appeal on the following exceptions: 1. That the sheriff could not retain the \$60.50 for costs due him in his office on proceedings between other parties. 2. That he could do so only by a levy upon the fund, and he had no execution. 3. That the \$13.50 should have been collected by the sheriff out of the defendant.

In the act fixing the costs and fees of attorneys and other officers, it is provided that in civil cases these shall become entitled to their fees and costs as of course, accordingly as the action may be terminated, and to be inserted in the judgment against the losing party. This act is now found in section 2425 of the General Statutes. Commissions on moneys collected on executions are fixed as part of the sheriff's fees, as an officer of the court, and, under the above act, are thrown on the losing party. As we understand, it has been the uniform custom throughout the State, since the act of 1839, for the sheriff to collect his commissions from the defendant in the execution in accordance with this law. We think, therefore, it was error on the part of the judge to discharge the rule, so far as the commissions, \$13.50, were involved. The plaintiff was entitled to this money as a part of his original debt, and the sheriff should have been ordered to pay it over to him.

As to the \$60.50, there was a preliminary question of fact involved. The sheriff claim-

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ed that the money in his hands did \*not belong to the plaintiff, but to Mr. Thomas, his attorney, which he was entitled to absorb by

virtue of a counter-claim held by him against Mr. Thomas. Where a question of fact arises upon a rule against the sheriff raising doubt as to the ownership of the money in his hands, the usual course is to discharge the rule and leave the parties to litigate their rights by suit.

As was said by O'Neill, J., in the case of *Dawkins v. Pearson*, 2 Bailey 620: "The proceeding by rule against the sheriff supposes that he is willfully in default, and the judgment of the court is that he is in contempt; anything, therefore, which shows that he is not in contempt ought to discharge the rule. \* \* \* Where there is any doubt as to whom the money should be rightfully paid, the correct course is to discharge the rule and leave the parties to litigate and determine their rights by a suit. A rule will always go where the legal rights of the parties can be made to appear from a conceded statement of facts. But where the facts are disputed, and the law depends on their development, the parties should be left to their action at law, or an issue will be directed at law to try them." *Cooper v. Scott*, 2 McM. 150. See, also, the case of *Dawson v. Dewan*, 12 Rich. 499.

Under these authorities, we think the judge was authorized to discharge the rule as to this money. The sheriff had collected the amount; he was, therefore, not in contempt in neglecting or refusing to enforce the execution; and if the amount in his hands really belonged to Mr. Thomas, which does not seem to have been denied, and if, at the same time, he had a valid and legal counter-claim against Thomas, why should he not be allowed an opportunity to set it off?

It is the judgment of this court that the order below be modified so as to reverse so much thereof as discharged the rule with reference to the \$13.50 commissions (which should be made absolute), and to affirm so much as discharged it with reference to the \$60.50.

19 S. C. \*20

\*CARTER v. COLUMBIA AND GREENVILLE R. R. CO.

(November Term, 1882.)

[1. *Trial* ⇨139.]

The defendant is entitled to a non-suit where there is a total failure of evidence to sustain the plaintiff's case; but if there is any testimony, the force and effect of which must be determined, the case should go to the jury.

[Ed. Note.—Cited in *Davis v. Columbia & G. R. Co.*, 21 S. C. 102; *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 562; *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 59; *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. C. 452, 60 Am. Rep. 516; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 385, 7 S. E. 614, 1 L. R. A. 682; *Lampley v. Atlantic Coast Line R. Co.*, 77 S. C. 322, 323, 57 S. E. 1104.

For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

[2. *Negligence* ⇨136.]

In action for damages for the negligent killing of a man, a motion for non-suit upon the ground that the evidence adduced showed contributory negligence by the deceased, cannot be granted.

[Ed. Note.—Cited in *Darwin v. Charlotte, C. & A. R. Co.*, 23 S. C. 536, 55 Am. Rep. 32; *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 59; *Petrie v. Columbia & G. R. R. Co.*, 29 S. C. 319, 7 S. E. 515; *Whaley v. Bartlett*, 42 S. C. 468, 20 S. E. 745; *Lyons v. Charleston & W. C. Ry.*, 77 S. C. 344, 58 S. E. 12.

For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. ⇨136.]

[3. *Negligence* ⇨121.]

Negligence is the absence of due care, and must be proved by the party alleging it.

[Ed. Note.—Cited in *Smith v. Gilreath*, 69 S. C. 359, 48 S. E. 262; *Wofford v. Clinton Cotton Mills*, 72 S. C. 350, 51 S. E. 918.

For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. ⇨121.]

[4. *Railroads* ⇨359.]

A railroad company is not liable in damages for the death of a man caused by the explosion of a torpedo with which he intermeddled while walking on the railroad track, and which had been placed there by the company as a danger signal to approaching trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1238; Dec. Dig. ⇨359.]

[5. *Trial* ⇨255.]

A proposition charged by the Circuit judge may be made a ground of exception, but a failure to charge can be assigned as error only when a request so to charge is made and refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 627; Dec. Dig. ⇨255.]

[6. *Railroads* ⇨359.]

In refusing to charge that a man who walks upon a railroad track, except at a road crossing, does so at his peril, the Circuit judge committed no error.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1238; Dec. Dig. ⇨359.]

[7. *Railroads* ⇨359.]

Nor was there error in refusing to charge "that if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and that the company was under no obligation to take precautions against possible injuries to trespassers."

[Ed. Note.—Cited in *Darwin v. Charlotte, C. & A. R. Co.*, 23 S. C. 535, 55 Am. Rep. 32; *Martin v. Southern Ry.*, 51 S. C. 163, 28 S. E. 303.

For other cases, see *Railroads*, Cent. Dig. § 1238; Dec. Dig. ⇨359.]

[8. *Death* ⇨23.]

Where there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and did not, he is the author of his own injury and cannot recover.

[Ed. Note.—Cited in *Guess v. Railway Co.*, 30 S. C. 165, 9 S. E. 18.

For other cases, see *Death*, Cent. Dig. §§ 25, 26; Dec. Dig. ⇨23.]

[9. *Trial* ⇨261.]

The judge is not called upon to separate a request to charge into parts, charging such as are sound, and rejecting such as are unsound. He may take it and consider it as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 660; Dec. Dig. ⇨261.]



[10. *Negligence* ⇐122.]

Contributory negligence is a matter of defense, and the burden of proving it is with the defendant.

[Ed. Note.—Cited in *Crouch v. Charleston & S. Ry. Co.*, 21 S. C. 497; *Joyner v. South Carolina Ry. Co.*, 26 S. C. 58, 1 S. E. 52; *Donahue v. Railroad Co.*, 32 S. C. 302, 11 S. E. 95, 17 Am. St. Rep. 854; *Whaley v. Bartlett*, 42 S. C. 473, 20 S. E. 745.

For other cases, see *Negligence*, Cent. Dig. § 229; Dec. Dig. ⇐122.]

[11. *Negligence* ⇐141.]

In refusing to charge that, if the jury believed that the accident was caused by the effort of the deceased to open the torpedo which he found upon the railroad track, the verdict must be for defendant, the Circuit judge committed no error, as such a charge would have taken from the jury a matter which was for their determination, to wit: whether the alleged act amounted to contributory negligence.

[Ed. Note.—Cited in *Guess v. Railway Company*, 30 S. C. 165, 9 S. E. 18; *Whaley v. Bartlett*, 42 S. C. 469, 20 S. E. 745.

For other cases, see *Negligence*, Cent. Dig. § 384; Dec. Dig. ⇐141.]

12. *Appeal and Error* ⇐1177.]

[Cited in *Townes v. City Council of Augusta*, 46 S. C. 38, 23 S. E. 984, to the point that the improper refusal to grant nonsuit for insufficiency of proof affords ground on appeal for granting new trial.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. ⇐1177.]

[This case is also cited in *De Camps v. Carpin*, 19 S. C. 121, 126, and distinguished therefrom.]

Before Wallace, J., Richland, April, 1882.

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\*Action by Gibbs Carter, as administrator of Christopher Carter, deceased, commenced in February, 1882. The opinion sufficiently states the case.

Messrs. Conner & Cheves, for appellants.

The non-suit should have been granted. 13 N. Y. 9; *Thomp. Carr.* 168, 206, 215; 15 Wall. 524; 44 Penn. 375; 1 *Thomp. Negl.* 449; 11 East 60; 10 Mees. & W. 546; 2 McMull. 405; 8 Rich. 126; 6 S. C. 83; 3 Com. B. (N. S.) 150; 8 Id. 570; 4 Hurlst. & N. 781; 14 Wall. 448; 22 Id. 120; 94 U. S. 284; 5 Rich. 443. The refusal of the first request was error. Gen. Stat., §§ 1518-20; 81 Penn. 366; 44 Id. 375; 31 Gratt. 812; 95 U. S. 697; 125 Mass. 75; 120 Id. 306; 58 Barb. 438; 41 N. Y. 530, 532; 66 Id. 247; 59 Penn. 129. As to the second request, counsel cited the same authorities.

Messrs. Abney & Abney, contra, cited 2 Bailey 321; 3 S. C. 9; 7 S. C. 144; 16 S. C. 636; 19 Conn. 507; 100 U. S. 214; 83 Ill. 405; 9 Rich. 90.

March 10th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff's intestate, while walking on the track of defendant's railroad, picked up a small torpedo which he saw lying on the track.

While he was examining this instrument (the character of which it seems was wholly unknown to him) it exploded, causing his death almost instantly. This action was brought by the plaintiff, his administrator, to recover damages, for the benefit of himself and of his wife, the father and mother of the deceased. The basis of the action is negligence on the part of the defendant, and this is charged in the complaint as follows, to wit: "That defendant wrongfully, negligently and carelessly placed on their track an explosive and dangerous instrument, commonly called a torpedo, and wrongfully, negligently and defaultingly left the torpedo on the track," &c.

The testimony of the plaintiff showed that the torpedo had been placed on the track on the morning of November 5th, 1881, the day on which the accident occurred, as a danger

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signal \*to guard against collisions, and in accordance with the rules of the company prescribing and regulating such matters; that the deceased, with another person, who were on their way to Columbia from some point above, in order to save distance had left the highway, and was on the track at a point where, for years, all persons who desired to do so had been accustomed to walk the track or along a path on its margin; that at this point he discovered this torpedo, when he picked it up, saying to his companion, "We had better keep this, it might have money in it;" that the deceased had two axes upon his shoulder, and while his companion was looking the other way an explosion took place, the deceased falling with his head outside of the rail, and one of the axes just in front of him. The companion was unable to say whether the deceased was kneeling down examining the torpedo with his axe, or how or why the explosion took place.

Upon the close of this testimony the defendant moved for a non-suit on the ground of want of evidence to sustain plaintiff's alleged case, because, first, there was no testimony to support the charge of negligence; and, second, even if there was, yet plaintiff's testimony showed contributory negligence by the deceased; and, therefore, the alleged cause of action was wholly without foundation in evidence. This motion was refused, and the trial proceeded to a conclusion, the jury rendering a verdict for the plaintiff.

The defendant requested the presiding judge to charge certain legal propositions found below, which he declined, and the defendant has appealed, assigning error because the judge refused the motion for non-suit, and also declined to charge the propositions requested. These propositions were as follows:

1. "That the use of a railroad track is for its owners, and those acting under them, its employés; and, except at crossings where the public have a right of way, the man who

walks upon a railroad track does so at his peril. If deceased was upon the track of the defendant without lawful authority and using it simply for his own convenience, he was a trespasser, and the company was under no obligation to take precautions against possible injuries to trespassers.

2. "That to entitle the plaintiff to recover

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he must prove \*negligence in the defendant, and no want of ordinary care on the part of the deceased; and even when there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided injury, and did not, he is the author of his own wrong and cannot recover.

3. "That if the jury believe that the accident was caused by the effort of the deceased to open the torpedo, then he was the author of his own injury and cannot recover, and the verdict must be for the defendant."

The defendant also excepted "because his Honor did instruct the jury that 'want of due care upon the one side does not relieve the other;' and also 'if plaintiff exercised due care, and defendant did not, he is entitled to recover; if defendant exercised due care, and plaintiff did not, he is not entitled to recover,' and failed to instruct the jury that if there was mutual negligence the plaintiff could not recover.

2. "Because his Honor, in the final clause of his charge, in effect limited the jury to the two issues only, of negligence on the part of the defendant and no negligence on the part of the deceased on the one hand, and of no negligence upon the part of the defendant on the other, and did not instruct the jury that there was a third issue, and that if there was negligence by the defendant, but that, nevertheless, the deceased, by the exercise of ordinary care, could have avoided the injury, then that the plaintiff was not entitled to recover."

We will consider first the exceptions founded upon the refusal of his Honor to grant the motion of non-suit. A non-suit is not only proper but it is the legal right of the defendant where there is a total failure of evidence to sustain the plaintiff's case, as alleged in the complaint. If the plaintiff has introduced any testimony, the force and effect of which has to be considered, then the case must go to the jury, because under our system of judicature the jury is the only constitutional tribunal authorized to weigh testimony. But in every case there may be a preliminary question, which is addressed to the judge, to wit: Has any testimony been introduced bearing upon the points at issue? If so, there is nothing left for the judge but the legal points involved, and the facts must be submitted to the jury; if not, however, a

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\*non-suit is proper. *Holley v. Walker*, 7 S. C. 144; *Miller v. Bolt*, 16 S. C. 636; *Boykin v. Watts*, 6 S. C. 83.

Now the gist of this action is negligence

on the part of the defendant. This was alleged in the complaint, and to entitle the plaintiff to go to the jury on that question it was necessary before the defense was put to proof, for the plaintiff to make out at least a prima facie showing. The defendant denies, first, that such showing was made; and, second, that if made it was overthrown by the additional testimony of the plaintiff proving contributory negligence by the deceased.

We do not think that this second ground could have been considered by the judge. That involved a question of fact, the truth of which depended upon the force and effect of the evidence touching that question, and before the judge could have reached the conclusion that contributory negligence by the deceased appeared, he would have been compelled not to consider simply whether any testimony had been offered upon that subject, but whether the fact had been made out that the testimony was sufficient in its force and effect to establish it. This would have been invading the province of the jury, and therefore unwarranted in this State under our constitution. Elsewhere the cases are conflicting.

This exception then must stand or fall upon the first ground. Was there a total failure by plaintiff to make out a prima facie case of negligence by defendant? It may be said in general terms that negligence, legally understood, is the "absence of due care." The presiding judge thus defined it below, and the doctrine is so familiar that this definition may be adopted without citing authorities. In a special case it is the absence of such care as the business or matter producing the injury may demand, and the party in charge bound to bestow, out of due regard to the rights of others. This being a material fact, indeed, the essential fact in all actions like the present, it must be proved affirmatively by the plaintiff.

Now let us examine the evidence introduced by the plaintiff in this case, under the right of these principles, with the view to determine whether there was any testimony bearing upon this point. The testimony of-

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ferred by the plaintiff has been briefly \*stated above, and there is no controversy as to the points to which it was directed. It was intended to show, and did show, that the torpedo was placed on the railroad track by the defendant; it showed that this railroad track was the exclusive property of the defendant; that this torpedo was placed at the point where the deceased discovered it, as a danger signal, under established regulations, made deliberately by the company; that the deceased, while traveling through the country, made use of the track as a road upon which to walk, not by any express permission of defendant, but by its sufferance, arising from the fact that others had for years been in the habit of thus using it; that he found



this torpedo, of the nature of which he was entirely ignorant, loose upon the track; that he picked it up and examined it, saying that "there might be money in it." His mode of examination is unknown, whether by striking it with an axe or otherwise, but it exploded and caused his death.

This is the testimony as admitted by both sides. Is any portion of it pertinent to the issue of negligence? or do the facts thus proved evolve, as a legal conclusion, this negligence? There is certainly no affirmative testimony that there was an absence of due care by the defendant in placing this torpedo upon its own track. There was none directed to the point, that due care required the company to place it at one point more than another, or that it should be left at the one side more than another, or loose upon the track, so far as outsiders were concerned. The defendant did nothing but place a torpedo upon its track, and, as it appears, for a commendable purpose. We do not find a particle of affirmative testimony reported in the "Case" tending to show that this was done without due care. The remaining testimony was intended to show what part the unfortunate deceased took, and it has no direct reference to the negligence of the defendant.

Now take the facts as a whole on the plaintiff's showing, and should negligence by defendant follow *prima facie* as a legal conclusion therefrom, independent of any direct testimony upon this question? We think not. The railroad track belonged to the defendant; it certainly had the right to take every reasonable precaution to prevent collisions. There was no evidence that

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\*the torpedo was extraordinarily explosive; no evidence that an accident had ever occurred before in the use of such instruments; no evidence that the company might have anticipated a fatal result like this; no evidence that the torpedo was so explosive and so dangerous as reasonably to require of the defendant a notice to the public that it was being used; no evidence that the deceased had been authorized by the company to make use of its track as a highway, or that they positively knew that it was being so used. In fine, no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the terrible calamity which resulted from its explosion.

We think, that at the close of plaintiff's case below, there was a total want of testimony as to the defendant's negligence, the gist of the action, and, therefore, the non-suit should have been granted; and, in such case, under the ruling of *Sampson & Wyatt v. Singer Manufacturing Co.*, 5 S. C. 465,

and *Willis v. Knox*, 5 S. C. 476, a new trial is proper.

As to the two last exceptions in which error is assigned, because the presiding judge failed to charge that there was a third class, in addition to the two presented by him to the jury, to wit, a class where there is mutual negligence. We do not feel at liberty to consider these exceptions, because the proposition insisted upon, though perhaps sound as a legal principle, was not brought to the attention of the judge. A proposition charged by the judge may be made the ground of exception, but a failure to charge can only be made so when a request is made, and it is refused by the judge. *Abrahams v. Kelly & Barrett*, 2 S. C. 238.

The last matter to be considered is, the refusal of his Honor to charge the three propositions requested by the defendant, and found above. We do not think that the refusal of the judge to charge these propositions as stated, was such error as to constitute substantial ground for exception. No doubt that the use of a railroad track is for its owners, and those acting under them, except at crossings, where the public have a right of way, as stated in the first part of

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the first request. *Mulherrin v. Delaware, &c.*, R. R. Co., 81 Pa. 366; *Philadelphia & Reading R. Co. v. Hummel*, 44 Pa. St. 375; 1 Thomp. Negl. 457. But it does not follow universally, and in every case, that a man who walks upon a railroad track, does so at his peril, as to all dangers which he may encounter and under all circumstances.

As an illustration: Suppose in this instance, the defendant, knowing that its track was being trespassed upon by parties unauthorizedly appropriating it as a track or road to walk upon, and to break up this use, had placed a dangerous explosive instrument thereon, likely to explode from mere contact, which was concealed from view, with no notice or advertisement to the public of the facts, and a traveler, though technically a trespasser, had been injured thereby, could it be claimed as a legal proposition that, under such circumstances, the company would be exempt from liability? We think not.

So, too, although the second part of the request may have been good technical law, to wit: "That if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and the company were under no obligation to take precautions against possible injuries to trespassers;" yet this principle could not have shielded the defendant from such injury as may have been produced by its negligence, if any, in every case without exception. It would, no doubt, require a much stronger case to make out negligence as to a trespasser than is required in ordinary cases, but we have found

no case which goes to the extent of declaring that a trespasser has no protection. 2 Thomp. Negl. 1162, in notis.

The general rule is, perhaps, as defendant requested, but it is subject to several modifications. It does not exempt from liability the owners of lands who permit pitfalls and obstructions to remain on them so near the highway that, when combined with the ordinary accidents of travel, they result in injury to travelers. There is a class, too, of cases, where such proprietors are held liable for injuries to children, although trespassing at the time, because, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owners should reasonably anticipate such an injury. And

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there are other similar cases \*where the general doctrine above does not apply in full. 1 Thomp. Negl. 304, and the cases cited in the notes. In such cases the question of negligence is still open, and it is for the jury. We think, therefore, it would have been error in the judge to have charged broadly, and without the proper qualification, the proposition requested.

Nor do we think the second request could have been charged in full. The latter portion is, no doubt, sound law, to wit: "That even where there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and did not, he is the author of his own injury, and cannot recover." This is nothing more than the well-established principle, that where there is contributory negligence on the part of the injured party to the extent of its being one of the proximate causes of the injury, then the courts will not undertake to graduate or apportion the damages according to the contribution from either side, but will leave the matter as they find it. *Gunter v. Graniteville Manufacturing Co.*, 15 S. C. 443, and the cases there cited.

If this had been a distinct request, made by itself, it would have been error to refuse it. In fact, as we read the charge in one portion, it was distinctly laid down, though, to some extent, subsequently modified, or rather left out. But the objection to the request is, that it incorporated several propositions, all of which could not be charged, and the rule is that the judge is not called upon to disintegrate the request and take it up in its several parts, charging such as are sound, and rejecting the unsound. On the contrary, he takes it as a whole, and considers it as a whole. Here, this request embraced, in addition to the one just discussed, the following also, to wit: That to entitle the plaintiff to recover, he must prove negligence in the defendants, and no want of ordinary care on the part of the deceased. In other words, that the plaintiff's cause of action rested in the first instance, not sim-

ply upon the negligence of the defendant, but also upon the exercise of due care upon the part of the deceased, and that the burden of proof, as, to both of these elements, was upon the plaintiff.

It is a general rule that the burden of proof

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is upon the \*party who maintains the affirmative of the issue. In other words, he who asserts a fact necessary to sustain an action must prove it; and he who asserts one which is to bar the action must also prove it. Mr. Thompson, on Negligence, states that in applying this rule to actions where it is sought to recover for an injury on the ground of negligence, the authorities are not in accord. Generally, contributory negligence, on the part of the plaintiff, will bar a recovery, and it would seem, therefore, to be a matter of defense, and that it would devolve upon the defendant to prove it. 2 Thomp. Negl. 1175. While, as Mr. Thompson says, the decisions in the different States are not uniform upon this question, nor, indeed, upon many of the questions involved in this interesting subject, to wit, the liability of railroads and other companies for injuries, a subject that is daily growing more and more important, yet the current of the decisions is strongest in favor of the proposition that contributory negligence is a matter of defense, and the burden of proving it is with the defendant. 2 Thomp. Negl. 1176-77, in notis.

The defendant excepts, lastly, because the judge declined to charge that, if the jury believed the accident was caused by the effort of the deceased to open the torpedo, then the verdict should be for the defendant. As we have already stated, where the plaintiff has contributed to the accident to the extent of furnishing a proximate cause thereof, the defendant is exempt from liability as matter of law, and the judge could so charge; but whether a particular fact, if proved, shall amount to such contribution is a matter for the jury and not for the court. What is negligence is defined in the books, and is a question of law, and it is the same whether it comes from the defendant or the plaintiff; but whether it is proved to be present in a special case is a question of fact for the jury.

The law holds that the want of due care is negligence. This much the judge can legitimately charge, but whether a particular fact, if proved, shows the want of due care, is for the jury acting upon all the evidence introduced. The objection to the exception is that it requested the judge to decide the effect of a certain fact assumed to be proved upon the issue which was before the jury, and which issue under the law they

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alone could \*determine. Under this view we think the judge was not in error in declining to charge the proposition as stated.

For the reasons given, we think the non-



suit should have been granted, and its refusal below, under the cases of *Sampson & Wyatt v. Singer Manufacturing Co.*, 5 S. C. 465, and *Willis v. Knox*, 5 S. C. 476, supra, now rendering a new trial proper; to this end it is the judgment of this court that the judgment of the Circuit Court be reversed.

## 19 S. C. 30

## CARRIER &amp; HARRIS v. DORRANCE.

(November Term, 1882.)

[1. *Bailment* ⇨14. 31.]

A bailee for hire is responsible only for injuries arising from that degree of negligence which occurs in the absence of ordinary care; and the burden of proving negligence is upon the plaintiff.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 46, 125; Dec. Dig. ⇨14, 31.]

[2. *Trial* ⇨139.]

When non-suits are proper.

[Ed. Note.—Cited in *De Camps v. Carpin*, 19 S. C. 121; *Davis v. Columbia & G. R. Co.*, 21 S. C. 102; *Glenn v. Same*, Id. 469; *Altee v. South Carolina Ry. Co.*, Id. 556; *Cooke & Co. v. Pearce*, 23 S. C. 247; *Bridger v. Asheville & S. R. Co.*, 25 S. C. 26; *Lamley v. Atlantic Coast Line R. Co.*, 77 S. C. 323, 57 S. E. 1104.

For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

[3. *Animals* ⇨27.]

In action by bailor against bailee for damages for the death of a horse hired, the testimony showed no negligence by defendant under the circumstances surrounding him, and the Circuit judge therefore erred in refusing defendant's motion for non-suit.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 72; Dec. Dig. ⇨27.]

[This case is also cited in *Townes v. City Council of Augusta*, 46 S. C. 38, 23 S. E. 984, and *Lyon v. Charleston & W. C. Ry.*, 77 S. C. 343, 58 S. E. 12, as to granting new trial after improper nonsuit in court below.]

Before Pressley, J., Greenville, July, 1882.

This was an action by Carrier & Harris against John M. Dorrance. The opinion states the case.

Mr. Julius H. Hayward, for appellant.

Messrs. M. F. Ansel and Edward Craft, contra, on the question of non-suit, cited 3 S. C. 9, 411; 6 Id. 83; 7 Id. 144, 170; also, 2 Kent 763; 1 Add. Torts 498, note 657; 3 Wait Ac. & Def. 615; 31 Geo. 348; 3 McC. 547; 1 Bailey 358; 2 Spears 495; 5 E. C. L. 437.

March 10th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, respondents, keeping a livery stable in Greenville, in May, 1881, hired to the defendant a coach and team of four horses, for a pleasure trip to Piedmont, a distance of

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twelve miles, and to return the same day. The party left the city in the morning and

returned in the afternoon, having left one of the horses behind, about seven miles, sick. During the night of the same day this horse was brought to the stable quite sick, and died early the next morning. This action was brought to recover her value. The other three horses returned in good condition.

After plaintiffs' testimony the defendant moved for a non-suit, which was refused. The defendant requested the judge to charge: "That if the plaintiffs, by their conduct, contributed at all to the accident, or if, by proper care and attention on the part of the plaintiffs, the death of the horse might have been prevented, and the plaintiffs failed to bestow this care and attention upon it, the defendant is not liable."

The judge declined to charge this in the language requested, but did charge as follows: "If the jury believed that the death of the mare was caused by her being driven hard after defendant knew that she was sick, and, further, if they believed it was not proper care to drive her while in that condition, then defendant was responsible for her full value. In that case no question of contributory negligence by the plaintiff would be submitted to them because he was not present, and they need not consider the question of whether the driver was employed by Harris or by defendant; as the latter had taken the mare from the care of the driver and placed her in the hands of his own servant, he alone was responsible for the consequences of that act if it was negligence. Further, if the jury believed that plaintiff, by proper care, could have saved the life of the mare after she was delivered to him, then defendant was not responsible for her full value, but he would still be responsible for such injury as was inflicted upon her by driving her whilst sick, if the jury believed it involved loss of service and impaired constitution, which proper care by the plaintiff could not have averted."

The jury found for the plaintiffs \$100. The defendant appealed: 1. "Because his Honor erred in refusing to charge as requested. 2. Because his Honor charged in respect to matter of fact. 3. Because it is submitted the non-suit should have been granted upon the ground that the proof of negligence on the part of the defendant was not sufficient."

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\*This case, and the questions raised, involve the law of bailments. It will not be necessary, however, to discuss that doctrine generally. We need only examine the law of the class to which the case belongs. This class is what is known in the books as *locatio rei*, bailment for hire. Mr. Chitty says that such a bailee is bound to use only an ordinary degree of care. 1 Chit. Cont. (11th ed.) 679. He is responsible for injuries arising from that degree of negligence which

occurs in the absence of ordinary care, such care as is ordinarily bestowed by parties in the preservation of property.

As a contract for hire is supposed to be a mutual benefit both to the bailor and bailee, the bailee in such case is not held too that strict accountability which appertains to a mere borrower who obtains possession for his own benefit, and without reward to the lender. The burden of proving the absence of this ordinary care, and the presence of that negligence, which is the result, and which makes the bailee liable, is ordinarily upon the bailor or plaintiff. 1 Chit. Cont. 680, note; Story Bail., § 410; Runyan v. Caldwell, 7 Humph. 134; Schmidt v. Blood, 9 Wend. 268; Platt v. Hibbard, 7 Cow. 500; Foote v. Storrs, 2 Barb. 326; Clark v. Spence, 10 Watts 335. This is the general doctrine in reference to this species of bailment.

Next, as to non-suits. It is well settled that a non-suit is proper only where there is a total failure of testimony by the plaintiff, either as to his whole case, or to some material and essential part thereof. It is also well understood that non-suits are not favored, and the practice of ordering a non-suit in invitum should be pursued with caution. Redding v. Railroad Co., 3 S. C. 9 16 Am. Rep. 681; Boykin v. Watts, 6 S. C. 83; Holley v. Walker, 7 S. C. 144; but it is also settled that where there is a total failure of evidence, the defendant has the legal right to stop further proceedings, by motion for non-suit.

Now, let the motion for non-suit below be subjected to the test of the principles announced above, and what is the result? The plaintiffs, in order to get the jury, were bound to offer some proof as to the negligence of the defendant, or as to the absence of that ordinary care which would amount to negligence in a case like this. Did they

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do this? Upon a careful examination \*of the testimony found reported in the brief, we think it will be apparent that they did not. The facts brought out by their testimony were simply that the coach and team were hired to the defendant, for a trip of pleasure to Piedmont; that this trip was to be made during the day; that it was made; that three of the horses were returned in the afternoon, sound and in good condition; that the fourth was left behind sick after reaching within some seven miles of the city of Greenville; that when the horse was found sick, the defendant took her from the coach and turned her over to one Earle, to be driven forward, hitched to a basket wagon, with instructions to drive her slowly and carefully on to the city, but if she got no better, or it became necessary, to leave her on the way at the house of Judge Cleveland, a gentleman who lived on the roadside; that she reached Greenville that night about

twelve o'clock, and died next morning; one witness stating that he would not drive a sick horse eight or ten miles if it could possibly be avoided, but had seen horses get well after being thus driven; another stating that he did not think it safe to drive a sick horse, but that he would prefer to get him home if he could, because he could be better treated; that there were no drug stores along the road, although one at Piedmont.

This was the whole testimony of the plaintiffs, upon the close of which the motion for non-suit was made. We do not see anything in all this bearing directly upon the question of negligence, the burden of proving which was upon the plaintiffs. There was not a particle of testimony tending to show that the sickness of the mare was caused by any act of the defendant, such as hard driving, inattention to watering, imprudent feeding, or anything on his part which might have caused this sickness. There was no evidence directed to the point that there was the want of ordinary care by the defendant in directing the mare to be driven slowly and carefully to Greenville after he found that she had taken sick within seven or eight miles of the city, or that he failed to bestow such care himself before leaving her. True, two of the witnesses, said, generally, that it was unsafe to drive a sick horse eight or ten miles, but, yet, it was better to get such horse home. These were general opin-

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ions, and seemed \*to have no special reference to the case before the court and the conduct of defendant.

The question was as to his negligence under the circumstances surrounding him; whether ordinary care required him to do more than he did do. The horse took sick on his hands within a few miles of the stable from which he had hired it. He was not a farrier, had no medicine, and, perhaps, would not have known how to use it if he had been thus provided. The sun was about an hour high; he concluded that it was best to get her to the stable and subject her to the treatment of those who knew best what to do, and he adopted that course.

These were the facts, but whether this was negligent or prudent conduct there was no testimony; and, in the absence of such testimony, there was nothing to submit to the jury upon the main and important question, to wit, the question of negligence and ordinary care. We think, therefore, that the non-suit should have been granted, and now, under the authority of Sampson & Wyatt v. Singer Manufacturing Co., 5 S. C. 465, and Willis v. Knox, 5 S. C. 476, a new trial should be had. It will be unnecessary to discuss the charge of the judge.

It is the judgment of this court that the judgment of the Circuit Court be reversed, to the end that a new trial be had.



## 19 S. C. 34

## HARRIS v. YOUNG.

(November Term, 1882.)

[Executors and Administrators  $\hookrightarrow$  508.]

Upon an accounting had in the Probate Court, a balance was ascertained to be in the hands of the executor, whereupon he gave a mortgage in the nature of a declaration of trust, to hold such balance under the provisions of the will; afterwards, he paid a larger amount to a valid outstanding claim against the estate. *Held*, that the decree and mortgage were thereby satisfied, and that he was entitled to have the mortgage discharged.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2191; Dec. Dig.  $\hookrightarrow$  508.]

Before Pressley, J., Spartanburg, March, 1882.

The opinion states the case.

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\*Messrs. Duncan & Cleveland, for appellants.

Mr. J. S. R. Thomson, contra.

March 12th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. John L. Young, having first duly made and executed his last will and testament, of which he appointed the plaintiff and the defendant, Mary T. Young, executors, died in 1862. The will was duly admitted to probate, and both of the persons named as such, qualified as executors, though the plaintiff seems to have assumed the active management of the estate.

The testator, at the time of his death, was indebted to one Shields, who died intestate, in 1864, and there being then no administration upon his estate, the plaintiff paid the said debt to the widow of Shields in Confederate money, some time in the year 1864, but did not take up the notes evidencing said debt, the widow not having possession of them. Subsequently, one Daniels took out letters of administration upon the estate of Shields, and refusing to recognize the payment made by the plaintiff to the widow, brought suit on said debt in 1867 against the plaintiff and the defendant, Mary T. Young, as executors of John L. Young, and recovered judgment thereon.

In April, 1877, under proceedings for that purpose in the Court of Probate, there was a settlement of the estate of the testator, John L. Young, in which plaintiff was allowed credit for \$41.83, the value of the Confederate money paid to the widow of Shields, and by which it was ascertained that there was a balance in the hands of the plaintiff, as executor, of the sum of \$541.05, due to the estate of his testator, for which a decree was entered against him on June 30th, 1877; that he holds the same "subject to the provi-

sions and terms of the will of John L. Young, deceased," and that the said Thomas Harris do "execute, within thirty days from the date of this order, a mortgage on his real estate, in the nature of a declaration of trust, to secure the amount of said trust and interest thereon." In pursuance of this decree, the plaintiff, on August 14th, 1877, executed the mortgage as required, and on the

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same day was \*required to pay and did pay the amount then due on the Shields judgment, to wit: the sum of \$659.56. The plaintiff subsequently made two payments of interest to the defendant, Mary T. Young.

In 1879 this action was commenced, in which the plaintiff, by his complaint, alleges that there was a mistake in the accounting, which resulted in the decree aforesaid, by reason of the omission to take any account of the amount of the Shields judgment, which had been forgotten by the parties at the time the accounting was taken in the Probate Court, and prays: (1). "That the mistake in the aforesaid accounting and decree be corrected; (2). That the deed of trust be ordered to be canceled; (3). That plaintiff have judgment against the defendants for the amount overpaid by him, and for the costs of this action; (4). And for such other and further relief herein as the circumstances may demand, and as to the court shall seem just." The defendants resisted the action, mainly upon the ground that the decree rendered by the Court of Probate was conclusive, and that the Circuit Court has no jurisdiction to review it, except by appeal; and also contended that there was no mistake in the accounting which resulted in said decree, and which was, in effect, a compromise decree, all parties being then aware of the Shields judgment, which was duly considered in making up the decree.

The issues of law and fact were referred to a referee, who found as matter of fact: (1). "That the decree of the Probate Court was not a compromise; (2). That the failure on the part of the plaintiff, in the accounting on final settlement to put in the judgment, was a mistake; (3). That the payments to Mary T. Young, as interest on the decree, was not a mistake." Upon these findings of fact the referee found as matter of law: (1). "That this court has jurisdiction; (2). That the mortgage or deed of trust should be canceled; (3). That the defendant, Mary T. Young, should be restrained from proceeding under the decree of the Probate Court; (4). That plaintiff is not entitled to recover the amounts paid as interest on the decree; (5). That the plaintiff is responsible for the amount wrongfully paid to the widow of Shields; (6). That the plaintiff is entitled to recover from defendants the difference between the amount

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of the decree, \$541.05, rendered \*June 30th,

1877, and the amount paid on the judgment, \$659.56, on August 14th, 1877, less the amount erroneously allowed in 1864, \$41.83, with interest on last-mentioned amount to this date."

To this report the defendants filed the following exceptions: 1. "In that the referee erred in second conclusion of fact. 2. In that the referee erred in his 1st, 2d, 3d and 4th conclusions of law." The Circuit judge who heard the case upon this report and these exceptions, together with the testimony accompanying the report, held that it was not necessary for him to consider whether there had been any mistake in the accounting, and, if so, whether the Court of Common Pleas had jurisdiction, except by appeal, to open the decree of the Court of Probate for the purpose of rectifying the mistake, because he found, as matter of fact, that the plaintiff had, since the decree was rendered, fully paid and satisfied it by payment of a valid judgment against the estate, and he therefore held that the plaintiff was entitled to have satisfaction entered upon the mortgage which was given to secure the amount of said decree, and accordingly ordered the clerk to enter satisfaction on the mortgage.

From this judgment the defendants appeal upon the following grounds: 1. "Because his Honor erred in not holding that the Circuit Court was without jurisdiction. 2. Because his Honor erred in not sustaining the defendants' exceptions to the report of the referee. 3. Because his Honor erred in not holding that the plaintiff was estopped from setting up the payment by him of the judgment subsequent to the decree of the Probate Court. 4. Because his Honor erred in holding that the decree of the Probate Court was satisfied by payment. 5. Because his Honor erred in holding that the payment by plaintiff of the judgment was a satisfaction of the decree of the Probate Court without re-opening the entire settlement. 6. Because his Honor erred in refusing to dismiss the complaint herein."

If the Circuit judge took a proper view of the case, as we think he unquestionably did, we do not see how many of the questions raised by the grounds of appeal can properly arise, and, therefore, we do not propose to consider them in detail. It might be conceded for the purposes of this case (though we

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are \*not to be regarded as expressing any opinion upon that point), that the Circuit Court would have no jurisdiction, except by appeal, to correct a mistake in an accounting before the Court of Probate, which had resulted in a decree of that court, and yet the view which the Circuit judge has taken might be fully sustained. If the Shields judgment constituted a valid claim against the estate of the testator, as we are bound to assume, in the absence of any testimony, or even al-

legation to the contrary, then, clearly, it was entitled to be paid out of the assets of the estate, in preference to any claim which the devisees or legatees may have had, whether those assets consisted of the property in specie left by the testator, or of a debt due to the estate by the executor on account of assets converted.

The plaintiff in that judgment could, therefore, by proper proceedings, have subjected the amount in the hands of the executor belonging to the estate, as ascertained by the decree of the Court of Probate, to the payment of the judgment; and if he had done so, it surely could not have been contended that the executor would still be liable to the legatees for the amount which he had thus been compelled to pay to a creditor who had a right superior to that of the legatees. And if the executor could have thus been compelled to make this application of the amount in his hands, then, certainly, if he did that voluntarily which the law afforded the means of compelling him to do, the same result would follow. Even if the executor had turned over all the assets belonging to the estate to the legatees, the creditor could still pursue those assets in the hands of the legatees, and the fact that those assets consisted of a debt due by the executor to the estate, cannot have the effect of altering the legal principles applicable.

The decree of the Court of Probate had ascertained that there was a certain amount in the hands of the plaintiff, as executor, belonging to the estate of his testator, which he was required to hold "subject to the provisions and terms of the will," and the mortgage in question was given to secure the performance of the requirements of the decree. The will is not set out in full in the record, and, therefore, we are not distinctly informed whether there was any specific direction

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therein as to the payment of debts, but we are certainly at liberty to infer that there was, for, even if there was not, the law would supply such omission. When, therefore, the executor shows, as he has done in this case, that he has applied the whole of the balance ascertained to be in his hands belonging to the estate, to the payment of a valid claim against said estate, he has shown full performance of the requirements of the decree, and he is therefore entitled to have satisfaction entered upon the mortgage given for the sole purpose of securing compliance with the terms of that decree.

We do not deem it necessary to consider the question whether the settlement in the Court of Probate should be re-opened, and leave the parties to take such course as they may be advised in reference to that matter.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.



## 19 S. C. 39

BROWN v. ATLANTA & CHARLOTTE A.  
L. RAILWAY CO.

(November Term, 1882.)

[1. *Railroads* ⚡484.]

Whether the facts of a case constitute negligence, as defined by the court, is a question for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1746; Dec. Dig. ⚡484.]

[2. *Railroads* ⚡453.]

A railroad company is not liable as a common carrier for cotton, placed by its owner near the track, where it was burned by a spark from a passing engine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1659; Dec. Dig. ⚡453.]

[3. *Railroads* ⚡453.]

As to cotton placed near the line of a railroad, the company is not liable for consequences resulting from its lawful use of locomotives on its track, if proper care and diligence was used.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. ⚡453.]

[4. *Railroads* ⚡453.]

The burning of such cotton by a spark from the engine being proved, the onus was upon the company to disprove negligence, and this might be done by showing that they had the most approved mechanical contrivances to prevent the escape of fire, and that the engine was managed with due care and skill on that occasion.

[Ed. Note.—Cited in *Hutto v. Seaboard Air Line Ry.*, 81 S. C. 573, 62 S. E. 835.

For other cases, see *Railroads*, Cent. Dig. § 1659; Dec. Dig. ⚡453.]

[5. *Railroads* ⚡453.]

The erection by a town council of a platform near to a railroad siding for the storage of cotton, imposed upon the company no other responsibility than such as existed as to their use of the main track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. ⚡453.]

[6. *Railroads* ⚡453.]

And the use of such platform in part by the railroad company for holding cotton in their custody did not so impose upon them the duty of providing a watchman for the platform, as to render them liable for cotton not receipted for, and there burned without their negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1659; Dec. Dig. ⚡453.]

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[7. *Railroads* ⚡485.]

\*The Circuit judge committed no error in charging the jury that "defendant cannot be made liable on a mere probability that the fire was caused by its engines, but only on the preponderance of proof that it was so caused, and on proof of negligence on the part of defendant or its servants—that the probability must amount to proof."

[Ed. Note.—Cited in *Whitney Mfg. Co. v. Richmond, etc., R. R. Co.*, 38 S. C. 371, 17 S. E. 147, 37 Am. St. Rep. 767.

For other cases, see *Railroads*, Cent. Dig. §§ 1747-1756; Dec. Dig. ⚡485.]

Before Hudson, J., Spartanburg, March, 1881.

Action by John J. Brown against the Charlotte and Atlanta Air Line Railway Com-

pany, commenced in January, 1880. The facts of the case are stated in the opinion. See case of *Wilson & Co. v. Railroad Company*, 16 S. C. 587. The charge of the presiding judge was as follows:

What is the plaintiff's action? He has brought an action here to recover from the railroad company \$750 for cotton which he lost, as he alleges, at the hands of the company. The company is charged in the complaint as a common carrier, and also for damages by reason of negligence, causing the destruction of the property in question, which was not in their charge. So far as their liability as common carriers is concerned, it has not been contended in the argument that the plaintiff has made out his case in that respect; it has not been claimed in the argument that this cotton was in the possession of the railroad company and under its control; that it had been delivered to the company and receipted for. So that the question of their liability as common carriers does not arise in this case. But the burden of the case is that the company negligently destroyed these twelve bales of cotton on the 2d day of November, 1879.

The first question—that which lies at the very foundation of the matter—is whether the company destroyed that cotton or not? Was that cotton destroyed by a spark or sparks from the passing engines? It devolves upon the plaintiff in this action, just as in any other case in the Court of Common Pleas, to make out his case. He cannot ask for a verdict from your hands unless his case is made out, and made out by proof—satisfactory proof and lawful proof.

The first question, that lies at the founda-

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tion, is: Was that \*cotton burned on that Sunday by sparks from the engines of the company? For, I believe no other probable method of destroying it, so far as the company is concerned, has been noticed in the testimony. It devolves upon the plaintiff to prove that fact—not to raise in your minds a suspicion of the fact; not to lay before you facts and circumstances which raise a mere suspicion—but to prove it by evidence sufficient to convince your minds. If the evidence raises as high a degree of probability that the fire occurred from a cause other than a spark from the engine, then, of course, you could not refer it to the spark from the engine. The fact of the destruction by the company must be proved, and until that is proved you need not go any further. If the evidence on that point is not sufficient to satisfy your minds you can stop there, and the verdict must be for the defendant. That is purely a question of fact, and you are the exclusive judges of the testimony.

Testimony has been introduced by the plaintiff tending to show that the sparks from the engine fired that cotton. I cannot

remember the names of all the witnesses, and it would be of no service for you to hear from my notes of the testimony what the witnesses have said. The counsel on both sides have fully commented upon the testimony. The plaintiff's testimony is, in effect, that on November 2d, 1879, at Gaffney City, the trains drawn by engines No. 2 and No. 3, going east and west, passed each other, as they had been doing for a long time; they had been doing so before the platform was erected by the town council, and, I believe, since June previous, the same year; the platform having been erected in July. So that there was nothing unusual in the trains meeting and passing there that day; that was according to the company's regular schedule, and according to the regular course of business.

But, it is said that the engine No. 2, having arrived with its train, from which the passengers were put off as usual, went in on the siding and came nearer that cotton than usual; that it came in dangerous proximity to the cotton without sufficient cause for so doing; and that whilst in such dangerous proximity to the cotton, the spark or sparks from the engine set the cotton on fire, which fire was not discovered until after trains had

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departed, but was \*discovered a very short time thereafter. That, gentlemen, is the circumstantial evidence as to the fact, on the part of the plaintiff. You have heard the different witnesses for the plaintiff state the different lengths of time after the trains passed when the fire was discovered—some putting it five or six minutes—the interval varying with the different witnesses; but all the witnesses for the plaintiff making it a short time afterwards that the fire was discovered.

If that testimony stood alone you would be left to inference as to whether the sparks from the engine fired the cotton or not, and that inference is for you to draw, and not for me. But the testimony for the defendant puts a very different phase upon the matter, so far as the time is concerned when the fire was discovered. You have heard the very substantial testimony of that witness who was in the buggy (Mr. Latham, I believe,) and other witnesses; and, according to their testimony, the fire was not discovered until after twenty-five or thirty minutes after the train had gone. It is in proof that it was a clear day, in a very dry time; that the cotton was very dry; and the position is taken by the plaintiff, that whatever fired the cotton, very soon after it was fired it must have been discovered; in other words, that the fire must have originated but a very short time before discovery, on account of the dry and windy state of the weather. You, gentlemen, have a knowledge of the nature of cotton, and the manner in which it is packed away. Sparks will slumber a long time, or

a short time; but the position taken by the plaintiff is that it must have been quite a short time before discovery that the fire was set.

In addition to the testimony for the defendant as to the difference in time, you have the further testimony, that upon this very cotton, whilst the train was there, and as the train came up, the platform was occupied by a number of persons, mostly colored, and that some of them were on the cotton itself, and were smoking. Such is the testimony of the conductor who brought up this train; such, also, I believe, is the testimony of the engineer. And then you have the testimony of other persons, who, after the train had passed and the crowd had dispersed and gone to their respective homes and places for

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dinner, were coming from \*church, and when crossing the railroad at that point observed these negro lads upon the cotton, some of whom were then smoking. No fire was seen, and they passed on to their homes. The credibility of these witnesses is altogether for you.

You see that there is a conflict of testimony, and you must ask yourselves, gentlemen, whether it is not perfectly natural that there should be a conflict of testimony, so far as time is concerned, and so far as different individuals might notice different things. Perhaps some of you have been about railroad depots when trains arrive; perhaps you know something about the habit of communities on such occasions. The evidence here shows that many people had congregated about the depot upon the arrival and departure of trains. What is that for, and to what is the attention of those people usually directed? Did they gather to notice bales of cotton on a platform, or to see who comes and who goes, who get off the trains and who get on? Is their attention more likely to be attracted to the crowd in and about the cars, or to persons on a cotton platform some distance off? When the crowd has dispersed and people come along by such a place, would they be likely to observe parties upon a platform and upon cotton, who were, perhaps, the only persons about there? Could they be mistaken as to the fact? What would attract their attention when the trains had gone, and the crowd had dispersed? If any persons were on the cotton bales, would they not have seen them? These are questions you must put to yourselves in trying to reconcile the testimony of different parties. On such occasions and around such a place, are not persons liable to have their attention directed one to one thing, and one to another? Are all liable to notice the same thing? And when afterwards called upon to speak about what they saw there, is it not like human nature that each one should speak about that to which his attention was attracted? So that, taking into consideration



the surrounding circumstances, it may be that we can reconcile all these witnesses, and that each spoke conscientiously, and told the truth so far as he knew and was able.

Then, after the departure of trains at such a place, and the bystanders have dispersed to

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their dinners, what capability have \*they of judging correctly as to time? Does time fly rapidly, or slowly? Are they observing closely, with minds clear? Is lapse of time likely to appear very short, or very long, on such an occasion? Is a person, who leaves a crowd at a train, goes to dinner, and an alarming or exciting event occurs afterward, likely to think the time elapsed shorter, or longer than it has been? All these matters you must ask yourselves.

When you take all that testimony into consideration, it is for you to say, from the whole of it, whether the facts proved satisfy your minds. There may be a preponderance of evidence, and yet that preponderance might not amount to satisfaction. But you are to judge of this by the preponderance of testimony. Does the great preponderance of testimony satisfy your minds that sparks from the engine fired that cotton, or that it was fired by a spark or coal, or a bit of burning tobacco from a pipe? To which, now, as twelve men in honest search of truth, from the testimony in this case—not from conjecture, not from probability—to which cause will you refer it? That is for you.

Well, gentlemen, if the case is so doubtful to your minds that you cannot satisfactorily refer it to either cause, the plaintiff must fail, because he must prove what he alleges: That the company burned that cotton; and if he adduces evidence, which, in connection with the counter-testimony of the defendant, leaves your minds in such a condition that you cannot say, as honest men in search of the truth, to which cause to refer it—whether to that which the plaintiff alleges, or that which the defendant has brought to your attention by its testimony—then you cannot say, as honest men, that the company burned the cotton in consequence of the emission of sparks from its engine, and you will find for the defendant.

Of course, you are not obliged to be satisfied beyond a reasonable doubt, as counsel on both sides have told you. The rule in this court does not go to the same extent as in criminal cases, owing to the great tenderness of the law for the liberty and life of the accused. But yet the rule in this court is that evidence must amount to proof, whether it be circumstantial or positive; and if it does not amount to proof, the plaintiff must fail. If a man sues upon a note, and he cannot

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prove it, but can only \*adduce testimony that raises a probability, he cannot recover. So, if he sues upon an open account and cannot prove it, but can only adduce circumstantial

evidence that raises a probability that that account was contracted, he cannot recover. He must adduce satisfactory proof, so that the jury can say that the note was given, that the account was contracted, or, as in this case, that the cotton was burned in the manner alleged.

Suppose you come to the conclusion, from all the testimony, that that cotton was burned by a spark from the engine on that occasion, then you are but half through with the trouble; because then comes the question whether the spark from the engine that fired that cotton got there through the negligence of the employés of the company or not.

But just here, if you conclude that the spark burnt the cotton, then I hold that it devolves upon the defendant, the railroad company, to show that it was not occasioned by negligence. It throws upon the company the burden of proof that it did not occur through negligence. And when the company have introduced testimony to show that the privileges granted to them by the legislature were being exercised in a prudent and careful manner, that their engines were in good fix, with proper appliances for the suppression of sparks, so far as sparks can be suppressed, that they were running their trains in the usual way, and that the engines thus properly constructed in point of mechanism were managed with ordinary care and ordinary prudence, then it devolves upon the plaintiff to show that, notwithstanding that fact, there was some circumstance or some act of negligence on the part of the defendant which would render it liable.

What is the evidence of neglect? You have maps before you, one produced by each party, and I suppose there is not a great deal of difference between them, though I have not examined them with a great deal of scrutiny, because I have not thought it necessary, so far as I am concerned. But you will observe that the platform is close to the side track, so that a train can run up by the side of the platform and take in cotton. Now, gentlemen, that platform was erected by the town council, or at the special instance and request of the town council of

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\*Gaffney City. That town council had determined that all cotton sold there should be weighed by a public weigher, and the platform was erected for the convenience of the town in having cotton weighed there so that they could get the revenue, and to have a convenient point from which it could then be shipped. But it was erected there by permission of the railroad company; and when it was put there, each one who left his cotton there understood, or should have understood, and is presumed by the law to have understood, exactly what his risk was. Here was cotton placed by various individ-

uals upon a platform next to a railroad track upon which railroad trains were running, or engines passing, almost against that cotton many times a day; and the cotton was placed there with a full knowledge of the danger to that cotton from sparks from an engine.

In other words, those persons, whether compelled by the town council or not, have taken the risk upon themselves; the cotton is there exposed to sparks from engines of freight trains which pass near to it on that track, and from the engines of passenger trains which pass upon the main track, and the two tracks are very close together—those engines coming and going in both directions many times a day. Now, gentlemen, you must take that into consideration in this case. What, then, would prudence dictate on the part of these individuals? If that town council compelled persons who brought cotton to that platform to be weighed, and after being placed there it was burned by a spark from an engine without fault of its manager, but in the usual course of business—burned unavoidably, accidentally, from a spark—then common sense, common fairness and common justice would say to you that it would be an act of injustice to throw the loss upon the railroad company. I say that if it was burned there from a spark from an engine well constructed and prudently managed, and was burned simply because of its proximity to the railroad and without fault from the company, then it would be contrary to all sense of justice to make that company pay for it, and if fault is anywhere to be laid, it would be against those—whether the individuals themselves or the town council—who so arranged matters as to place the cotton in that position.

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\*Prudence would have dictated that they should have had a watchman there, that they should have had the place properly policed. The evidence is that the town council did have the place policed; that they took charge of it, had cotton weighed there, and that parties who had it weighed there, left it there, and that notice was put up forbidding smoking, and all that; and prudence would have dictated that a watchman should be kept there also. Because, gentlemen, there is no evidence that that platform was under the charge of the railroad company, and not being under the charge of the company, they were not bound to put a watchman there over it, and they were not bound to exercise special police care over it; that devolved upon the owners, or the town council as the representative of the owners.

But if this prudence was not exercised by the parties who put the cotton there, if they were negligent, it nevertheless did not excuse the railroad company for negligence, because it was by the permission of the rail-

road company that the platform was erected and that cotton was put upon it. And whilst the railroad company was not bound to exercise any care or control over that cotton, except that which it had received for, yet it was not excused from exercising the proper care and prudence in the management of its road; and if by any defect in the construction of the company's engines, or any negligence or imprudence in the management of those engines, the cotton was burned, the company would be responsible, notwithstanding the absence of a watchman.

Now, the question is, Was there negligence? The company owned its franchise and property, and it was authorized to operate a railroad, with all its incidents; and having the responsibilities as well as the rights of a railroad company, it had a right to run its trains there as often as its business required. It had a right to run its engines along the side track as well as along the main track. Both tracks belonged to the company and they were built for its use, and the right to control those tracks could not be affected by putting that platform there. But they must be controlled as railroad tracks, the engines run as railroad engines; it is necessary that the engines should be well constructed and have their proper appliances for the suppression of

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sparks, and that \*they should be run in the general course of business and carefully managed.

Now, where is the neglect? You will notice the distance between that platform and the main track on which the passenger trains run. The side track is up against the platform. How far the main track is from the side track I believe the testimony does not exactly show, except that they were close. On that main track the passenger engines were many of them running daily, and they had a right to run. How near were they to that cotton in thus running along that main track? It is said that this engine upon the side track went too near the cotton. Was there anything in the contract between the parties which inhibited a passenger train from running through that siding, close by that cotton, and coming out of the siding at the other end upon the main track? If there is nothing against it in the contract between the parties, the right to do so existed.

Then, was it prudent? Was it an act of negligence when the train took the side track, if it went a little beyond the clearing post? Was there anything in the charter of the railroad company, or in its usages, or was it an act of prudence that they should only go so far on the side track? Did the spark of fire, if it touched that cotton at all, come from the engine while it was on the side track, or when it was on the main track? If it was running along the main



track, either coming in or going out, in doing so how far was it from the platform? and did the spark fall upon the cotton when it was starting or when it was in motion?

Now, gentlemen of the jury, if you can find from the testimony that in this particular case there was anything out of order in the engine, or that the engine was pushed up so close to the cotton that it was negligence thus to do, and that while thus negligently there, the cotton was fired—if those facts and circumstances are sufficiently proved, you might then refer the fire to negligence on the part of the company. But, gentlemen, if the spark set fire to the cotton in the usual and prudent management of those engines, in a way that could not be anticipated and could not be guarded against, the plaintiff cannot recover against the defendant.

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\*You have heard the testimony of witnesses as to the position the engine on the side track took. Whether it went nearer to the cotton than it was on the main track I do not know. Some say it went nearer; others say that it did not go so near, and that it took its usual position on the side track and run in far enough for the other train to pass safely. If that is the case, and everything was in usual good order, the ordinary precautions used in the construction of the engine and in its use on that occasion, why, though much cotton was lost, the railroad company is not responsible, and it can only be responsible if on that day its conduct satisfies you that it was negligent. And that, gentlemen, is a question of fact, under the explanation I have given you.

From the fact that there was a heavy loss to private individuals, you must not take it for granted that the defendant caused it, or that, if they caused it, it was the result of negligence, but you must act upon proof in this matter. If the proof satisfies you first, that it was caused by sparks, and that the sparks came not in an ordinary and natural way, but from negligent conduct of the engineer on that day, then you should find for the plaintiff, and not till then.

On behalf of the defendant I am requested to charge you:

I. "That the defendant is not liable unless the evidence shows negligence on the part of itself or its servants, and that the burden of proof is on the plaintiff to show such negligence." Not in that shape can I charge. I charge you as follows: It devolves on the plaintiff to prove that the fire was caused by the defendant. Having proved this fact, the burden is then cast on the defendant to prove the absence of negligence and the use of due care. The fact that the fire occurred from a spark from the engine is not proof of negligence, if the engines were well constructed, having improved safeguards, and were prudently managed. But this the defendant must prove.

II. "That the measure of the defendant's duty is the ordinary care of a prudent man in the management of his own personal property." I would not say that, because negligence and prudence and care are relative terms, and what might be prudence in the management of private property might not

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be in the case of a \*railroad company. I say this is correct: That the measure of duty is the use of ordinary care by a well regulated railroad company in the conduct of its business.

III. "If it is probable that the fire originated from any cause other than the defendant's engines, the defendant is not liable." That is correct, with the insertion of the word "equally," so that it will read "If it is equally probable," &c.

IV. "That the defendant cannot be made liable on a mere probability that the fire was caused by its engine, but only on the preponderance of proof that it was so caused, and then only upon proof of negligence on the part of the defendant or its servants." That is correct; the probability must amount to proof.

V. "That if the jury believe from the evidence that the defendant corporation was provided with the most approved machinery for protection against fire, and that the said machinery was worked by careful and competent employes, they must find for the defendant." That is correct, provided the evidence is that the machinery was worked with reasonable care on that day.

VI. "That if the jury believe, from the evidence, that the defendant's engines were of the same construction and operated in the same manner on November 2d, 1879, the day of the fire, as at and prior to the time the cotton was placed on the platform, then the owners of the cotton took the general risk, and it was such contributory negligence on their part as defeats the plaintiff's right to recover." I do not charge in that shape. I say that: The owner of cotton on the platform took the risk arising from the usual and prudent running of the trains. Sparks are liable to be emitted from engines, and the risk of this liability from well-constructed and well-managed engines the plaintiff took.

VIII. "If the jury believe, from the evidence, that the town council of Gaffney City erected and controlled the cotton platform, and allowed persons to place cotton thereon, knowing its liability to destruction by fire, and did not take the necessary precaution to prevent it, this constitutes the intervention of an independent responsible agent, and the defendant is not liable." I would add to that, "except for negligent destruction of the cotton." The proposition would then be correct.

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\*IX. "That when the owner of the cot-

ton placed it on the town platform, in known proximity to passing trains, the duty was incumbent upon him to use due care for its protection, and the failure to do so would be negligence."

X. "That if the jury find that due care required a watchman for the protection of the cotton, it was incumbent upon the owners to provide one, and failure to do so was such negligence on their part as defeats the plaintiff's right to recover."

I shall charge this: The plaintiff should have taken steps of ordinary care to protect his cotton from ordinary danger. A watchman would have been a source of protection, but the want of a watchman over the cotton did not excuse the defendant for negligence. Sufficient proof of a negligent burning by defendant renders defendant liable, notwithstanding the fact that the plaintiff had no watchman.

First, you are to look to the fact: Did the defendant's engine burn that cotton? and before you can find for the plaintiff you must be satisfied, from the testimony on that point, that the engine did it. The evidence must not be merely enough to raise a suspicion, but it must produce satisfaction in your minds; and if you can account for the burning, under the testimony, upon any other hypothesis as well as the spark from the engine, then you cannot find for the plaintiff, because you must be satisfied that the allegation of the plaintiff, that it was burned by the spark, is true.

If you find that it was burned by a spark on that occasion, you still cannot find for the plaintiff unless it appears, from the testimony, that the defendant was negligent; and the first thing the defendant has to do, when the burning is proved to have come from its engine, is to prove the exercise of due care—that is, that the trains were running as the law allows, on a road chartered by the law; that they were running in the usual way; that the engines were in good fix, and used on that occasion with ordinary care and prudence. And, if that be the proof, then that negatives the idea of negligence, and the plaintiff must then resort to proof of positive facts and circumstances showing negligence. The plaintiff must show you, notwithstanding the engines were in good fix, and were running as the law al-

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lows, yet that the defendant did something on that particular occasion which amounts to actual negligence, and caused the destruction of that cotton; and, without proof of that kind, the plaintiff cannot recover if the defendant has negated the idea of negligence by proving that it had good engines, operated in the usual way.

You will then ask yourselves the question: If no cotton had been burned on that occasion would there have been any proof of any unusual conduct of the defendant at that

time? You will also ask yourselves the question, whether or not the fact of the cotton being burned has not given rise to the efforts to prove a departure from the usual rule on that day? When the trains had come and gone that day, was there anything that had occurred which amounted, in the mind of anybody there, to an act of negligence? Were the acts of negligence the results of after-thought, or did they actually take place on that day? And, if the evidence shows that the usual mode of the coming and departure of trains occurred on that day, that everything was in good fix, and managed in the usual prudent way on that day, then, gentlemen of the jury, the plaintiff cannot recover.

But, if the evidence satisfies you of the defendant's negligence, and that the engine burned the cotton, you will find for the plaintiff, and you must find the value of the cotton and interest up to this day. If, however, you are not satisfied from the testimony that the defendant burned the cotton, or that it was done negligently, in either event you must find for the defendant; and let your verdict, gentlemen of the jury, be according to your honest convictions from the testimony. We may feel that these people ought to be paid for their cotton, yet, if it was burned through their own fault, or the fault of the town council, or, if it resulted from unavoidable or actual accident, it would not be right for the company to pay for it. But, if the company burned it through improper management of their business on that day, they ought to pay for it.

The jury found for the defendant, and the plaintiff appealed.

Messrs. J. S. R. Thomson, Bobo & Carlisle, for appellant.

Messrs. D. R. Duncan, W. E. Earle, contra.

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\*March 13th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was brought to recover damages for twelve bales of cotton burned at Gaffney City on November 2d, 1879. The allegation was that the fire was produced by a spark from an engine of the defendant corporation, and the cotton consumed by their "careless, negligent and unskillful management." The cotton had not been received by the company, nor had there been any order to ship it. The owner had placed it on a platform, which, with the consent of the company, had been built adjacent to the side track of the railroad by the municipal authorities of the town of Gaffney, who retained control of it and established there public scales, which weighed all the cotton purchased at that point; but on the day of the fire there was no guard or watchman on duty to look after the cotton placed there.



At Gaffney, there is a side track of the defendant corporation near the main track, both running an easterly course from the direction of Spartanburg, the side track being north of the main track. The platform was west of the depot, a few feet from the side track. A street of the town crossed the railroad, and there was ample room for a train to stand on side track west of said street, the distance from clearing post to street being two hundred and eighty feet. About three hundred and fifty bales of cotton were burned, part of it on the platform and part on the ground. Some of this cotton had been received for by the company, and that they have paid for.

On the day the cotton was burned, the depot employes of the company were absent. On that day two passenger trains stopped at Gaffney, as they were in the habit of doing. The eastward bound train first came on the track, put out passengers, backed out and switched off on the side track. The westward bound train then stopped for a few minutes and passed on. The other train then backed, switched on to the main track, took on board the passengers and left for Charlotte. For a month previous the weather had been very dry, and on the day of the fire there was a brisk wind blowing from the southwest to northeast. There was conflict of testimony as to the precise point to which the engine went on the side track, and as to

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the time which elapsed after the train left, before the fire was discovered; and also as to the allegation that persons were on the cotton platform smoking cigars at the time the cars arrived. The defendant's witnesses testified that the engines were in good order and supplied with the most improved spark-arresters; and that the employes were careful and competent men, and acted with care and prudence that day.

After a full charge by the presiding judge, in which he carefully considered requests to charge by both parties, the jury found for the defendant, and the plaintiff appeals to this court, alleging that there was error in charging:

1. "That the fact that the fire occurred from a spark from the engine is not proof of negligence if the engines were well constructed—having improved safeguards, and were prudently managed.

2. "That the measure of defendant's duty is the ordinary care of a prudent man in the management of his own property.

3. "That if it is equally probable that the fire originated from any cause other than defendant's engine, the defendant is not liable.

4. "That defendant cannot be made liable on a mere probability that the fire was caused by its engines, but only on the preponderance of the proof that it was so caused, and then only upon proof of negligence on the

part of defendant or its servants; and that the probability must amount to proof.

5. "That if the jury believe, from the evidence, that the defendant corporation was provided with the most approved machinery for protection against fire, and that said machinery was worked by careful and competent employes, they must find for the defendant.

6. "That the owner of cotton on the platform took the risk arising from usual and prudent running of the trains: Sparks are liable to be emitted from engines, and the risk of this liability, from well-constructed and well-managed engines, the plaintiff took.

7. "That if the jury believe, from the evidence, that the town council of Gaffney City erected and controlled the platform, and allowed persons to place cotton thereon, know-

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ing the liability to destruction by fire, and did not take the necessary precaution to prevent it, this constitutes the intervention of an independent responsible agent, and the defendant is not liable, except for negligent destruction of the cotton.

8. "That the liability of defendants, as common carriers, did not arise in this case.

9. "That prudence would dictate that the town council of Gaffney should have a watchman in charge of the cotton placed at or near platform.

10. "In charging that the defendant had the right to run its engines along the side track as well as along the main track; that both tracks belonged to the company, and were built for its use; and the right to control these tracks could not be affected by putting that platform there.

11. "In charging that if there was nothing against it in the contract of the parties which inhibited it, the defendant had the right to run the passenger train through the side track close by the cotton, and come out on the main track at the other end of the siding.

12. "In charging that it required a great preponderance of testimony to establish the fact of burning the cotton by sparks from the engines."

There were, really, only two questions in this case: First. Whether the fire which consumed the cotton was caused by a spark from an engine of the company; and, if so, second, Whether that was an act of negligence for which the company should be held liable. The former was a pure question of fact for the jury; and the latter also, except in so far as it involved the necessity of defining what constitutes negligence. This was for the judge, and if he defined it correctly, as applying to the circumstances, then the whole case was for the jury. They found for the defendants, which must have been upon the ground, either that the fire did not proceed from the engine, or that there was no negligence; and in either case the verdict is con-

clusive upon us, unless there was some error of law in submitting the case to the jury.

We will consider together exceptions 1, 2, 5, 6, 8, 10 and 11, as to the rights, duties and

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liabilities of the railroad company in \*relation to the cotton of the plaintiff. We cannot say that it was error in the judge to charge that the company was not liable for the cotton as a common carrier, and, therefore, bound to account for its value, if it was set on fire by a spark from one of the engines, whether that was done negligently or not. The plaintiff himself placed the cotton in proximity to the track without any agency of the company, and on a platform which did not belong to it. The company may not have known of the existence of this particular lot of cotton. They certainly had not, directly or indirectly, received it or come under any obligation to exercise special police care over it, or even to transport it. They stood to this cotton as to any other property placed by the owner near the track, and which did not belong to them. That is to say, they could not injure it willfully, wantonly or negligently; but, having the right, by charter of the State, to run upon their track locomotives propelled by steam, they were not responsible for the consequences which might result as an incident from such use of locomotives as would be inevitable accident, provided it appeared that such consequences had resulted notwithstanding the exercise of proper care and diligence; and the fact of the injury being proved, the onus was upon the company to disprove negligence, which they might do by showing that they had the most approved mechanical contrivances to prevent the escape of fire, and that on that day such engines were managed with due care and skill.

We think the charge of the judge was in accordance with the principles laid down by Mr. Pierce: "A railroad company, being authorized by law to work its engines in the usual and proper way, and, when necessary in the exercise of this right, to send forth particles of fire from them, is not liable for injuries caused thereby to private property, provided it exercises its rights in a lawful manner, and with reasonable care and skill.

\* \* \* The plaintiff must show that the fire originated from the company's engines. It is not sufficient to show a possibility that the injury was caused by the company. The proof that the company caused the fire may be circumstantial as well as direct. As negligence is the gist of the action against the company for injuries received from it while

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exercising its lawful right to conduct its trains, the burden of proof is on the plaintiff to prove the negligence. The fact of injury suffered by the plaintiff in consequence of the exercise of a right by the defendant, does not raise the presumption of negligence, ex-

cept in some particular cases, as in actions against innkeepers and common carriers, which are made exceptions to the general rule on grounds of public policy. Hence, the setting on fire of grass, fences or buildings, on the railroad, by particles of fire, which are proved to have issued from the company's engines, does not, of itself, justify the inference of negligence. There are, however, authorities which hold that the fact that the company caused the injury by fire, raises the presumption of its negligence, and that, upon this fact appearing, the burden of proof is on the company to disprove negligence by showing that it used the best mechanical contrivances in known practical use to prevent the escape of fire from its engines, and that it managed such engines with due care and skill." *Pierce Railr. L.* 431, 437 and 438, and many authorities there cited; *McCready v. S. C. R. R. Co.*, 2 Strobl. 356.

We can see no difference in this respect between the use of the side track and that of the main road, subject, of course, to the same rule of proof as to negligence. Both belonged to the company, and both, built in the same right, had their proper uses connected with the running of the road. The platform, placed near the side track by the town authorities, did not impose on the company a measure of responsibility as to the use of that siding, other than that which existed as to the use of the main track. The plaintiff chose to put his cotton on the platform close to the side track, and, as the judge states, "When he placed it there he took the risk arising from the usual and prudent running of the trains."

Exceptions 7 and 9 complain that the judge charged: "That if the jury believe from the evidence that the town council of Gaffney City erected and controlled the cotton platform, and allowed persons to place cotton thereon, knowing its liability to destruction by fire, and did not take the necessary precautions to prevent it, this con-

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stitutes the intervention of an \*independent responsible agent, and the defendant is not liable, except for negligent destruction of the cotton."

We do not see how this could prejudice the plaintiff. The defendants were liable for the cotton burned which they had receipted for, not on the ground of negligence, but as common carriers, and it was a matter for them to decide, with reference only to their own security, whether they would keep a guard there or not. They were not bound to do so, in order that, as an incident, the cotton of the plaintiff might also be protected. In the same connection in which he referred to the want of prudence on the part of others in having this cotton guarded, the judge said: "But, if this prudence was not exercised by the parties who put the cotton there, if they were negligent, it, nevertheless



did not excuse the railroad company from negligence, because it was by their permission that the platform was erected and the cotton put on it. And, whilst the railroad company was not bound to exercise any care or control over that cotton, except what it had receipted for, yet it was not excused from exercising the proper care and prudence in the management of its road; and if, by any defect in the construction of the company's engines, or any negligence or imprudence in the management of their engines on that day, the cotton was burned, the company would be responsible, notwithstanding the absence of a watchman," &c.

Exceptions 3, 4 and 12, in different form, make the point that the judge erred in charging "that defendant cannot be made liable on a mere probability that the fire was caused by its engines, but only on the preponderance of proof that it was so caused, and then only upon proof of negligence on the part of the defendant or its servants, and that the probability must amount to proof." We have already disposed of the question of proof as to negligence. This part of the charge, in terms, had reference to the primary issue, whether the fire was caused by the engine of the company. That was purely a question of fact, as to which the onus was on the plaintiff. Was it error for the judge to say to the jury, in submitting that issue, that the allegation should be made out by "the preponderance of proof—that it was not sufficient if there was an equal probabil-

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ity that \*the fire originated from some other cause; that the probability must amount to proof?"

It is contended that, in reference to the findings of facts by a jury, there is really no distinction between probability and proof, and that the charge led the jury to infer that positive, as distinguished from circumstantial, evidence was necessary. The whole charge shows, unmistakably, that such was not the meaning of the judge. He says: "The evidence must not be merely enough to raise a suspicion, but it must produce satisfaction in your minds, and, if you can, under the testimony, account for the burning upon any other hypothesis, as well as the spark from the engine, then you cannot find for the plaintiff, because you must be satisfied that the allegation of the plaintiff is true." And at another place he says: "Does the great preponderance of testimony satisfy your mind that sparks from the engine fired that cotton, or that it was fired by a spark, or coal, or a bit of burning tobacco from a pipe? Now, to which, as twelve men in honest search of truth, from the testimony in this case—not from conjecture, not from probability—to which cause will you refer it? That is for you."

It seems to us that there is a difference

between probability and proof. The object of both words is to express a particular effect of evidence, but "proof" is the stronger expression. All the dictionaries give different definitions of "probability." One of Worcester is, "Likelihood of the occurrence of an event in the doctrine of chances, or the quotient obtained by dividing the number of favorable chances by the whole number of chances;" and one of Webster is, "Likelihood; appearance of truth; that state of a case or question of fact which results from superior evidence or preponderation of argument on one side, inclining the mind to receive it as the truth, but leaving some room to doubt. It therefore falls short of moral certainty, but produces what is called opinion. Demonstration produces certain knowledge, proof produces belief, and probability opinion." We think the case was fully, fairly and clearly submitted to the jury.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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19 S. C. \*60

\*McDANIEL v. STOKES.

(November Term, 1882.)

[1. *Appeal and Error* ⇨273.]

An exception in the words "that the order is unauthorized by any statute or law in South Carolina," is really no exception at all.

[Ed. Note.—Cited in *Weatherly v. Covington*, 51 S. C. 56, 28 S. E. 1.

For other cases, see *Appeal and Error*, Cent. Dig. § 1621; Dec. Dig. ⇨273.]

[2. *Continuance* ⇨7.]

Continuances are within the discretion of the Circuit judge.

[Ed. Note.—Cited in *State v. Lucker*, 40 S. C. 550, 18 S. E. 797.

For other cases, see *Continuance*, Cent. Dig. § 17; Dec. Dig. ⇨7.]

[3. *Execution* ⇨364.]

After return of execution unsatisfied, the court may, under proper proceedings, require money in its hands, belonging to the defendant, to be applied to the payment of the debt.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1100; Dec. Dig. ⇨364.]

Before Aldrich, J., Greenville, April, 1882.

The case is fully stated in the opinion of this court.

Mr. E. F. Stokes, for himself, appellant.  
Mr. D. P. Verner, contra.

March 13th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. As settled by the judge, the facts were as follows: On January 10th, 1881, J. G. Hawthorne, Esq., a trial justice for the county of Greenville, issued a summons against the defendant, Edward F. Stokes, requiring him to answer the complaint of W. B. McDaniel, plaintiff, claiming judgment for \$58.20 for printing a

brief. The defendant was served on January 17th, but he failed to appear on the day named for trial, February 26th; and on that day the trial justice gave judgment for the plaintiff, and issued a transcript of said judgment, which was filed in the clerk's office, and execution issued thereon. On April 1st, 1882, the sheriff returned the execution "wholly unsatisfied."

On April 4th, 1882, D. P. Verner, attorney for the plaintiff, made affidavit that the judgment had been duly rendered in the action by a trial justice against the defendant for \$58.20 and costs, a transcript of which had been duly docketed in the office of the clerk of the court, and execution issued thereon; that the said execution had been returned by the sheriff wholly unsatisfied, and was still unsatisfied; and that Samuel J.

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Douthit, \*Esq., master of the court for said county, had money of the defendant in his hands exceeding the amount of ten dollars. Upon the filing of this affidavit, Judge Aldrich, presiding judge at Greenville, passed an order requiring the defendant, Stokes, to show cause, on April 8th, 1882, why the master should not be required to pay the said judgment and costs out of funds in his hands belonging to the defendant, and directed the order, with a copy of the above affidavit, to be served upon the defendant, which was done.

On April 11th, 1882, the defendant was not in court, and had filed no return to the rule to show cause. He declined to come into court on account of indisposition, and having given him notice that he could not continue the case, the judge, on reaching the case, granted an order requiring the master to pay the judgment, \$58.20, and the costs of the proceedings out of money in his hands belonging to the defendant. From this order the defendant appeals to this court, upon the ground "That the defendant excepts to the whole proceeding, and submits that the order is unauthorized by any statute or law in South Carolina."

This general objection to the order of the judge is really no exception at all. "The points of law wherein error is charged should be specifically stated in exceptions, otherwise the court has no guide as to the matters contested. It is not a compliance with the first section of the act of 1878 to except in general terms. This court is excluded from considering the sufficiency or insufficiency of evidence or any other question except errors of law, and it is indispensable to the discharge of that duty that the questions submitted for consideration should be separately and distinctly stated." *Norton v. Livingston*, 14 S. C. 178.

But we may say that we see no error in the order to which objection is made. It was entirely within the discretion of the

Circuit judge to decide whether the defendant was entitled to a continuance as to the rule served upon him.

In regard to "proceedings supplementary to the execution," section 312 of the revised code provides that "When an execution against property of the judgment debtor, issued to the sheriff of the county where he resides, or has a place of business, or if he does not reside in the State, to the sheriff

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of the county \*where a judgment-roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the Circuit Court, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, in the county to which the execution was issued." And section 317 provides that "the judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself, or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, except." &c., &c. *Earle v. Stokes*, 5 S. C. 340; *Voorhies' Code*, 471 (10th ed.)

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 19 S. C. 62

STATE, ex relatione SLAY, v. WILLIAMS.

(November Term, 1882.)

[1. *Principal and Surety* ¶152.]

The surety on a sheriff's bond may be sued without joining the sheriff, or, if he be dead, his representative.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 417; Dec. Dig. ¶152.]

[2. *Principal and Surety* ¶140.]

It is not necessary that judgment should be obtained against the sheriff, or his representative, before such suit is instituted against the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 389; Dec. Dig. ¶140.]

[3. *Sheriffs and Constables* ¶162.]

To constitute a cause of action against the surety in such case, it is not necessary to allege and prove demand and refusal as to the sheriff, or his representative, nor to allege judgment obtained against the sheriff, or his insolvency.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 388-390; Dec. Dig. ¶162.]

[4. *Pleading* ¶35.]

It is surplusage to allege in a complaint that which need not be proved at the trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 76-80; Dec. Dig. ¶35.]

5. This case, distinguished from *State, ex relatione Coleman, v. Cason*, 11 S. C. 392.

[6. *Pleading* ¶42.]

[Cited in *Gist v. Telegraph Co.*, 45 S. C. 365, 23 S. E. 143, 55 Am. St. Rep. 763, to the



point that, for a complaint to be defective, something must be omitted which the plaintiff is required to prove in order to maintain his suit.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 96; Dec. Dig. ¶ 42.]

Before Pressley, J., Abbeville, June, 1882.

This was an action in the name of the State, ex relatione Sallie R. Slay, in behalf of herself and other creditors, under the official bond of L. P. Guffin, late sheriff, against Roger L. Williams, commenced in March, 1882. The opinion states the case.

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\*Mr. L. W. Perrin, for appellant.  
Messrs. Noble & Noble, contra.

March 15th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was an action on the official bond of the late sheriff of Abbeville county, one Lawrence P. Guffin, on which the defendant, appellant, was bound as one of the sureties of the said Guffin. The bond was in the usual form of such bonds, and obligated the parties jointly and severally.

The respondent brought the action in behalf of herself and all other creditors of the said sheriff who might come in and contribute to the expenses, alleging, as breaches of the bond, that Guffin had collected and received large sums of money on executions and orders of court, all of which should have been paid over to the parties entitled thereto, and especially, that he had collected for the relator on July 4th, 1876, the sum of one hundred and twenty-nine dollars in a certain case in which she was interested, and had failed to pay it over to her, or deposit the same according to law, and that the defendant surety, although demanded of him since the death of Guffin, had refused to pay the same, and she demanded judgment for the sum of \$10,000, the penalty of the bond.

The defendant filed a formal demurrer because it appeared on the face of the complaint: First. "That the personal representative of the deceased sheriff was not joined in the said action as a party defendant." Second. "That the co-sureties upon the official bond sued on were not joined in the said action as parties defendant." And, at the hearing, the defendant further demurred: "That the complaint did not state facts sufficient to constitute a cause of action, in this, that a judgment against the sheriff is necessary before a surety can be sued upon an alleged breach of the bond; no judgment having been alleged in complaint it is defective."

The Circuit judge, Judge Pressley, pronounced the following decree: "This is a suit against a surety to sheriff's bond, and defendant demurs specially on the ground

that the representative of the deceased sheriff is not joined in the suit. And, further,

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\*really on the ground that the complaint, in failing to allege a judgment against the sheriff, does not state a sufficient cause of action. In *Treasurers v. Gibson*, 3 Hill 339, the sheriff was not joined; there was no judgment against him, and no demand on him for the money. The court, by Judge Richardson, held that the action could be maintained on proof that the sheriff was absent from the State. In *Taylor v. Easterling*, 1 Rich. 314, a similar case, the court, by Judge O'Neill, held that the action could be maintained on proof that the sheriff was dead. The demurrer is, therefore, overruled, with costs to follow the result of the suit, and defendant is granted leave to answer the complaint within twenty days after notice of this decision."

The defendant has appealed from this decree upon exceptions: 1. "For defect of parties, in this, that the sheriff or his personal representative should have been joined. 2. Because the insolvency of the sheriff is not alleged, nor that judgment had been obtained against the sheriff or his representatives. 3. Because no demand is alleged to have been made upon the sheriff or his personal representatives. And 4. Because the complaint does not state facts sufficient to constitute a cause of action."

The questions involved are: First. Can a surety on sheriff's bond be sued without joining the sheriff, or his representatives, if he be dead? Second. Before suit against the surety, is it necessary that judgment should be obtained against the sheriff, or his representatives, if he be dead? Third. To constitute a cause of action against the surety in such case, is it necessary to allege and prove demand and refusal as to the sheriff, or his representatives, or judgment obtained against the sheriff?

In the face of the two cases, referred to by Judge Pressley, and found in our own reports, the questions raised do not need much discussion at our hands. Where the court of last resort in this State has once decided a question, until overruled, it is controlling, and where the question arises again it is wholly unnecessary to do more than to cite the previous decisions.

As was said by Judge Pressley, in the *Treasurers v. Gibson*, supra, the sheriff was not joined; there was no judgment against him, and no demand for the money—the

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court holding that, as \*the sheriff was absent from the State, no demand was necessary. In the case of *Taylor v. Easterling*, the sheriff was dead; no demand was required, nor was there joinder of the representatives of the sheriff. These cases, in their facts, run parallel to the case now before us in many respects, and yet the actions in these cases were maintained, without joinder and with-

out demand in the last case, and without judgment, joinder or demand in the first.

If this be so, the failure to allege these facts did not leave the declaration or complaint so defective as not to contain a cause of action, or, otherwise, these cases would have been dismissed. For a complaint to be thus defective, something must be omitted which the plaintiff is required to prove, in order to maintain his suit. In the cases above referred to, it was held that it was not necessary for the plaintiff to prove the facts relied on by the appellant to sustain his demurrer. If they were not necessary facts in the evidence, it would have been surplusage to allege them in the complaint.

It is true it was held in *State, ex relatione Coleman, v. Cason*, 11 S. C. 392, that an allegation in a complaint of an unsatisfied judgment against the sheriff alone, for moneys received by him in his official capacity, and converted, states a cause of action against him and his sureties on his official bond, and is *prima facie* evidence against the sureties of a breach of the bond; but it is not stated that there can be no cause of action against the sureties without this allegation. In fact, inasmuch as such judgment is only *prima facie* evidence, the sureties being allowed to reject it if they see proper, and can do so, it would seem that the existence of such judgment is not an essential averment, any other allegation of default and breach of the bond being sufficient.

Whatever may be the law as to other quasi-official bonds requiring the performance of duties, we think this case must be governed by *Treasurers v. Gibson and Taylor v. East-erling*, *supra*.

It is, therefore, the judgment of this court that the judgment of the Circuit Court be affirmed.

# 19 S. C. \*66

## \*JONES v. FULLER.

(November Term, 1882.)

### [1. Evidence 470.]

The exception to the general rule, that the opinions of witnesses are not competent evidence, is not confined to the case of expert testimony.

[Ed. Note.—Cited in *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 561; *Bridge v. Asheville & S. R. Co.*, 25 S. C. 26; *State v. James*, 31 S. C. 233, 9 S. E. 844; *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 449, 35 S. E. 745; *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 129, 54 S. E. 255; *State v. Stockman*, 82 S. C. 395, 64 S. E. 595, 129 Am. St. Rep. 888; *Miller v. Hamilton-Brown Shoe Co.*, 89 S. C. 534, 72 S. E. 397, Ann. Cas. 1913B, 166; *Hand v. Catawba Power Co.*, 90 S. C. 271, 73 S. E. 187.

For other cases, see Evidence, Cent. Dig. § 2220; Dec. Dig. 470.]

### [2. Evidence 501.]

While it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is

not necessary to do so where the facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion. Such evidence is competent from the necessity of the case.

[Ed. Note.—Cited in *Ward v. Charleston City Ry.*, 19 S. C. 525, 45 Am. Rep. 794; *State v. Summers*, 36 S. C. 485, 486, 15 S. E. 369; *State v. Lee*, 58 S. C. 354, 36 S. E. 706; *State v. Stockman*, 82 S. C. 395, 64 S. E. 595, 129 Am. St. Rep. 888; *Nelson v. Charleston & W. C. Ry.*, 92 S. C. 163, 75 S. E. 408; *Henry v. Southern Ry.*, 93 S. C. 128, 75 S. E. 1018; *Barnett v. Gottlieb*, 98 S. C. 183, 82 S. E. 407.

For other cases, see Evidence, Cent. Dig. § 2292; Dec. Dig. 501.]

### [3. Evidence 498.]

In action for breach of promise of marriage, witnesses for the plaintiff, her neighbors and the intimate friends of her family, were permitted to testify as to what, in their opinion, was the amount of damage she had sustained by reason of the breach. Held, that such evidence was admissible.

[Ed. Note.—Cited in *State v. Merriman*, 34 S. C. 37, 12 S. E. 619; *State v. Sullivan*, 43 S. C. 208, 21 S. E. 4; *Cothran v. Knight*, 45 S. C. 3, 22 S. E. 596; *Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 24, 43 S. E. 307; *Willis v. Western Union Tel. Co.*, 69 S. C. 535, 536, 48 S. E. 538, 104 Am. St. Rep. 828; *Mauldin v. Seaboard Air Line Ry.*, 73 S. C. 12, 52 S. E. 677; *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 94, 54 S. E. 244; *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 129, 54 S. E. 255.

For other cases, see Evidence, Cent. Dig. § 2289; Dec. Dig. 498.]

Before Wallace, J., Laurens, September, 1882.

Action by Mary Belle Jones against P. H. E. Fuller. The opinion states the case.

Mr. B. D. Cuninghame, for appellant, cited 10 Pick. 477; 21 Id. 142; 22 Id. 427; 27 Me. 35; 19 Wend. 232; 1 Hawks 6; 1 Greenl. Evid., § 440; 13 N. J. 232; 1 McMull. 57; 1 Paige 171; 4 Den. (N. Y.) 311; 17 Wend. 136, 161; 4 Id. 320; 12 Me. 310; 3 N. H. 357; 20 Wis. 262; Sedgw. Dam. (5th ed.) 228, 421, 693.

Mr. R. C. Watts, contra, cited Whart. Ev., §§ 509, 512; 27 Conn. 192; 17 Id. 249; 117 Mass. 133; 14 N. Y. 562; 1 McMull. 56; 14 Serg. & R. 142; 13 Metc. 288; 49 N. H. 399; 56 Id. 227; 29 Mich. 173; 1 Greenl. Evid., § 440; 2 Id., § 171.

Mr. D. R. Duncan, in reply.

March 17th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover damages for a breach of promise

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of marriage. The contract and the breach thereof were fully established, not only by the admission in the pleadings, but also by testimony adduced at the trial, and the only question for the jury was as to the amount of the damages.

The plaintiff, after adducing testimony as to the contract and its breach, offered evi-



dence tending to show the damages which she had sustained. Amongst other witnesses offered for this purpose, Dr. E. G. Simpson was examined, who testified "that he had known the plaintiff from her infancy, having been the family physician; that the social standing of the family was as good as any in the county; that the plaintiff was particularly bright and attractive, and that she was well educated; that her engagement to Fuller was well known in the community, and also the treatment which she had received from Fuller; that he thought she had been seriously damaged."

This witness was then asked the following question: "From what you know of all the facts and circumstances, how much was the plaintiff damaged?" To this question the defendant objected, and his objection being overruled, the witness answered as follows: "That he thought the plaintiff had been seriously—somewhere from \$5,000 to \$10,000." The next witness offered was Col. John G. Williams, who, after testifying substantially as Dr. Simpson had done, was asked the same question, as to what he thought was the amount of the damages sustained by plaintiff, to which, after objection, which was overruled, he replied: "Her damages are incalculable in dollars and cents—certainly not less than \$10,000."

No testimony was offered on the part of the defense, and the Circuit judge, after instructing the jury that the only question for them to determine was the amount of the damages, the contract and its breach having been admitted by the pleadings, proceeded to charge the jury in these words: "In considering the damages, it would be their duty to consider all the facts as brought out in the evidence, and that they were not bound to take the amounts stated by the witnesses, but could find their verdict regardless of any sum mentioned or named by any witness. That the amount of the damages belonged exclusively to them, and must be reached from the facts;

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that they could \*find from the smallest coin to \$10,000," that being the amount demanded in the complaint.

The jury found a verdict in favor of the plaintiff for \$9,000; and a motion for a new trial, on the minutes, having been refused, the defendant appealed from the judgment entered on the verdict on the following ground: "Because his Honor erred in allowing the witnesses, Dr. E. G. Simpson and Col. John G. Williams, to state to the jury their opinions as to the damages inflicted upon plaintiff by breach of contract of marriage by the defendant."

While much has been written by elementary writers, and in the opinions of the courts, as to the admissibility of the opinions of witnesses as evidence, we are not aware of any case in which the precise question raised by this appeal, has been determined. We must, therefore, resort to the general principles of

evidence, and from them deduce the rule applicable to this particular case.

There can be no doubt that, as a general rule, a witness is not at liberty to express an opinion, but must confine himself to the statement of facts; but there is as little doubt that this rule is subject to many exceptions. This will be seen by reference to the case of *Commonwealth v. Sturtivant*, 117 Mass. 122, and the note to that case as reported in 19 Am. Rep. 410, as well as to the case of *State v. Pike*, 49 N. H. 399, reported also in 6 Am. Rep. 533; especially the dissenting opinion of Doe, J., which afterwards received the sanction of the same court in *Hardy v. Merrill*, 56 N. H. 227 (22 Am. Rep. 441), where the case of the *State v. Pike* was overruled. In these cases will be found elaborate discussion of the subject and very full collections of the authorities.

In 1 Whart. Ev., § 511, the writer, in discussing this subject, after mentioning many instances in which exceptions to the general rule have been allowed, lays down the following principle: "Whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, then a witness may describe it by its effect on his mind, even though such effect be opinion." Again, in section 450, the same author, in showing that the exception to the general rule is not confined to the

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\*case of the testimony of an expert, speaks of the admissibility of opinions as to the amount of the damages caused by another's act, in these words: "When the thing damaged is one of everyday use, whose depreciation an ordinary observer can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified, then they must be stated; if the conclusion is one which the jury can draw, then to the jury must be left the drawing the conclusion. But when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by the witness."

In *Commonwealth v. Sturtivant*, supra, it is said: "The exception to the general rule, that witnesses cannot give opinions, is not confined to the evidence of experts, testifying on subjects requiring special knowledge, skill or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice."

In *Hardy v. Merrill*, it is said: "Opinions of witnesses, derived from observation, are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained."

The case of *Seibles v. Blackwell*, 1 McMull. 56, referred to in the argument, is not in conflict with these authorities. There the question was, whether non-professional witnesses could express an opinion as to the existence of disease in a slave; and the point really decided was, that they could do so, inasmuch as it appeared that they had first stated the facts upon which they based their opinions. It is true, O'Neill, J., did say, that if they had merely expressed their opinions without stating the facts, their testimony ought to have been rejected; but that was said in reference to a case where the facts could have been reproduced before the jury.

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\*From these authorities we deduce the following conclusions: First. That the exception to the general rule, that the opinions of witnesses are not competent evidence, is not confined to the case of expert testimony. Second. That while it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is not necessary to do so where the facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion. Third. That such evidence is competent from the necessity of the case.

Now, to apply these principles to the case under consideration: The only question for the jury was as to the amount of damages sustained by the plaintiff, and this question was to be determined by the evidence adduced. The witnesses whose testimony was objected to, were not strangers who were called upon to express an abstract opinion as to the amount of damages which a lady would sustain by the breach of promise of marriage, but they were intimate acquaintances, who knew well the social position of the plaintiff, her temperament and disposition, and all her surroundings, and from the knowledge thus acquired they formed their estimate of the damages which she had sustained. It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained? We think it was just one of those cases where, in the language of that eminent author,

Wharton, the "facts can be best expressed by the damage they cause."

In our judgment, therefore, there was no error in admitting the testimony of these witnesses, especially where, as in this case, the jury were carefully instructed that they were not bound to adopt the estimates made by the witnesses, but they were to be considered along with all the other testimony

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in the case, from which the jury were to make their own estimate as to the amount of damages.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 71

PINCKNEY BROS. v. W. U. TELEGRAPH COMPANY.

(November Term, 1882.)

[1. *Telegraphs and Telephones* ¶39.]

A telegraph company, having received and transmitted a message, but with a mistake in its terms, resulting in loss to the sender, proof of due care by the company, or of the absence of negligence and carelessness on their part, is a good defense to an action brought to recover for such loss.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 34; Dec. Dig. ¶39.]

[2. *Telegraphs and Telephones* ¶36.]

Telegraph companies are not liable for all mistakes made in the transmission of messages, except such as they may show to have occurred from an act of God, or irresistible force.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31, 32; Dec. Dig. ¶36.]

[3. *Telegraphs and Telephones* ¶36.]

Telegraph companies are not held to the liability imposed by law upon common carriers, but are to be governed by the law applicable to that class of bailments styled *locatio operis faciendi*.

[Ed. Note.—Cited in *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 91, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870.

For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31, 32; Dec. Dig. ¶36.]

[4. *Appeal and Error* ¶968.]

The ruling of the trial judge, directing the empanelling of jurors who had formed an opinion, not disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3843; Dec. Dig. ¶968.]

[5. *Telegraphs and Telephones* ¶70.]

Under action brought against a telegraph company for damages to the extent of a loss caused by an error in the transmission of a telegram, plaintiff, failing to sustain his elected cause of action, is not entitled to recover an amount stipulated in his contract as the measure of the company's liability in case of error.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 72; Dec. Dig. ¶70.]

[This case is also cited in *Hill v. Western Union Telegraph Co.*, 42 S. C. 368, 20 S. E. 135, 46 Am. St. Rep. 734, without specific application.]



Before Hudson, J., Charleston, December, 1881.

This was an action commenced by the plaintiffs, October 25th, 1880, to recover from the defendant \$271.50, upon the statement in the complaint that, on the evening of May 22d, 1880, plaintiffs had delivered to the defendant's agent, in Charleston, S. C., to be sent as a night message, the cipher dispatch, which will be found in full in the opinion of this court; that such dispatch, when translated, had the following meaning: "If market firm, with hardening tendency, buy on best terms for the month of August, one hundred bales of cotton; if market has downward tendency, sell on best terms for the month of August, two hundred bales of cotton;" that the telegram was duly delivered in New York to F. Warley on the next morning, written as sent, except that the word "humor," meaning one hundred bales

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\*of cotton, was changed to "hump," which stood for four hundred bales; that the purchase was accordingly made of 400 bales, which, when discovered, plaintiffs endeavored to cover by selling 300 bales of August delivery, but the loss occasioned by the error, although reduced by plaintiffs' sale, amounted to the sum demanded in their complaint.

It will be observed that the error complained of was caused by a change of the letters "or" into the letter "p." The testimony showed that the message was legibly written by the plaintiffs, was sent by a skillful operator in Charleston, and received by the ear of an experienced operator in New York; that the letter "o" was indicated by a dot, a space and a dot, and the letter "r" by a dot, a space and two dots, and the letter "p" by five dots, or represented on paper "or" would be . . . . . and the letter "p" . . . . .; that their instruments were the most approved, and then in good order; that mistakes occurred in telegraphing which could not be accounted for, resulting, principally, from crossing of wires, atmospheric disturbances and improper adjustment of instruments; that no other mistakes occurred on that night between Charleston and New York.

Two of the jurors were sworn on their voir dire, one of whom stated that he had formed an opinion as a jurymen in a similar case, tried a few days before; that he was not conscious of any bias, but had formed an opinion as to the sending of telegraphic messages, but, if sworn as a juror, would decide the matters of fact according to the testimony; nor would the opinion formed sway him outside of the testimony; that if the company failed to show cause for mistakes he had formed an opinion. The other juror was asked if he had formed any opinion as to the liability of telegraph companies, which would cause him to decide other than upon the testimony in this case.

To this he replied: "No; but I think that in the transmission of telegraphic messages accidents will occur, and influences will operate, which cannot be explained in testimony. In cases of that kind I have made up my mind as to where the liability rests." Both jurors were sworn, the plaintiffs excepting.

The judge charged the jury as follows:

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\*This is an action to recover damages because of a mistake made in the transmission of a telegram by the Western Union Telegraph Company, which, it is alleged, caused an immediate and direct loss to Pinckney Bros. The charge is a breach of contract on the part of the company. The contract by which these parties are to be governed is printed here on the telegraph blank; and this and no other contract is to bind them. When Pinckney Bros. signed this contract they became parties to it; and when the company accepted the telegram it became the contract of the two parties. This is the contract: \* \* \*

Now, the telegraph company has entered into the contract to send this message as a night message, under the conditions stated above, and Pinckney Bros. assented to those conditions. The contract is to be expounded by myself. Is there in this contract anything which renders it void? The telegraph company has a right to make rules of a reasonable character for the conduct of its business. And it has a right to limit its liability by means of its written contracts. But, being an institution of a public character, to which the public are free to resort, it is against public policy for the company to exempt itself from all liability, from whatever cause. It cannot exempt itself from the errors occurring through the acts of its agents, of a negligent and careless kind. It cannot obtain exemption from the gross negligence of its agents.

This contract bound this company to deal with this message as a night message, subject to all the usual risks of a night message—freeing itself from all liability except the fraud, malpractice and gross negligence of its agents. When Pinckney Bros. selected a night message instead of a day message, they selected a message which was without many of the advantages of a day message, chiefly among which was that which would have insured absolute safety, viz.: the repeating of it. They subjected themselves to the risks incidental to a night message, and, in doing so, they then had a right, in case of a breach of this contract, to hold the company to that degree of diligence which they were bound to use in transmitting a night message, and not the amount of diligence required in the transmission of a day message, or one ordered to be repeated.

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\*This is a cipher message; a message which evidence is introduced to show that

the officers of the company did not understand. To them it was a blank, so far as the meaning was concerned, and it is contended, therefore, that they could not have had in contemplation the loss which would flow from the erroneous transmission of the telegram; and that, under these circumstances, only nominal damages can be recovered. They have undertaken to transmit that message according to the terms of this contract, upon their usual night message blanks; and whatever loss flowed directly and immediately from the failure to transmit that message correctly, is the subject for a claim for damages against the company, and must be recovered unless the mistake made in the transmission of the message is not attributable to the negligence of the company or its officers. Undertaking to transmit the cipher message without demanding an interpretation of it, they undertook to transmit just as they would have transmitted any other message, written on their day or night blanks, under their contracts.

This brings us then to the question of negligence—to the testimony in this case. That is a matter for you and not for me. I would say to you, that the facts must be investigated by you with utmost fairness and impartiality, and with strict reference to this contract, with the modifications I have given you. The plaintiff in this case has proved the contract; he has established the receipt of the message, with the error existing, and that certain loss accrued to him. Having established that, I have been holding throughout this case, and so instruct you now, that the plaintiff could there rest; and that the burden of proof would be on the defendants to explain to you, that the error occurred through no fault of theirs—to rebut this prima facie case of the plaintiff, to show due diligence and care in the transmission of this telegram, as a night message, and under all the attendant disadvantages of a night message. You must not allow the fact that it is a night message, and a cheap message, to pass out of your mind. The company has come forward and has endeavored to make this explanation.

In the other case, which some of you had under consideration, a question put by your

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foreman showed that a portion of my \*charge was misunderstood. The company is not called upon to explain how the mistake did occur, because that might be an impossibility. The mistake might have occurred in a way so subtle and mysterious that no one could find it out. But it is the duty of the company to prove that they had an expert and skillful operator here; that the machinery of the company was in good working condition; that so far as they knew the wires were not deranged; that in New York there was a skillful and careful operator, and that by these two operators due care in transmit-

ting and receiving that message was exercised. If they prove due care and diligence on their part by affirmative testimony, and that testimony is such as to convince you of its truth, by its preponderance, then the company has made out a prima facie case of rebuttal, and would be entitled to be excused, unless it appear by other testimony that they were not exercising that due care and diligence. They have explained to you the little characters that represent the letters "or" and the little characters that represent the letter "p." They have explained that these little dots were exactly the same in number, the only difference being the difference in time between the clicking of the instrument; and that electrical influences existing between here and New York might cause the intervals of the clicking of the instrument to so differ as to make the letter "p" to be received in New York, while the letters "or" were really sent from Charleston. The evidence is such as to show that this mistake might occur with skillful operators, if there was an atmospheric disturbance between the two points. In looking at those little marks you must remember that those signs were received by the ear. These matters the company bring forward to rebut the charge of negligence.

And now, bearing in mind the further testimony, that the transmission of these messages, notwithstanding care and diligence, are subject to errors and mistakes, bearing in mind that this was a night message, that it was voluntarily selected by the plaintiff as the means for the transmission of an important communication with New York; taking the testimony in regard to the condition of the office here and the office in New York, it is for you to say, as impartial men, whether the error in this case is to be attributable to negligence, carelessness, malpractice or

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fraud \*on the part of the company's agents or officers. If, from the preponderance of the whole testimony, you believe that it is attributable to this negligence, why, then, the company is liable. But, if from the whole testimony, you are satisfied that it was one of those little mistakes which might occur, and do occur in the best regulated companies, and against which they cannot guard unless it was sent as a day message, and ordered to be repeated, then the company ought not to be mulcted in damages for that which, with the due exercise of care and diligence, it could not avoid. It can only be held liable when it is shown to have been in fault. If you come to the conclusion that this company, under all the circumstances, has not broken or violated its contract, then your verdict will be for the defendant. If you come to the conclusion that they have been negligent, then you will determine the damages to be awarded to the plaintiff.

Now, as I have said, this was a cipher



message. My instruction to you is that, if the company is liable on the ground of negligence, fraud or malpractice, the actual damages caused by the mistake is the measure of the recovery. When a mistake of this sort has been detected, then it was the duty of the plaintiffs, Pinckney Bros., and their correspondent in New York, to exercise due diligence in making the loss as small as possible. It was an order, as received in New York, for the purchase of four hundred bales of cotton; and the party in New York bought the four hundred bales of cotton for the month of August. Now, gentlemen, having bought the four hundred bales of cotton, then if the company was liable for the mistake, then this person might have held on to that contract to its maturity, and then the loss occasioned by it at its maturity would have been the measure of damages. But if he saved loss by selling it out before the contract reached maturity, then it was a prudent sale. If the premature sale occasioned a loss, then that might have operated to prevent the plaintiffs from recovering.

It is contended that the operator could not have had in contemplation the danger of a mistake, or the probable importance of the message. Suppose that message had not been delivered, and the contracts in New York had not been entered into, then the company could not have been held responsible for the

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possible profits which the party might have made. But when the mistake has been committed, and the contract has been entered into, and produces an actual loss, then if the mistake is due to the negligence of the company, they are responsible for the actual damage, and that alone.

I am requested by the plaintiff to charge you as follows:

1. "That upon the acceptance by a telegraph company of a message of any kind for transmission, the company is bound to transmit the same correctly and without error, unless prevented from so doing by some uncontrollable cause." I will not put it in that shape. The company is bound to use due diligence, care and skill in transmitting the same correctly.

3. "That a telegraph company is liable for actual and proximate damage and loss, caused by an error or mistake in a telegram of any kind, unless such error or mistake be produced by some uncontrollable cause." I can't use that language exactly. I will charge that a telegraph company is liable for actual and proximate damage and loss, caused by an error or mistake in a telegram of any kind, if such error be produced by carelessness or negligence.

4. "That proof of the contract, the consideration and the breach, in an action by the sender of a message against a telegraph company for damages caused by an error or mistake in the message, is prima facie evi-

dence of carelessness or negligence, for which the company is liable. And that thereupon the burden of proof is on the company to disprove the presumption of carelessness or negligence, by showing that some uncontrollable cause produced the mistake—or at least that some one or more uncontrollable cause or causes were in existence, to which the error might be attributable. And it is not enough to prove that the company has used the utmost care and diligence." That proposition I will not charge. But I will charge you as hitherto, that the burden of proof is upon the company, when a prima facie case is made out against it, to show not how the error occurred, but to show that the error did not occur by the fraud, malpractice or negligence of the company. The error might have been caused by something so mysterious that it could not be proved. It is only neces-

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sary, therefore, to show the exercise of due care and diligence, and thus negative the presumption of negligence.

I am requested by the defendant to charge the jury as follows: \* \* \*

5. "That the company, having shown the observance of due care in the selection of its agents and in the instruments used for the business it undertakes, and having shown the exercise of care by its operators, is not bound to go farther in rebutting the allegation of negligence." I would add to that: It is only bound to prove due care, and is not called upon to reveal the precise cause of the mistake.

6. "That the defendant company is not bound to show that errors in the message did occur from some cause other than the negligence of its officers or servants, if it show, as far as such proof is possible, reasonable care, and thereby exclude the conclusion of negligence." That is correct.

These constitute the instructions which I have been requested to give you—and which I now charge you, with the explanations and modifications which you have heard. You have seen the contract, its nature and character; you have heard the testimony as to the incidents that naturally attend a night message; the increased risk which the party sending a night message takes. Having thus explained to you the law applicable to this contract, you will take the case; and if, from the preponderance of the testimony, you come to the conclusion that this was an error attributable to the neglect, fraud or malpractice of the defendant, then the plaintiff can recover the amount of the actual loss; but if, on the contrary, you come to the conclusion that the mistake has been accounted for in a manner which shows that it cannot be charged to the negligence of this company, or that it may be referred to some unknown cause, your verdict must be for the defendant. If they have carelessly or negligently wronged the plaintiff, then you will give the

plaintiff the actual loss sustained. But if they have not done this, and the error is not attributable to the negligence of the company's officers, you will release the company from liability. The small amount involved in this case must not influence your verdict in any degree.

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\*The plaintiffs appealed to this court upon the following exceptions:

1. "Because W. J. Miller and W. J. McCormack (two of the jurors who were sworn and examined on their voir dire, and who tried the cause,) were incompetent and should have been excluded from the jury.

2. "Because his Honor erred in charging that 'the company is not called upon to explain how the mistake did occur.'

3. "Because his Honor erred in refusing to charge as requested by the plaintiffs' counsel in their first request.

4. "Because his Honor erred in refusing to charge as requested by plaintiffs' counsel in their third request.

5. "Because his Honor erred in refusing to charge as requested by the plaintiffs' counsel in their fourth request.

6. "Because his Honor erred in charging as requested by defendant's counsel in their fifth request; and in charging, in addition, that 'it is only bound to prove due care, and is not called upon to reveal the precise cause of the mistake.'

7. "Because his Honor erred in charging as requested by defendant's counsel in their sixth request.

8. "Because the evidence before the jury was insufficient to support the verdict found; and because the verdict should certainly have been for the plaintiffs for a 'sum equal to ten times the amount paid for transmission,' to wit, in this case, the sum of \$5, if not for the actual loss which they had sustained."

Mr. T. W. Bacot, for appellant, cited, upon the evidence of operators, 45 N. Y. 553; as to the distinction between day and night messages, 60 Me. 9; 62 Id. 209; 33 Wis. 558; 34 Id. 471. On the 3d and 4th exceptions, Scott & J. Tel., §§ 165 7; 2 Thomp. Negl. 836; 62 Me. 219; 30 How. (N. Y.) Pr. 414; 60 Ill. 421; 74 Id. 168; 33 Wis. 558; 34 Id. 471; 35 Pa. 302. On 2d, 5th, 6th and 7th exceptions, Shearn & R. Negl., § 559; 2 Thomp. Negl. 837, 843; 6 Wait Ac. & Def. 9, 16; 6 So. L. Rev. 341; 15 Cent. L. J. 183; 62 Me. 209; 49 Ind. 53. The case of Aiken v. Telegraph Co., 5 S. C. 358, is unsatisfactory, and doubted in 2 Thomp. Negl. 346. And in that case the action was by the receiver, a distinction recognized in Whart.

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Neg., §§ 766; 41 Iowa 458. The burden of proof was on the company. 2 Bailey 157; 2 Rich. 286; 9 Id. 201. On 8th exception, 6 So. L. Rev. 327; 105 U. S. 464; 96 Id. 9.

Messrs. Simonton & Barker, contra.

Mr. E. McCrady, Jr., in reply.

March 19th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, citizens of Charleston, sent a night message from that city over defendant's wires to their agent in New York, directing him to purchase a certain number of bales of cotton. The message was in cipher, and a mistake was made in its transmission, on account of which several hundred more bales were bought than plaintiffs ordered. Cotton fell in price, and the plaintiffs incurred a considerable loss. This action was brought to recover damages because of said loss. The message being a night message, and under the rules of the company not required to be repeated or to be sent as promptly as day messages, was transmitted at much lower rates, and also upon different conditions than those attending the latter, all of which was specified in a special contract, printed as a heading upon the paper, on which the message was written, of which the following is a copy:

"Blank No. 45.

"The Western Union Telegraph Co.

"Half Rate Message.

"The business of telegraphing is liable to errors and delays, arising from causes which cannot at all times be guarded against, including, sometimes, negligence of servants and agents whom it is necessary to employ. Most errors and delays may be prevented by repetition, for which during the day half price extra is charged in addition to full tariff rates. The Western Union Telegraph Company will receive messages, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at one-half the usual day rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such messages happening from any cause,

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\*beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery, the sender hereby guaranteeing payment thereof.

"The company will be responsible to the limit of its lines only, for messages destined beyond, but will act as the sender's agent to deliver the message to connecting companies or carriers, if desired, without charge and without liability.

"A. R. Brewer, Secretary.

"Norvin Green, President.



"Send the following half rate message, subject to the above terms which are agreed to:

"May 22d, 1880.

"To F. Warley, 101 Pearl Street, N. Y.:

"If failure hottedot humor if exactly idle humorist. Pinckney Bros.

"☞ Read notice and agreement at the top."

The judge charged the jury that the stipulations in this contract in reference to absolute and unconditional exemption for errors and mistakes, were void as against public policy, and that notwithstanding these stipulations, the company was still liable if the mistake occurred from either the fraud, malpractice or negligence of its agents, employés or servants.

We may say at this point that no exception in the "Case" questions the correctness of this ruling, and therefore it is not involved in the appeal, and, not being involved, we have not considered it. The questions before us come up from another portion of the charge, and upon these the appeal depends. In the portion of the charge alluded to, the judge instructed the jury that upon a prima facie case being made by the plaintiffs, (which would be so upon proof of the contract to send, of the consideration and of the breach,) that then to rebut this the burden was upon the defendants to show that the mistake did not occur through any carelessness or negligence on their part, or of their agents. He further instructed that the company was not bound to prove either how the mistake

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occurred, or that it \*did occur from some other cause than the negligence of its officers or servants. In substance, he charged that the company was not bound to explain how the mistake occurred, but was only required to show that it did not occur through the carelessness or negligence of its servants or officers, and that the onus of showing this was upon the defendants, as matter of defense.

The verdict was for the defendants. The plaintiffs have appealed upon several exceptions, assigning error. These exceptions, however, when analyzed and reduced, really raise but a single question, or rather, upon examination, it appears that the whole appeal turns but upon one question, which is this: A prima facie case having been made for the plaintiff by proof that the message had been received and transmitted by the company with a mistake in its terms, which resulted in loss to plaintiff, whether the company could be relieved from liability except by showing that the mistake occurred from some uncontrollable cause or causes, to which it could be attributed, the difference between the appellant and the presiding judge being that the judge charged that proof of due care, or the absence of negligence and carelessness on the part of the company, was

good defense, while appellant contends that nothing short of an uncontrollable cause could relieve or exempt, the onus of showing this being upon the defendant.

We do not know that there can be any cause which, in the language of the exception, may be termed "uncontrollable," except it be an act of God or irresistible force, and the question to be considered, therefore, is, whether telegraph companies are liable for all mistakes made in the transmission of messages, except such as occur from an act of God or irresistible force, the onus of showing which is upon them.

There are three classes of cases in which the law has settled the principle, independent of the stipulations in the contract, which is to govern where alleged injuries have been received by one at the hands of another. These are: first, bailments; second, duties undertaken by one claiming to be skilled in the matter which he undertakes, such as medical treatment and other professional employment; and, thirdly, common carriers. As to the two first, the principle is that

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reasonable and due care and \*skill, according to the nature and character of the work done or service rendered, is guaranteed, and, in case of injury, to be exempt, the defendant must show the presence of this care and skill, or, which is the same thing, the absence of negligence and inexcusable carelessness. As to the latter, to wit, common carriers, the more stringent principle is that nothing but an act of God or irresistible force (expressed in the books as the public enemies) will exempt.

Now, into which of these classes shall telegraph companies be placed, or to which have they been regarded as belonging? It is true, the business in which these companies are engaged is quasi-public, but there is a wide difference between them and that of common carriers, and the foundation upon which the very stringent doctrine of non-exemption, except for an uncontrollable cause, is imposed by the law upon common carriers is altogether wanting as to a telegraph company. There is no motive or opportunity for a telegraph company to make mistakes or commit errors. There is no inducement or possibility for such companies to appropriate anything which may be entrusted to them, to their own benefit, at the sacrifice of their employer's interests. Their business is simply to transmit messages by the medium of that mysterious agent, electricity, which, with increasing progress, is now being made to contribute so wonderfully and so usefully to our wants.

In the discharge of their duties, the principal qualifications required are experience, practice, skill and good faith on the part of their agents and servants, but even with the best qualified employés, much depends upon electric, atmospheric and other subtle influ-

ences beyond the reach of experience and of the utmost skill: while, therefore, there is reason for holding them responsible for the qualifications necessary for the proper performance of the work which they propose to do, as the first classes mentioned above are held, to wit, professional employés and bailees, yet there is no reason for holding them as insurers like common carriers. Common carriers transport goods, merchandise and other corporeal materials, which are constantly in their possession from the commencement of their trip until the destination is reached, and it is entirely reasonable that

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they \*should guard and protect these goods against all dangers which can be warded off by human power. But telegraph companies transmit ideas—intangible and fleeting things—which, when placed upon the wire, instantly escape from the hands of the operator, and in a moment—yea, in the twinkling of an eye—are hundreds and thousands miles away, far beyond the reach and control of him who started them upon their distant mission, passing through different parallels of latitude or degrees of longitude, as the case may be, with the rapidity of thought, but encountering for themselves all the dangers or obstacles that may be met by the way. To apply the rule of common carriers to these companies, would, it seems to us, be extremely unjust, and to hold them absolutely liable as insurers would greatly impair this mode of correspondence, crippling, if not destroying, a most important and growing department of business.

Such we do not understand to be the law as settled in England, or in a majority of the American States. It is true there is a lack of uniformity in the decisions, and in many cases where the point has not been distinctly adjudged, will be found many loose and somewhat ill-defined expressions tending to the application of the stringent doctrine of common carriers, but the current of authority is decidedly opposed to this. 2 Thomp. Negl. 836, and the numerous cases cited in the note at that page. Cases from New York, Pennsylvania, Missouri, Maryland, Michigan, Kentucky and other States. We concur in the doctrine indicated in these cases, and therefore think there was no error in the Circuit judge declining to rule as requested by the appellant.

In many of the cases which have been before the courts, the principal question has been whether these companies could exempt or limit their liability by special contract, either as to day or night messages. In this, the same want of uniformity exists. But this question is not before us, and we have not felt called upon, therefore, to consider it.

We do not think that these companies are bound to explain how mistakes, like this complained of here, occurred. This, from

the very nature of the subtle agent made use of, would in many cases be utterly impossible, at least at the present stage of

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\*information upon that subject, and the law does not require impossibilities.

Our opinion is that telegraph companies, as to the work which they engage to do, belong to that department known as bailment, especially to that class styled *locatio operis facendi*, and that they are governed by the principles of law which have been long since established in reference to this department. We think the charge of the judge was in accordance with these principles, and therefore this appeal cannot be sustained.

The exception as to the competency of one of the jurors cannot avail. If it had clearly appeared that the juror had formed a fixed and decided opinion, then he should have been excluded, but this was a matter about which the judge was peculiarly qualified to determine, and we cannot say that he erred in his judgment. As it appears to us, if the juror had any bias it was decidedly in favor of the plaintiffs, but he distinctly stated that no opinion formed by him in a previous case would have the least influence upon him in this. In a case like this we would not feel warranted in overruling the decision of the presiding judge, whether his decision was the one way or the other. It is our province to correct errors of law and not of fact, and this seems to be more a question of fact than of law.

The plaintiff's cause of action, as appearing in the complaint, being outside of and independent of the contract between the parties, he cannot fall back upon that contract in this action. The complaint presents the only issue between the parties, and the case must stand or fall on that.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

19 S. C. 85

WESTFIELD v. WESTFIELD.

SYMME v. SYMMES.

(November Term, 1882.)

[1. *Appeal and Error* §566; *Continuance* §12.]

A motion for continuance is addressed exclusively to the discretion of the Circuit judge, and is not reviewable by this court. His refusal to postpone the hearing of this case in the absence of defendant, who was his own counsel, approved.

[Ed. Note.—Cited in *State v. Lucker*, 40 S. C. 550, 18 S. E. 797.

For other cases, see *Appeal and Error*, Cent. Dig. § 3837; *Dec. Dig.* §466; *Continuance*, Cent. Dig. § 42; *Dec. Dig.* §12.]

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[2. *Interest* §37.]

\*Two notes were executed between the same parties, and on the same day, one payable in one year, and the other in two years, both



calling for interest to be paid annually. *Held*, that the former drew annual interest after maturity, but that the latter did not.

[Ed. Note.—Cited in *Baum v. Raley*, 53 S. C. 40, 30 S. E. 713.

For other cases, see Interest, Cent. Dig. § 78; Dec. Dig. ☞37.]

[3. *Execution* ☞402.]

A debtor is entitled to credit on his note for the amount paid by him to an indebtedness of his creditor under an order of court in supplementary proceedings against such creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1158; Dec. Dig. ☞402.]

Before Aldrich, J., Greenville, April, 1882. The opinion states the case.

Mr. E. F. Stokes, for appellant.

Messrs. T. Q. Donaldson and M. F. Ansel, contra.

March 19th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. Were it not for the fact that we have had some previous acquaintance with the nature and object of these actions, inasmuch as they have, in different forms, been before this court on previous occasions, it would be extremely difficult, if not impossible, to understand from the meagre "Case" now presented what were the questions involved. It seems that under a decree of Judge Kershaw, of April 19th, 1881, the master was directed in both of these cases to restate the account between Edward F. Stokes, the present appellant, and the estate of John Westfield, deceased, and that accordingly the master submitted reports, in which he ascertained the balance due the appellant, after deducting all credits on two notes presented by him, against the estate of John Westfield, to be the sum of \$1,588.54. To these reports the appellant filed sundry exceptions, couched in such general terms that, without a previous knowledge of the fact, it would be impossible to ascertain the nature of the errors complained of. The exceptions are as follows:

"Because the report is premature, the master having reported on certain matters which are pending before the Supreme Court, and which remain unsettled.

"The defendant excepts to so much of the

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master's report as \*allows discounts on said notes to the amount of \$4,992.49, and to the allowance of interest on the amount claimed as discounts on said notes.

"The defendant excepts to so much of the master's report as fixes the amount due on the notes mentioned in said report, to defendant, at \$25,425, only, the amount due on said notes exceeding this.

"Because the amount still due, after deducting the discounts allowed by the master, exceeds \$20,432.51.

"Because the amount still unpaid after deducting credits on notes, exceeds \$1,588.54.

The cases came before Judge Aldrich for a hearing upon the reports of the master, which are set out in full in the case, and the exceptions thereto, above set out. When the cases were first called for hearing, on the evening of April 10th, 1882, they were postponed, "at the request of the appellant, until the next morning, with the understanding that they were to be taken up at 10 o'clock, appellant stating that his papers were not in court. At the call of the causes at the time appointed, the appellant was absent, and sent a message that he was unwell and could not attend." The Circuit judge then directed that a notice be served on the appellant that, unless sufficient cause be shown, at 3 o'clock p. m. of that day, orders would be presented to the court overruling the exceptions and confirming the reports. The sheriff, upon going to the house of appellant to serve this notice, was refused admittance, whereupon he left a copy of the notice with the sister of the appellant. At the hour appointed, no sufficient cause being shown, and the judge being satisfied that the plea of sickness was not well founded, and it being the last day of the term of the court, orders were granted overruling the exceptions and confirming the reports of the master. From these orders this appeal was taken in the following words:

"The defendant excepts to the orders of the presiding judge, and submits that the orders were premature, and that they should not have been passed without allowing defendant a hearing upon the exceptions, and he submits that there is still due on the notes, after deducting all legal credits, the amount of \$11,143.56.

From the foregoing statements derived

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from the "Case" as \*prepared for argument here, it appears that the only ground of appeal which we could properly be called upon to consider, is whether there was any error on the part of the Circuit judge in proceeding to hear the cases in the absence of the appellant, who seems to have been acting as his own counsel. It has so often been adjudged that questions of continuances of cases are addressed exclusively to the discretion of the Circuit judge and are not reviewable by this court, that it seems wholly unnecessary to cite the authorities. But even were we at liberty to consider such questions, we do not see how we could say that there was any error in proceeding with the hearing of these cases, notwithstanding the absence of the appellant. He was in court when the cases were first called for hearing, and on his motion and for his convenience they were postponed to a designated hour on the next day, with the understanding that they were then to be heard. When the hour thus appointed arrived, the appellant was absent, and his absence was accounted for by a simple message

that he was unwell and unable to attend. No certificate from a physician was produced—not even an affidavit from appellant or any friend or member of his family, showing his inability to attend the court, and yet the judge extended him still further indulgence, giving him explicit notice that if no sufficient cause should be shown, the court would proceed with the hearing of the causes at a designated hour, which was very near the close of the term. And when that hour arrived, no sufficient cause being shown, we do not see what else the judge could do, in justice to the other parties litigant, but proceed with the hearing of the causes.

We are entirely satisfied that there was not only no error upon the part of the Circuit judge, but that he extended every indulgence to the appellant which he could reasonably demand or expect. If he had done as other parties litigant are expected and required to do—furnish the court with satisfactory legal evidence of his inability to attend the court, we do not doubt that the Circuit judge would have pursued a different course. But when the appellant persistently refused to pay any attention to the summons from the court, and even denied admittance to the officer sent to notify him, he certainly

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could not expect that \*indulgence which the court is always disposed to extend to a party litigant who, by some accident or from some cause beyond his control, has been found in default.

While this would be sufficient to dispose of this appeal, we have been induced, by what seems to be the earnest conviction of appellant that great injustice has been done him, to look into what we understand to be his real grounds of complaint, not because we think the appellant has any legal right to demand it, but simply *ex gratia*. His first exception to the reports of the master has nothing whatever in the "Case" as presented here to sustain it, and from our previous knowledge of these cases we are satisfied that there is nothing upon which it could be sustained. The other grounds of appeal really involve but two questions: 1st. Whether both or only one of the notes presented by appellant against the estate of Westfield, bore annual interest after maturity. 2d. Whether the estate of Westfield was entitled to credit on the notes for the amounts which the trustees had been required to pay on judgments obtained against appellant by various of his creditors under proceedings supplementary to an execution.

While we think that both of these questions have been already adjudged in the previous course of this litigation, we may take this occasion to say that, in our opinion, they were correctly adjudged by Judge Ker-

shaw, adversely to the views contended for by appellant. He seems to think that because the two notes are very nearly identical in form, the decree of Judge Kershaw, adjudging that one bears annual interest after maturity, while the other does not, is manifestly inconsistent, and, therefore, must be erroneous. The fact is, however, that, so far from these notes being practically identical in form, there is a material and fundamental difference between them—one being payable *within twelve months* after its date, while the other is payable *more than twelve months* after its date; and the law is well settled, that when the maker of a note promises to pay the sum mentioned in it, at twelve or within twelve months after its date, "with interest from date *payable annually*," it is necessary, in order to give the words italicized any force and effect, to construe the promise as a promise to pay the interest annually

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until \*the note is fully paid. Hence, on a note so drawn the interest will continue to be payable annually *after*, as well as before, maturity. But where the promise is to pay *more than twelve months* after date, "with interest from date *payable annually*," no such necessity arises, and therefore the interest does not continue to be payable annually *after* maturity. This doctrine is so well settled in this State that it is not necessary to do more than refer to the cases. *Singleton v. Lewis*, 2 Hill 408; *O'Neill v. Sims*, 1 Strobh. 115; *O'Neill v. Bookman*, 9 Rich. 80; *Wright v. Eaves*, 10 Rich. Eq. 582; *Sharpe v. Lee*, 14 S. C. 341.

In regard to the other question, as to allowing the estate of Westfield credit on the notes for the amounts which the trustees had been required to pay out of the property placed in their hands to meet these notes, on judgments against appellant, under supplementary proceedings, we do not think there can be any doubt. If any wrong was done to appellant in the recovery of those judgments, or in the orders under the supplementary proceedings, such wrong should have been corrected by appeal from such judgments or order, or by some proceeding to set them aside. But surely after the trustees had been compelled to apply a portion of the proceeds of Westfield's property to the payment of debts of the appellant, which were in judgment against him, it was nothing but the plainest equity that the estate of Westfield should have credit for the amounts so paid.

We are satisfied, therefore, that in no view of the case has the appellant any legal ground to complain of the judgments rendered in these cases. The judgment of this court is, that the judgment of the Circuit Court in both of the cases above stated be affirmed.



## 19 S. C. 90

## STATE v. SUMMERS et al.

(November Term, 1882.)

[1. *Criminal Law* ⇨756, 763, 764.]

The charge in this case was not a charge "in respect to matters of fact," but only such a statement of the testimony as the constitution permits. Article IV., § 26.

[Ed. Note.—McPherson v. McPherson, 21 S. C. 272; State v. Addy, 28 S. C. 13, 4 S. E. 814; State v. Norton, 28 S. C. 579, 6 S. E. 820; State v. Jackson, 36 S. C. 491, 15 S. E. 559, 31 Am. St. Rep. 890; Norris v. Clinkscates, 47 S. C. 514, 517, 25 S. E. 797.

For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1766; Dec. Dig. ⇨756, 763, 764.]

[2. *Criminal Law* ⇨737.]

There was at the trial sufficient prima facie evidence of venue to be submitted to the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1703, 1704, 1706; Dec. Dig. ⇨737.]

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\*Before Aldrich, J., Orangeburg, May, 1882. The opinion fully states the case.

Messrs. Lathrop & Webster, for appellant.  
Mr. Solicitor Jervey, contra.

March 20th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an indictment for riot, assault with intent to kill, and aggravated assault and battery. Each of the three counts charged that the offense was committed on April 7th, 1882, in the county of Orangeburg.

Henry Galluchet, the prosecutor, testified that on the night stated he and two others were sleeping in a new school-house near where he had been working that day. There was a large camp of workers at Holcomb's mill, about half a mile off; during the night he was aroused by the talking of Henry Glover and Cyrus Jones, who wanted him to go with them to the mill. He refused, and they carried him by force three or four hundred yards to a place near the swamp, where there was a great crowd of people, who tied him to a tree, and, coming up in squads, whipped him for an hour with clubs and switches, marking him severely from his shoulders to his feet. During the time, while they were tying him, he heard some one in the crowd say "Kill him." He said he recognized all of the defendants as being among those who whipped him.

Ned Robinson, one of the men who were sleeping with Galluchet in the school-house, testified that when he was awakened from sleep Galluchet was going out of the door "grumbling" with some persons; afterwards heard "hallooing down to the branch;" went down where they were; heard "a parcel of men talking easy," and when they came towards him he ran off.

Dr. W. S. Barton testified that he saw

Galluchet the Sunday following. Did not examine his condition further than his face, which was badly banged up and mutilated; his face was badly beaten up.

A. M. Sally, sheriff, testified that he was

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the sheriff of Orange\*burg county; knows what is called Holcomb's mill, near the Colleton line; did not see the school-house, but the place where it was, in a clump of pines, was pointed out to him by his deputy, who had been to it; has executed warrants in the neighborhood; treated as a part of his bailwick; does not know, but is satisfied where the Colleton line runs; so satisfied that he executed the warrants; could only get information upon the subject by inquiring; received his information from mill hands, and also from Mr. Westbury in particular; was so satisfied that he executed the warrants without having them endorsed.

Adam Wannamaker testified, that he used to live in the section near Holcomb's mill; knew of two school-houses down there, about two miles apart; one built some seven or eight years ago, and the other last July; knew where the county line runs; between Dick Summers' and Holcomb's mill, about half a mile from the mill; runs from east to south; it is blazed on the trees something like the line surveyors make; leaves the old school-house on the Colleton side; "this school-house" (the new one) "is in an old field with pine woods round it, right north of the mill and about half a mile from it; if you were at Holcomb's mill and looking towards the sunrise, you would look across a little bit of the Orangeburg road" (line).

The defense was an alibi, and, to sustain it, two witnesses, Isaac Berry and Shedrick Carn, testified that on the night in question they were in the same camp with defendants here on trial, about a mile from the mill in a direction of right angles from the school-house. Both witnesses testified that they were awake that night until after the moon had risen, and were positive that neither of the defendants left the camp before that time. In reply Mr. John S. Rowe testified that he was acquainted with Isaac Berry, witness for the defense, that his reputation was bad and that he would not believe him on his oath from that reputation.

No requests to charge were made. The judge charged the jury, they returned a verdict of "guilty," and the defendants appeal to this court upon the following grounds:

1. "Because the judge charged the jury that there is no proof whatever that there was any private enmity existing between the

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\*prosecutor and the defendants, not a particle of proof on that score. He comes here and gives you a full and detailed account of what happened on that occasion.

2. "Because the court further charged the

jury that he (the prosecutor) was beaten, is established beyond a doubt.

3. "Because the court further charged the jury that he (the prosecutor) says that he identified those (the defendants), and he had an opportunity of identifying them, not only from their countenances, but from their voices.

4. "Because the court charged the jury that 'the defense set up is an alibi. It is a favorite defense—I think it is called, in the books, "the rogues' defense." It is always a complete defense if established, but it is a very dangerous one, because when a person is accused of committing a crime and he sets up a false defense which cannot be established, and the jury do not believe it, then it raises a presumption of guilt from the fact that he sets up that which is not true.'

5. "Because the court further charged the jury: 'Now you are to take all these facts into consideration, and if, as fair, honorable and just-minded men, you come to the conclusion that there is a reasonable doubt upon your minds that this man, Galluchet, has been mistaken in his identification of the parties, you must give them the benefit of that doubt. But if you have no such doubt, you will weigh the testimony, as honorable men, and say what conclusion you have arrived at.'

6. "Because the court further charged the jury: 'So far as the county is concerned, you will take into consideration the evidence which has been introduced. The sheriff says it is his bailiwick, and that he served papers there. Mr. Wannamaker says that the school-house is in the county, and he says that the line of the county was marked and blazed out beyond where the school-house is. If you have no doubt on the subject, why you need not let that consideration weigh with you a single iota.'

7. "Because the court further charged the jury: 'The only question for you to decide is, Has Galluchet told the truth? If he has, he has brought this offense home to these defendants. If he has not, or has been entirely mistaken and your minds hesitate, you will give the defendants the benefit of the doubt.'

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\*8. "Because the jury having rendered a verdict of guilty as to the defendants, Mordecai Summers, Pat Summers, Sr., Ben Glover, Asbury Davis, Asbury Baxter and Clay Johnson, the court then sentenced the said defendants to be confined in the State penitentiary, at hard labor, for the period of five years."

The eighth exception, as to the punishment imposed, was not pressed. The case involved only questions of fact, on which the jury have passed, and it is, therefore, taken from the consideration of this court, unless the judge committed error of law in submitting it to the jury.

Exceptions one, two, three, four, five and seven complain that the judge, in regard to the matters stated in them respectively, transcended his authority under section 26, article IV., of the constitution, which declares that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." There is no more difficult duty imposed upon this court than that of deciding questions which arise under this clause of the constitution. This difficulty arises from the vague, undefined nature of the subject. What is embraced in the right to "state the testimony"? Who can fix with certainty the exact limit, and apply it satisfactorily to the infinite combination of circumstances which arise in the administration of justice? If there is no testimony, the judge undoubtedly has the right to say so; and it is as clearly his right and duty to classify and arrange the evidence under proper heads, that the jury may be the better enabled to apply the law to the facts.

In the case of the State v. White, 15 S. C. 392, this court stated the rule, as follows: "While the judge is not expected to confine himself to a mere statement or repetition of the testimony as it was delivered, but may place it before the jury in the order in which it relates to the propositions which it is adduced to support or contradict, by pointing out the questions of fact which arise, and calling the attention of the jury to the evidence applicable to such questions, yet he should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions, unbiased by any impression which the testimony may have made upon the mind of the judge."

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\*Taking this as the test, we cannot say that the particular expressions complained of in the judge's charge, when considered in connection with the whole, did more than place the evidence before the jury in the order in which it related to the issues made. The point in the case, was whether the defendants were the persons who did the whipping; and we do not see that the judge indicated any opinion on that subject, when he said, "That the prosecutor comes here and gives you a full and detailed account of what happened on that occasion;" or when he said, "That the prosecutor was beaten is established beyond a reasonable doubt;" or, "Has the prosecutor sufficiently identified the accused to enable you to come to a conclusion that they are the same who perpetrated the outrage on that occasion? If you are not satisfied that he has identified them, you must give them the benefit of any reasonable doubt that arises in your minds. \* \* \*

He says that he identified them, and he had an opportunity to identify them, not only from their countenances but from their voices. \* \* \*

The only question for you to decide



is, Has Galluchet told the truth? If he has, he has brought this offense home to these defendants. If he has not, or has been entirely mistaken, and your minds hesitate, you will give the defendants the benefit of the doubt. \* \* \* Now you are to take all these facts into consideration, and if, as fair, honorable and just-minded men, you come to the conclusion that there is reasonable doubt upon your minds that this man, Galluchet, has been mistaken in his identification of the parties, you must give them the benefit of that doubt. But, if you have no such doubt, you will weigh the testimony as honorable men, and say what conclusion you have arrived at."

Nor do we think that the observations of the judge, as to the general character of the defense of alibi, stated in the fourth exception, was such an expression of opinion upon the facts of this particular case as should set aside the verdict. Particularly, as the judge added: "If these men were not present, of course they could not have committed the offense. They may account for themselves in the way it has been described to you by the solicitor. So far as the question of evidence

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is concerned, you \*are to decide that without the assistance of the court, and you are to decide it upon the comparison of the testimony."

Exception six charges that the judge erred in his statement of the evidence in relation to the venue, saying that "so far as the county is concerned, you will take into consideration the evidence which has been introduced. The sheriff says it is his bailiwick and that he served papers there. Mr. Wannamaker says that the school-house is in the county; and says that the line of the county was marked and blazed out beyond where the school-house is. If you have no doubt on that subject, why you need not let that consideration weigh with you a single iota."

The indictment charged that the offense was committed in the county of Orangeburg, and it was necessary that the State should prove it. In order to do so, the sheriff of the county, A. M. Sally, and Adam Wannamaker were sworn as witnesses. No evidence was offered on the other side. Neither of them stated in express terms, as reported in the case, that the school-house where it was alleged the whipping had taken place, was in the county of Orangeburg, but they both said substantially that. What they did say could not be understood to mean anything else. Sally said that he knew where the school-house stood in a clump of pines; that he had served writs in that neighborhood; that he had made inquiries and received that information, and that he was so satisfied that he executed the writs without having them endorsed. This alone was *prima facie* evidence of the fact, sufficient

until the contrary was shown, and properly for the consideration of the jury.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 96

IRWIN v. BROOKS.

(November Term, 1882.)

[1. *Dower* ⇨98.]

Five commissioners in dower met, examined the land and failed to agree; the Probate judge ruled them and required a return to be made, but only three were served, and these three thereupon met without notice to the others, and made a return. *Held*, that the return was sufficient.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 344; Dec. Dig. ⇨98.]

[2. *Dower* ⇨99.]

The parties in interest are not allowed as matter of right to assail a return of commissioners in dower, where it has been fairly made

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and is unaffected \*by fraud, or error of law or fact; but the court may withhold confirmation from a return which, in its judgment, from any cause, does injustice.

[Ed. Note.—Cited in *Simonds v. Haithcock*, 24 S. C. 207, 210.

For other cases, see *Dower*, Cent. Dig. § 347; Dec. Dig. ⇨99.]

[3. *Dower* ⇨99.]

A decree of a Probate judge not approving, but, nevertheless, confirming a return of such commissioners, reversed upon the ground that the Probate judge erred in supposing that he was without power to set the return aside.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 345-347; Dec. Dig. ⇨99.]

[4. *Costs* ⇨3; *Dower* ⇨111; *Statutes* ⇨267.]

The law now of force regulating costs governs an action commenced in 1872, but not determined prior to the act of 1880. 17 Stat. 296. Therefore, the demandant of dower in lands of her husband aliened during coverture is entitled to her costs, although the dower was not demanded before the institution of her suit.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 5; Dec. Dig. ⇨3; *Dower*, Cent. Dig. § 359; Dec. Dig. ⇨111; *Statutes*, Cent. Dig. § 357; Dec. Dig. ⇨267.]

Before Kershaw, J., Newberry, November, 1880.

The opinion states the case. The Circuit decree was as follows:

This was an appeal from decree of the Probate Court confirming the return of commissioners appointed in that court, for the admeasurement of petitioner's dower in certain lands which are in the possession of the defendant. Reference will be had for the facts to the records in the case, and they need not here be repeated.

The Probate judge says in his decree: "It does seem to me to be the intention of the law that the doweress must, if possible, be provided with a present means of enjoyment of her dower, and I intended to send this case back to the commissioners, coupled with

such instructions as would change their return, so that at least some more cultivatable land would be set out to her; but after more mature reflection and consideration of the testimony, I am reluctantly forced to another conclusion: reluctantly, because, while I feel assured that the return here confirmed, does not give the doweress the full measure of her right, still the case made is not sufficient to set aside the return of commissioners where no fraud nor error of principle is shown."

The position taken is that the return of commissioners is conclusive and beyond the control of the court, unless they have been guilty of fraud, or proceeded upon erroneous principles. That though manifest injustice may have been done by the commissioners, and this is clearly seen by the court, yet the return may not be interfered with, except in cases of fraud or erroneous principles. This appears to me to be an error in the

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\*Probate judge. The return is under his control, and he may set it aside and direct an assignment *de novo* to be made by the commissioners, whenever manifest injustice appears to him to have been done.

In directing such new assignment, he may and should indicate to the commissioners the objections he finds to exist in the former return. Care should be taken to have each commissioner duly notified to be present at all meetings and conferences of the commissioners, and proper efforts should be made to procure their attendance. The judge of Probate has ample authority to compel such attendance, and the performance of other duties required by the writ, by attachment, and other punishment for contempt, if necessary. The unexplained absence from their deliberations of any of the commissioners might of itself constitute a valid objection to a return, especially when they had not all been properly notified to be present as in this case.

The Probate judge has the same powers which the judge of the Court of Common Pleas had under the act of 1876, of which chapter 113 of the General Statutes is almost a literal transcript, only substituting the Probate Court for the Court of Common Pleas. That court had full control of the return of the commissioners in dower, and could correct any mistakes therein of fact or law, just as the chancellor could in the Courts of Equity. *Beaty v. Hearst*, 1 McM. 31; *Gibson v. Marshall*, 5 Rich. Eq. 261. The latter case is especially instructive in this; for the court says there: "It is not necessary that there should be corruption or misfeasance on the part of the commissioner; it is enough to set aside their return, that they have mistaken the extent and value of the interest or shares of the parties concerned." The Probate judge is right in supposing that the doweress should "be provided with a present means of enjoying her

dower." It is intended as a provision for her support and maintenance, and when land is specifically set apart for that purpose, it should always, if practicable, include a proper portion of arable or other productive lands. So stoutly has this principle been insisted on in some instances, that the widow has been held not dowerable of wild and unimproved lands; but the law here is more favorable to the widow.

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\*It is claimed by the respondent that the petitioner should not be allowed costs, according to what is said in section 333 of the code of procedure. That section was repealed by the act of 1873, 15 Stat. 500, § 17. The general rule is, that the demandant in dower is entitled to her costs.

It is adjudged, that the appeal be sustained, and the order of the judge of Probate confirming the return of the commissioners in dower be reversed; that the case be remanded to the Probate Court for such further and other proceedings as may be proper to complete the assignment of dower to the petitioners, in accordance with the principles herein declared; also, that the defendant pay the costs of this appeal.

Mr. L. J. Jones, for appellant, cited 2 Mill Con. R. 254; 4 McC. 346; 1 Bay 454; 4 McC. 346; 5 S. C. 433; 1 McM. 33; 6 Rich. Eq. 215; Code, \*§ 333; 15 Stat. 500, § 17.

Mr. T. S. Moorman, contra, cited *Dudley* 127; 1 Bay 495; 2 Id. 449; 1 McM. 31; 5 Rich. Eq. 259; 3 Wait Pr. 456.

March 20th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Susan C. Irwin, then Smith, on October 28th, 1871, filed a petition in the Probate Court for Newberry county, claiming dower in a certain tract of land, containing 475 acres, then in the possession of defendant. A. M. Smith, the husband of the petitioner, then lately dead, had been seized in fee of the land during the coverture of the petitioner, but it seems that it had been sold by the sheriff in his lifetime. The right to dower was not seriously contested, and the only questions in the case arise in relation to the mode of procedure in laying it off to her. On February 24th, 1872, a writ was issued for the admeasurement of the dower, and the commissioners made return, laying off as dower a part of the said land, but the return was set aside on the ground that the commissioners had included in the land laid off their estimate of the petitioner's share of the rents and profits.

On January 17th, 1878, the petitioner filed a supplemental petition and a new writ for

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the admeasurement of dower was issued to five commissioners, viz.: W. W. Wallace, D. C. Crow, M. B. Lipscomb, J. W. Williams



and J. T. Kelly, who made return that they "could not agree." On May 3d, 1878, the Probate judge made an order that "the commissioners make a formal and legal return within ten days from the date of the order." All the commissioners (except Lipscomb, who lived in another county,) had notice of this order, but no return was made as directed. On July 26th, the Probate judge made another order, requiring the four commissioners who had been served with the previous order, "to show cause why they should not be attached for contempt in refusing to obey said order." This last rule was served on only three of the commissioners, viz.: W. W. Wallace, D. C. Crow and J. T. Kelly, and these alone made return on August 1st, "laying off by metes and bounds 156¼ acres of land to the petitioner for dower," and the rule against them was discharged.

To this return the petitioner filed exceptions: "First, that all of the commissioners were not notified of the time and place of meeting when the dower was assessed; and second, that the 156¼ acres set off as dower is not one-third of the whole land, nor a just, fair and impartial division thereof—the remaining two-thirds being worth at least three times the value of the said one-third." Testimony was introduced before the Probate judge by the petitioner to set aside the return, and by the defendant to sustain it. The Probate judge with much hesitation confirmed the return. Upon appeal to the Court of Common Pleas, the Circuit judge reversed this ruling, and from his order the defendant appeals to this court upon the following grounds:

1. "Because his Honor erred in reversing the decree of the Probate Court, confirming the return of the commissioners, which was made after several examinations of the land, and after mature consideration of their duty in the premises, and was sustained by the evidence of many witnesses taken before the Probate Court at the instance of the petitioner.

2. "Because his Honor erred in reversing the decree of the Probate Court, confirming the return of the commissioners, when it did not appear in any way that they were guilty of any fraud or proceeded upon erroneous principles.

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\*3. "Because his Honor erred in deciding that the defendant should pay the costs of this appeal, upon the ground that the seventeenth section of the act of 1873, page 500, repealed section 333 of the code, which declares that the dowress shall not recover costs when she applies, as in this case, for dower in the lands aliened in the husband's life-time, 'unless it appears (as it does not in this case) that the dower was demanded before the commencement of the action and was refused.' This suit was commenced in 1871, and the repeal of said section 333

after that time, cannot affect this case, and his Honor therefore had no power to order the defendant to pay the costs right in the face of the positive injunction of the statute."

If there was nothing else in the case but the fact that the return was signed by only three of the five commissioners, we do not think that of itself would be sufficient to set it aside. The power is given to the commissioners, "or a majority of them." All the commissioners seem to have gone upon the land and to have had conferences upon the subject prior to the making of the return, but at the time final action was taken and the return made, two of them were not present for the reason that they had not been notified of the time and place of meeting. It does not appear that they were intentionally excluded. The other three commissioners were obliged to make return promptly, on pain of being attached for contempt, and knowing the views of the absent commissioners, they proceeded to purge the contempt by making the return. We suppose the absence of the signatures of two of the commissioners might, under these circumstances, be regarded by the Probate judge as not more significant than if the two had made written protest against the return. It has been held by this court "that a return of the majority of the commissioners in dower must stand, unless fraud or error of law or fact be shown, and this although the minority dissent in writing." *Stewart v. Blease*, 5 S. C. 433.

When, at the instance of the parties, commissioners are appointed by the court to lay off dower, they become a part of the machinery provided by law for that purpose. They are selected, and their judgment invoked on account of their supposed fitness. They take a solemn oath to discharge the

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duty, \*and when they have exercised their best judgment fairly, honestly and impartially, and embodied that judgment in a return in proper form, we think that return is something more than a mere estimate of a certain number of persons, which may be overthrown by the opinions of the same number of other persons examined as witnesses. It is a record. The commissioners are in one sense the agents of the parties, who are not allowed as matter of right to assail the return, if it has been fairly made and is the judgment of the commissioners, unaffected by fraud or error of law or fact. If the law were otherwise, controversies as to value resting only in opinion, would never end. *Buckler v. Farrow*, Rich. Eq. Cas. 180; *Stewart v. Blease*, 5 S. C., supra.

In the case from Richardson, which was in reference to a return in partition, the court says: "The commissioners are required by law to divide the land, if it be practicable to do so without injustice to any of the parties, and they are also required to make a return of the entire valuation. \* \* \* If it ap-

pear on such a return made that there has been mistake, fraud or corruption, no doubt the proceedings would be set aside, and a new writ of partition ordered. But nothing of that sort is pretended in this case. \* \* \* The commissioners are the agents of the parties, acting under the authority of the court, and they are as much bound by their return made in due form, fairly and impartially, as a plaintiff and defendant would be by an award of arbitrators made under a rule of court," &c.

But the better opinion seems to be that, whether the parties themselves may or may not demand it as a right, the court which issued the process still has control of it, and in the exercise of a sound discretion may withhold confirmation from a return which, in its judgment, does injustice from any cause. It seems to be considered that, to complete the matter, both the return of the commissioners and the confirmation of the court are necessary. *Payne v. Payne*, Dud. Eq. 127; *Beaty v. Hearst*, 1 McM. 31; *Gibson v. Marshall*, 5 Rich. Eq. 262. In the last case cited Chancellor Wardlaw said: "It is not necessary that there should be any corruption or misfeasance on the part of the commissioners; it is enough to set aside the

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return that, \*they have mistaken the extent and value of the interests or shares of the parties concerned. Their return is intended to satisfy the conscience and judicial discretion of the chancellor, and any circumstance exhibiting error on their part may justify him in refusing to do that which seems to him to be inequitable."

In the case before us no such thing as "mistake, fraud or corruption" was charged, only a mistake in judgment on the part of the commissioners, and in accordance with the principles above announced, if the Probate judge had approved the action of the commissioners and simply confirmed the return, we would have been inclined to sustain it. But he seems to have confirmed it contrary to his judgment, in the view that as no fraud or error of principle was shown, he had not the power to withhold his confirmation. In his decree he says: "I intended to send this case back to the commissioners, coupled with such instructions as would change their return, so that at least some more cultivatable land would be set out to her; but after more mature reflection and consideration of the testimony, I am reluctantly forced to another conclusion: reluctantly, because while I feel assured that the return here confirmed does not give the dowress the full measure of her right, still the case made is not sufficient to set aside the return of commissioners when no fraud nor error of principle is shown." We agree with the Circuit judge that in this the Probate judge erred in underrating his power.

In regard to the costs: As the case has to go back, it would seem to be premature to determine now the question of costs, but the matter is made the subject of one of the exceptions.

It is true that subdivision 6, of section 333, of the original code (1870) provides that "in an action hereafter brought to recover dower, before admeasurement, of real property aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action and was refused." This section was stricken out by the amendments to the code in 1873 (15 Stat. 500), and certain other provisions inserted in its place, but in the section striking out it is "provided that nothing herein contained shall apply to suits commenced and existing at the time

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of the passage of this act, \*wherein the costs shall be the same as allowed previous to the passage hereof." This action was commenced in 1871, after the code but before the said amendment, and if there was no other law upon the subject, the costs in this case would probably have to be taxed under the provisions of the original code, unaffected by the amendment of 1873. But in 1880 the legislature passed an act covering the whole subject of costs, (Gen. Stat. §§ 2425-2446,) which in effect repealed the provisions of both the original code and the said amendment as to costs in cases for dower, and, as we understand it, this is now the only law of force upon the subject.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

19 S. C. 104

KENNESAW MILLS CO. v. WALKER.

JENKINS &amp; SON v. SAME.

(November Term, 1882.)

[1. *Execution* ⇨393.]

In supplementary proceedings separately taken by two judgment creditors against the same defendant, an order was passed in each case, referring it to a referee to take the examination, the referee in both cases being the same person. *Held*, that the two cases might be heard together.

[Ed. Note.—Cited in *Sparks v. Davis*, 25 S. C. 384.]

For other cases, see *Execution*, Cent. Dig. § 1146; Dec. Dig. ⇨393.]

[2. *Reference* ⇨47.]

A referee, no matter how limited his powers, must sometimes necessarily decide questions of law arising in the progress of the inquiry he is ordered to make.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 78; Dec. Dig. ⇨47.]

[3. *Judges* ⇨27.]

A Circuit judge at his chambers in a county other than that in which the judgment debtor resides, may pass the final order in supplementary proceedings, the examination of the



defendant having been had in his own county before a referee appointed for that purpose.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 119; Dec. Dig. ⚭27.]

[4. *Contempt* ⚭72; *Execution* ⚭398; *Jury* ⚭16.]

An order in supplementary proceedings for the surrender of a sum of money ascertained to be in the defendant's hands, and for imprisonment in case of refusal, is not a "punishment without trial by jury," nor "imprisonment for debt," within the meaning of those terms as used in the constitution.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 251; Dec. Dig. ⚭72; Execution, Cent. Dig. § 1151; Dec. Dig. ⚭398; Jury, Cent. Dig. § 89; Dec. Dig. ⚭16.]

[5. *Contempt* ⚭55; *Execution* ⚭402.]

But in an order for the delivery of money by the judgment debtor to the receiver, it is error to incorporate a direction for imprisonment in case of refusal; the application for attachment should be made after the time fixed for the execution of the order, and on rule to show cause.

[Ed. Note.—Cited in *State ex rel. Nesbitt v. Marshall*, 28 S. C. 561, 6 S. E. 564; *Jenkins v. Bennett*, 40 S. C. 402, 18 S. E. 929.

For other cases, see Contempt, Cent. Dig. § 150; Dec. Dig. ⚭55; Execution, Cent. Dig. § 1156; Dec. Dig. ⚭402.]

[6. *Execution* ⚭402.]

The order to pay over should direct a payment of so much only as is necessary to satisfy the debts proven, and the costs of the proceeding.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1156-1159; Dec. Dig. ⚭402.]

[7. *Court* ⚭34.]

[A court of record has the right to enforce its orders by attachment as for a contempt.]

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 102; Dec. Dig. ⚭34.]

[This case is also cited in *Dauntless Mfg. Co. v. Davis*, 24 S. C. 542; *Henlein v. Graham*, 32 S. C. 307, 10 S. E. 1012; *Martin v. Hutton*, 82 S. C. 439, 64 S. E. 421. to the point that supplementary proceedings are a continuation of the action in which judgment was recovered, and distinguished therefrom.]

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\*Before Wallace, J., Spartanburg, January, 1880.

These were supplementary proceedings in the two cases of the Kennesaw Mills Company against W. E. Walker, and T. Robert Jenkins & Son against the same defendant. The opinion states the case.

Mr. J. B. Cleveland, for appellant.

Messrs. Evans, Bomar & Simpson, J. S. R. Thomson, contra.

March 24th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. In each of these cases judgment was rendered against the defendant, W. E. Walker, in the county of Spartanburg; one for \$147 and costs, and the other for \$67.42 and costs. Executions were issued against the property of the defendant and returned by the sheriff "unsatisfied." Supplementary proceedings in each

case were instituted, in which Judge Wallace, at chambers, made similar orders, appointing Charles P. Wofford, Esq., referee, and directing the defendant to appear before him at Spartanburg Court House, on May 8th, 1879, and answer concerning his property, and abide such order as might then or thereafter be made in the premises.

The same referee being appointed in both cases, to hear the matter at the same time and place, he considered both the cases together. At the outset a motion was made to vacate the service of the orders upon the defendant, which the referee refused, and after an examination of the defendant and taking other testimony, and giving very careful consideration to the facts, he reported on May 23d, 1879, that the defendant had in his possession or under his control money at least to the amount of \$1,097.50, which he unjustly refused to apply to his debts. The report also stated that there were other outstanding judgments against the defendant, amounting to the sum of \$4,864.19.

As Judge Wallace was the judge of the Circuit to which Spartanburg belongs, and had ordered the proceedings, the report was made to him at his home in Union county, and he, at chambers, after full argument and consideration, confirmed the report of the referee, appointed Charles P. Wofford, Esq.,

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receiver, with \*all the rights and powers of a receiver under the law, and then ordered as follows: "It is further ordered that William E. Walker, the said defendant, do pay over to Charles P. Wofford, the said receiver, the aforesaid sum of one thousand and ninety-seven and fifty one-hundredths dollars, now in said defendant's hands, within two days after personal service of this order upon said defendant, or that in default of such payment (such default to be evidenced by the affidavit of said receiver, served upon the sheriff of Spartanburg county,) that said sheriff do arrest said defendant, William E. Walker, and commit and imprison him in the common jail for said county as for a contempt of court, until he shall comply with this order, or unless sooner discharged by order of court. It is further ordered that from the amounts which under this order may come into his hands, the said receiver do first pay the costs and disbursements of these proceedings, to be taxed by the clerk of the court, and that he do retain the balance thereof subject to the further order of this court."

To this decree the defendant excepted, and appeals to this court, charging error as follows:

1. "That he had not jurisdiction to pass such order at chambers in Union county, when the record showed upon its face that the judgment debtor was ordered to appear and answer in Spartanburg county, and the

proceedings were had to enforce the payment of an execution issued from the Court of Common Pleas for Spartanburg county, based on an action tried in that county and not lodged in the county of Union.

2. "His Honor, the Circuit judge, erred in holding that the orders passed by Judge Pressley were not an estoppel to a further proceeding herein, when the orders passed by Judge Pressley are still of force and not appealed from.

3. "Because his Honor erred in holding that the cases could be heard together, and that the same examination could be used in both cases.

4. "Because of error in that the Circuit judge held that the referee could decide questions of law, when the report and evidence submitted showed upon its face that the referee passed upon matters of law to which objection was made at the time, and argued before him and exceptions taken.

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\*5. "Because the order passed by his Honor, January 27th, 1880, is unconstitutional and not warranted by law, in that it inflicts and imposes a punishment as for a contempt, and subjects the defendant to imprisonment, before he can be heard by himself or counsel as to whether he may be in contempt, and is a decree final in its nature and not passed in term time.

6. "Because the Circuit judge erred in holding that there was such a continuity of proceedings as rebutted the presumption of abandonment from the lapse of time.

7. "Because the order directs the payment of a sum in gross which is more than sufficient to satisfy the claims of the plaintiffs.

8. "Because the order vests in the sheriff of Spartanburg county the right to determine whether the order is obeyed, and to that extent is a delegation of power which can rest only in the court.

9. "Because the order is repugnant to and in violation of section 14, article I. of the constitution of this State, in that it inflicts a punishment not based on the verdict of a jury.

10. "Because the process for commitment does not run in the name of the State of South Carolina, and is not tested by the seal of the court."

The second exception seems to have reference to some homestead proceedings before Judge Pressley, in which other creditors objected to the homestead assigned to the defendant. Neither the record nor Judge Pressley's rulings were in evidence before the referee, and can not in any way affect this case.

The third exception complains that the judge erred in holding that the referee could hear the cases together. We are unable to see why not. The union did not and could not injure the defendant. The course pursued by the referee not only saved time, trouble

and expense to all concerned, but was precisely the proper course. Where there is more than one judgment creditor, prosecuting supplementary proceedings against the same debtor, the practice is to unite them in one proceeding. All the creditors have a common interest in the same matter. The proceeding is not technically what is called a special proceeding, but a continuation of the action in which the judgment was recovered,

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and in one sense a substitute for \*the former creditor's bill. Voorh. Ann. Code, page 462 and notes. Section 318 of the code, after giving the judge the power to appoint a receiver of the property of the judgment debtor, provides: "But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed," &c.

The fourth exception makes the point that the referee could not decide questions of law, but without specifying any particulars in which he erred in that respect. We agree with the Circuit judge that a referee, no matter how limited his powers, must sometimes necessarily decide questions of law which arise in the progress of the inquiry he is ordered to make. If he has not decided such questions wrongly and thereby prejudiced defendant's rights, there is no just ground to complain. The Circuit judge certainly had this right, and he approved all the rulings of the referee. In looking carefully through the record we can not see that the referee decided any questions of law, except those raised by the defendant himself. He moved to vacate the service of the order under which the reference was held, and now complains that the referee had no right to decide that motion. To set aside a referee's report upon such grounds would be to put proceedings in the power of those against whom they were instituted.

The first exception makes the point that the judge, at chambers, in Union county, had not the right to confirm the referee's report and grant the final order—the defendant residing, and the judgment having been recovered, and the proceedings before the referee had, in the county of Spartanburg.

The code of procedure, in the chapter on the subject of "Proceedings supplementary to the execution," provides as follows:

"Section 312. When an execution against property of the judgment debtor \* \* \*

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is returned unsatisfied, the judgment creditor, at any time after such return made, is



entitled to an order from a judge of the Circuit court, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued," &c.

"Section 320. The judge may in his discretion order a reference to a referee agreed upon by the parties or appointed by him, to report the evidence or the facts, and may in his discretion appoint such referee in the first order or at any time."

"Section 318. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner and with the like authority as if the appointment was made by the court according to section 265," which provides that "A receiver may be appointed by a judge of the Circuit court, either in or out of court."

"Section 317. The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment," &c.

From these provisions it is manifest that the judge, as well as the court, may make orders in supplementary proceedings. Indeed, it seems that at least the first order for the examination of the debtor can only be made by the judge out of court. Voorh. Code 464, note. It seems to us also that the restriction in section 312, "within the county to which the execution was issued," relates only to the examination of the debtor. When that examination had to be made before the judge who issued the order, the place where he kept his chambers was a matter of importance with reference to the view that the debtor, compelled to answer, should not be carried out of his county to do so.

But after the power was given to the judge to appoint a referee to take the examination and "report the evidence," it ceased to be important where the judge who issued the order resided. *Wilson v. Andrews*, 9 How. Pr. 39. When the referee in this case took the examination of the debtor in Spartanburg county, and reported the evidence to

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Judge Wallace, the whole purpose \*of the provision in the code was accomplished, and all other orders in the case "to continue and consummate the proceeding," including that made upon the evidence reported to him, could be made by the judge of the circuit at his home in Union, within the judicial district, though not in the county of Spartanburg, where the execution was issued and the examination was taken. *Crouse v. Wheeler*, 33 How. Pr. 337.

Exceptions 5, 8, 9 and 10, in different forms, make the point that the order appealed from is unconstitutional, first, as repugnant to and in violation of section 14 of the "Declaration of Rights," in that it in-

flicts a punishment not based upon the verdict of a jury; but if not, second, that the attachment was ordered prematurely, in being included in the same order which required the payment of the money; that it could only issue by the judge himself, after the disobedience and failure to show cause why the attachment should not issue.

If the first ground could be sustained, it would utterly defeat the whole purpose of supplementary proceedings, which, after the abolition of imprisonment for debt, were given as a sort of substitute for the old process of *capias ad satisfaciendum*. There can be no doubt that a court of record has the right to enforce its orders by attachment as for a contempt. As we understand it, that has always been the law in this State. *Ex parte Thurmond*, 1 Bailey 607; *Sherman v. Cohen*, 2 Strobb. 556. In the last-named case a certain sum of money was found to be in the hands of a garnishee. The court ordered him to pay it, which he refused to do, and, having no other means of enforcing it, held that it might and should be enforced by attachment for a contempt.

In delivering the judgment, Judge O'Neill said: "If the court has ordered it to be paid over (as in this case), and the defendant has failed to comply, cannot the court enforce that order? To say that it cannot would be to make the mandate of the court a sound and no more. But the case *Ex parte Thurmond*, 1 Bailey 606, tells us that an attachment may be issued to compel the performance of 'the orders' of a court of record. This shows that when no other remedy is given to enforce obedience, attachment is

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proper. The notion that a party has \*sworn off the contempt in advance, and therefore the writ can not issue, is altogether wrong," &c.

We do not think that this pre-existing right of the court to enforce its own orders by attachment, was taken away by the fourteenth section of the "Declaration of Rights," in the constitution of 1868, which declares that "the general assembly shall not enact any law that shall subject any person to punishment without trial by jury." *Commissioners of New Town Cut v. Seabrook*, 2 Strobb. 564. The code of procedure, enacted soon after the constitution was adopted, and to a large extent by the same persons who framed it, gives the right in express terms. Section 322, upon this very subject of supplementary proceedings, enacts that "if any person, party or witness, disobey an order of the judge or referee duly served, such person, party or witness may be punished by the judge for contempt."

But it is urged that this view is met by that other provision of the present constitution, which forbids imprisonment for debt "except in cases of fraud"—that attachment in such case for the non-payment of money

is only an indirect way of restoring the old law of imprisonment for debt. In regard to the enforcement of an order by attachment there may possibly be some difference (alluded to in some of the cases) between an order for the payment of money generally, and the delivery of property—a specific thing, such as a horse, a watch, or a note. In the former case, the order, in form at least, is something like a money decree, and as such may be supposed to run counter to the aforesaid provision of the constitution, but clearly in the latter case no such question can arise.

We consider that the order in this case to turn over the money was something more than mere process for the collection of a debt which was already in judgment, and the execution returned “unsatisfied.” It was in effect an order to deliver a specific thing—specie or bank bills to a certain amount—ascertained to be in the possession or under the control of the defendant; and the super-added order to attach him in case of his disobedience, was not within the provision of the constitution against imprisonment for debt. The question in the case of Gilliam v. McJunkin, 2 S. C. 443, was as to the en-

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forcement by attachment \*of a mere money decree of the Probate judge, which was rendered without authority of law. Besides, may it not be said that such orders are never issued except “in cases of fraud,” which are exceptional. Be that as it may, the code, as above stated, has expressly given the power, and in section 199, which prohibits arrests in civil cases, declares that “the same shall not apply to proceedings for contempt.”

It only remains to consider the form of procedure adopted. It appears that there was no application made to attach the defendant after he had failed to obey the order, but the same order which required the money to be paid within two days, went on and directed in the alternative, “or that in default of such payment, (such default to be evidenced by the affidavit of the receiver, served upon the sheriff of Spartanburg county,) that said sheriff do arrest said defendant, William E. Walker, and commit and imprison him in the common jail for said county, as for a contempt of court, until he shall comply with this order or unless sooner discharged by order of court.” Was this error? The code gives the right to attach for contempt, but no direction as to the form of proceeding. As to that we must look to the general law and practice.

It seems to us that there is force in the view that one failing to obey an order, should have an opportunity to be heard upon the subject before he is punished by imprisonment. The nature of the right to attach is such—being in stricti juris and involving the liberty of the citizen—that in exercising it the greatest care should be observed, to the end that the subject of it should not be de-

prived of any privilege which the law gives him. It may be conceded that in his return to a rule to show cause why he should not be attached for disobeying the order to pay, the defendant could not renew the litigation and re-open the question of fact as to whether he had possession or control of the money, which was adjudged against him upon his answering before the referee, (Freem. Judg., § 327,) but we can conceive of matters which might be shown in the return, as, for instance, that the money, after it was found to be in his possession, had been lost or destroyed without fault upon his part. It is the safer course that the judge or the court

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which issued the order should hear \*the application for attachment, after the time fixed for its execution, and determine whether there has been in fact a default, and if so, whether any excuse which may be given should or should not be held sufficient to exonerate the party.

It is true the order in the alternative follows precisely the form for such an order given in 4 Wait Pr. 170; but it seems that the New York authorities upon this subject are not in accord. The same author elsewhere, under the head of “Process of Contempt,” states the practice as follows: “Application for an order of attachment may be made ex parte or on notice of motion, accompanied by copies of the papers on which it is founded. Whether it shall issue in the first instance or on notice, is discretionary with the court or the officer granting it. It is said, however, that the usual and more advisable course is to apply for the attachment on notice in the usual manner, or on an order to show cause. \* \* \* The order for the attachment should merely direct the issuing of the attachment, or only declare that it appears to the court there is probable cause for issuing an attachment, to bring the defendant before the court to answer as to the alleged contempt. It should not contain an adjudication of the court that the defendant is guilty of the contempt,” &c. 4 Wait Pr. 181.

We see no reason why the attachment for contempt, allowed in supplementary proceedings, should not conform to the general rule. The case of Earle v. Stokes, 5 S. C. 336, is the only one in our reports in which there was an attachment to enforce an order made in supplementary proceedings, and in that case there was a rule to show cause after the failure to answer. As we understand it, the practice in this State is not to attach until the party has had an opportunity to be heard. In the case of the State v. Hunt, 4 Strobb. 338, which was the attachment of an attorney for contempt, the court say: “The proceeding by rule is the result of the provision contained in the act of 1811, which grew out of the commitment by Mr. Justice Grimke of the constables at Newberry in



1807, who were found absent from their posts, without requiring them to show cause. Its provision, that no one shall be imprison-

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ed without \*hearing him, necessarily, in a case like the present makes the proceeding by rule proper. It has the sanction of a well settled practice, and is prudent as affording cooling time and an opportunity for the interference of friends."

We do not see in the case any evidence that judgment creditors, other than the two who instituted the proceedings, were ever notified or came in as parties and proved their judgments. Neither their names nor the respective amounts of their judgments are given. The only reference made to them is the statement of the referee that "It was in testimony that there were other outstanding judgments against the defendant amounting to the sum of \$4,869.14, inclusive of interest and costs." Under these circumstances we can not regard these other judgment creditors as parties to the proceeding, in such sense as to authorize an attachment in their behalf. The order to pay the money found to be in the hands of the defendant should have been limited to so much as was necessary to pay the costs of this proceeding, and the debt, interest and costs of the two judgment creditors who instituted supplementary proceedings.

It is the judgment of this court that the judgment of the Circuit Court be affirmed, in so far as it confirmed the report of the referee; but in so far as it ordered the defendant to pay the whole sum found to be in his hands, or in default thereof to be arrested and imprisoned, be set aside and the case remanded for such further proceedings as may be deemed necessary, according to the principles herein announced.

### 19 S. C. 114

STATE, ex relatione WOODSIDES, v.  
McDANIEL.

(November Term, 1882.)

[1. *Statutes* ⌘106.]

The codification of the statutes adopted in 1882, under the requirements of the constitution, and known as the general statutes of that year, is valid, notwithstanding it did not relate to but one subject and was without a title. And on its passage by the general assembly, it was subject to amendment in the same manner as ordinary acts are.

[Ed. Note.—Cited in *Kaminitsky v. North-eastern R. Co.*, 25 S. C. 63; *Floyd v. Perrin*, 30 S. C. 9, 8 S. E. 14, 2 L. R. A. 242; *City Council of Charleston v. Weller*, 34 S. C. 362, 13 S. E. 628.

For other cases, see *Statutes*, Cent. Dig. § 119; Dec. Dig. ⌘106.]

[2. *Officers* ⌘4; *Registers of Deeds* ⌘1.]

The office of register of mesne conveyances is a legislative office, and therefore subject to be modified, limited or abolished by the legisla-

ture. Its duties having been devolved by stat-

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ute upon the clerk of court, it was \*within the power of the legislature to take it away from the clerk during his term of office, create it a separate office, provide for the election of an incumbent and transfer to one so elected the duties and emoluments of that office.

[Ed. Note.—Cited in *Waring v. Miller Battering, etc., Co.*, 36 S. C. 317, 15 S. E. 132.

For other cases, see *Officers*, Cent. Dig. § 5; Dec. Dig. ⌘4; *Registers of Deeds*, Cent. Dig. ⌘1; Dec. Dig. ⌘1.]

This was an original application to the Supreme Court in quo warranto by Thomas L. Woodside, under the facts set forth in the opinion.

Messrs. W. H. Perry, J. H. Heyward and C. M. Furman, for relator, cited 10 How. 416; 4 Wheat. 629; Cool. Con. Lim. \*276-7; *State v. Herriot*, MSS. Dec. 1827; 7 Rich. 368; 2 S. C. 81; 26 Wis. 428; 5 N. Y. 285; 21 Wend. 563; 44 Geo. 463; 7 Stat. 296; 11 Id. 88, 115; 13 Id. 229; Gen. Stat. 1872, page 187; 2 Stat. 14, 120, 137; 3 Id. 303; 1 Id. 143, 190; 5 Id. 674; 6 Id. 12; 1 McC. 238, 251; 44 Mo. 129; 52 Miss. 665; 40 Id. 268; 37 N. Y. 518; 7 Ind. 157.

Messrs. Wells & Orr and G. W. Westmoreland, contra, cited 1 Hill 267; 2 McC. 301; 2 Bailey, 524, 554; 2 Strobb. 530; Bailey Eq. 97; 4 S. C. 430; 9 Id. 288; 13 Id. 228; 30 Cal. 680.

January 30th, 1883. The following order was passed by

Mr. Chief Justice SIMPSON. On hearing the pleadings, the agreed statement of facts and the argument of counsel, and after full consideration thereof, it is adjudged that the plaintiff relator is entitled to the relief demanded in his complaint, and that judgment be entered accordingly, and also for the plaintiff's costs and disbursements. The reasons upon which this judgment is based will be announced in an opinion hereafter to be filed.

March 20th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. At the general election in November, 1882, the relator was elected register of mesne conveyances for Greenville county, an election for said officer in said county at each general election having been provided for by amendment to the General Statutes, passed at the session of 1881-82. Gen. Stat., § 764. After giving the required bond and receiving his commission from the governor, he demanded the books and records of said office of the

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respondent, W. A. \*McDaniel, clerk of the court. McDaniel declined to give them up, claiming that having been elected to the office of clerk of the court in said county, at

the general election in 1880, when the duties of register of mesne conveyances were attached to said office, and his term not having expired by two years, that he was entitled to hold on for that time. Upon this refusal, the relator commenced this proceeding in the nature of quo warranto, which, upon an agreed statement of facts without action, has been heard under the original jurisdiction of this court.

The ground relied upon by the respondent to sustain his refusal is the unconstitutionality of the act under which the relator claims to have been elected. This proposition is urged upon three grounds: 1. Because it was an amendment to an act as to a matter not expressed in the title of said act, and therefore in violation of section 20, article II., of the constitution, which declares that every act and resolution having the force of law shall relate to but one subject and that shall be expressed in the title. 2. That McDaniel having been elected clerk for four years, when by law the duties of register of mesne conveyances had to be performed by the clerk, he had a vested right in said office, both by law and by contract, of which he could not be deprived by an "act." 3. That the office of register of mesne conveyances was a constitutional office with a fixed term, and therefore beyond the reach of an "act."

The first ground, we think, is met by section 3, article V. of the constitution, which provides that the general assembly at its first session and within every subsequent period of ten years, shall make provision to revise, digest and arrange under proper heads the body of our laws, civil and criminal, &c. &c. This section not only authorizes the general assembly to consolidate the matter directed therein, but imposes it as an absolute duty, and inasmuch as no special mode is prescribed for the performance of this duty, the end carries with it all the necessary powers, the general assembly having carte blanche in their exercise according to its discretion.

No doubt the end intended to be accomplished was the formation of a code containing all the acts of force at the time in a statutory form and arranged according to

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some definite and well-considered plan, which, being adopted as a whole, would take the place of the mass of separate statutes found scattered through different volumes containing the numerous acts of the different sessions. At all events the general assembly seems to have come to the conclusion that the requirements of this section of the constitution could be best accomplished by the enactment of a general statute of the kind indicated above. Hence the commission to whose labors the work was entrusted, and hence the general statutes which have been the result,

Now, it is admitted that this general statute does not relate to but one subject which is expressed in its title—on the contrary it relates to the numerous subjects found in the different acts which it embraces and codifies, and there seems to be no title attached; and being in both respects in direct conflict with section 20, article II., of the constitution, if that section applies of course it would follow that the position of the respondent is well taken. Does it apply? We think not, for the reason indicated above. We do not see how the work required of the general assembly, section 3, article V., referred to supra, could possibly be performed with that body trammelled and hampered by section 20, article II.

The provisions of the constitution evidently intended that all the acts passed in the different decades of our history, should be arranged and embraced together in one general and convenient form, and when so arranged should have the force and effect of law. We see no way in which this could be done except by the passage of one general act containing them all, duly ratified and approved, and inasmuch as this could not be done in accordance with the requirements of section 20, article II., we must conclude that said section was never intended to apply to this duty, as we can not think that the constitution would impose a duty upon the general assembly, and at the same time tie its hands and thereby prevent the discharge thereof.

In our opinion section 3, article V., makes an exception to section 20, article II., and is in the nature of a proviso thereto. The two should be read together, and when thus read both can be sustained in harmony, as follows: Every act and resolution having the force of law shall relate to but one subject, which

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\*shall be expressed in the title, except as to the revision and codification of the statutes, which the general assembly is required to make every ten years, in such way and according to such scheme as may be deemed best. Thus construed, we think the general assembly had power to put the general statutes upon its passage without regard to section 20, article II., and when thus upon its passage it was subject to such amendments as in its wisdom the legislature might adopt according to the rules governing in such cases.

We understand that the objection that the two houses did not concur in the amendment in question has been withdrawn. It therefore need not be considered. Nor in the view we have taken, is it necessary to consider the question of fact, whether this amendment was read three times in each house, because, being simply an amendment to a bill which was thus read, the rule suggested was complied within the three readings of the original bill. We conclude that the first ground relied on by respondent can not be sustained.



Second. Did the respondent have such vested right in the office of register of mesne conveyances, by virtue of his being clerk of the court, as that the legislature could not divest it? As to this, it is only necessary to say that a public office, created by legislative enactment, never escapes from the control of the legislature; on the contrary, such office exists by sufferance only, as it were. If there be no constitutional inhibition, its powers and duties may be modified or limited as the public interest may require, or the entire office may be abolished at the will of the legislature. See the numerous authorities cited by the relator, and especially our own case of *Alexander v. McKenzie*, 2 S. C. 81.

It is said, however, that while this may be the case as to offices created by acts of the general assembly, yet this has no application here because this is a constitutional office of four years. This position has no better foundation than those already considered. The office of register of mesne conveyances seems to have come down to us from a remote period in our history. In 1685 (2 Stat. 14) we find provision made for a register of marriages, births, &c. In 1695 (2

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Stat. 120) this officer was \*required to reside in Charleston. In 1698 it was enacted that the sale, conveyance or mortgages of land first recorded in the register's office in Charleston, should be good as against conveyances not so recorded. 2 Stat. 137. This last appears to be the first mention of an office for the recording of deeds, &c.

In the constitution of 1776 (1 Stat. 133) the office is mentioned by name as "register" of mesne conveyances, to be elected by joint ballot of the general assembly and legislative council, and to hold his office during good behavior." In the constitution of 1778 (1 Stat. 143) it is provided that the register of mesne conveyances in each district shall be elected by joint ballot of the senate and house of representatives for the term of two years.

In the constitution of 1790 no mention is made in terms of this office, but section 2, article VI., (1 Stat. 190,) after having directed how certain named officers should be elected, provides that "all other officers shall be appointed as they hitherto have been, until otherwise directed by law."

The matter remained in this condition until 1799 (7 Stat. 296), when an act was passed constituting the clerk of the court of each district where the county courts had been established, as register of mesne conveyances. In 1812 (5 Stat. 674) it was enacted that registers should be elected by the legislature for a term of four years. In 1839 (11 Stat. 88) it was enacted that clerks of the court, whose election had previously been given to the people, should be the registers of mesne conveyances in their respective districts, ex-

cept in the districts of Georgetown and Charleston.

Thus the law stood at the adoption of the constitution of 1868. The act of 1839 was embodied in the general statutes, and under this act the clerks of the several counties have since been discharging the duties of register, except in Georgetown and Charleston. In 1882, by the act now under consideration, a change was made as to Greenville county, which provides that the register for that county shall be elected at every general election, thus substantially cutting down the term of office for this county for two years, and withdrawing it from the duties of the clerk of the court. This act also provides that the register for Charleston shall be the register for the new county of Berkeley.

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\*The constitution of 1868 makes no mention of the office of register of mesne conveyances.

It will be seen from this history that under the constitutions of 1776 and 1778, this office was a constitutional office, the tenure under the first being good behavior, and under the second for two years. In the constitution of 1790 it was impliedly recognized as in existence, and to remain so until otherwise directed by law. Since then, and up to the constitution of 1868, by virtue of the above provision of the constitution of 1790, it has been entirely under the control of the legislature, as appears from the various acts referred to above, to wit: Acts of 1799, 1812 and 1839, supra. The constitution of 1868, as has been stated, makes no provision in reference to it, either as to the mode of election or its terms. At the adoption of this constitution, the act of 1839, which imposed the duties of register upon the clerks of most of the counties, was of force, and this act remained of force, by virtue of its original enactments, until it was incorporated into the general statutes, in 1872.

Thus it will be seen that, at the session of 1882, when the present act was passed, the office of register and the mode of having its duties performed depended solely and entirely upon the act of 1839, which had been passed by virtue of the constitution of 1790, and which had been re-enacted and incorporated into the general statutes in 1872. In 1882, therefore, the constitution of 1790 having been swept away and a new constitution adopted in 1868, which latter made no mention of this office, it was simply (and nothing more) a legislative office, and, therefore, under the authorities already cited, subject to be modified, limited, or altogether abolished, at the will of the legislature.

Let this opinion be filed with the judgment of this court heretofore pronounced and entered.

Application refused.

19 S. C. \*121

## \*DE CAMPS v. CARPIN.

(November Term, 1882.)

[1. *Contracts* ⇨176.]

The construction of a written contract is a question for the court and not for the jury.

[Ed. Note.—Cited in *Arnold v. Bailey*, 24 S. C. 497; *Bratton v. Lowry*, 39 S. C. 389, 17 S. E. 832.

For other cases, see *Contracts*, Cent. Dig. § 767; Dec. Dig. ⇨176.]

[2. *Contracts* ⇨189; *Evidence* ⇨397; *Principal and Surety* ⇨77.]

A written contract by C. to be surety for the debts of J. to D., held from its terms not to include an existing liability of D. as surety for J., and which had not then been paid by D.; and parol testimony was inadmissible to prove that such was the understanding of the parties.

[Ed. Note.—Cited in *Crawford v. Oman & Stewart Stone Co.*, 34 S. C. 98, 12 S. E. 929, 12 L. R. A. 375.

For other cases, see *Contracts*, Cent. Dig. § 820; Dec. Dig. ⇨189; *Evidence*, Cent. Dig. § 1756; Dec. Dig. ⇨397; *Principal and Surety*, Cent. Dig. § 123; Dec. Dig. ⇨77.]

[3. *Trial* ⇨136.]

There being in this case, not merely a want of evidence to sustain a valid claim, but the absence of any legal demand whatever, the judgment below for plaintiff was reversed and the complaint dismissed. This case thus distinguished from the cases of *Carter v. Railroad Company* [19 S. C. 20, 45 Am. Rep. 754], and *Carrier & Harris v. Dorrance*, ante p. 30.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. ⇨136.]

[This case is also cited in *Lamplsey v. Atlantic Coast Line R. Co.*, 77 S. C. 323, 57 S. E. 1104, and *Townes v. City Council of Augusta*, 46 S. C. 38, 23 S. E. 984, as to the distinction between cases in which the court can grant a nonsuit and those in which it must grant a new trial, and distinguished therefrom.]

Before Aldrich, J., Greenville, April, 1882. Action by M. G. DeCamps against A. Carpin.

The opinion states the case.

Mr. Julius H. Heyward, for appellant.

Mr. W. L. Wait, contra.

March 22d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action brought by the plaintiff to recover certain amounts alleged to be due to the plaintiff by one P. Jaffeux, the payment of which the plaintiff claimed had been assumed by the defendant.

It seems that the plaintiff, being the owner of a tract of land, had agreed to sell it to Jaffeux for \$500, the same price which he paid for it, and had also befriended him by making advances and becoming security for stock and fertilizers. Jaffeux being unable to pay for the land, negotiations were opened by the defendant for the purchase of the land, by letter bearing date July 24th, 1878,

in which he proposed certain terms which are stated in the letter as follows: "You will sell me your property, with immediate pos-

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session, in consideration of the sum of \$500, which I will pay at the following dates, viz.: \$100 the 1st of January 1879, \* \* \* and lastly, \$100 the 1st of January 1881. \* \* \* It will be impossible for me to do any better, and above all to give any money at once, besides in giving you \$100 on the 1st of January next, and that which Mr. Jaffeux will give you, may be \$100 also, you will then have the sum you wish to have. I say \$100, but I do not know if Mr. J. owes you that sum, in interest or otherwise. At any rate I engage myself to compensate you at this period of that which he may owe you outside of the price of acquisition, such as interest, money still due on stock or any private account, &c., from the time he went on the farm until the day I enter in possession. \* \* \* If these, my conditions, seem acceptable to you, you can settle to date with Mr. Jaffeux all he owes you, and make him acknowledge the sum payable on the 1st January next. I will be security if you desire it."

These terms were acceded to by plaintiff with a slight modification as to the rate of interest, and accordingly titles were made to defendant, and he went into possession. The plaintiff then made a settlement with Jaffeux and found that they were about even, but plaintiff was liable as surety for Jaffeux on a note to one Davis, for \$65, given for a mule, and, Jaffeux failing to pay, the plaintiff paid the note to Davis on June 28th, 1879. The plaintiff had also become surety for Jaffeux for some guano and for a physician's bill due by Jaffeux, amounting together to the sum of \$10.90, which the plaintiff subsequently paid.

The plaintiff, in his complaint, amongst other things alleges that on July 24th, 1878, the defendant "wrote to this plaintiff a letter requesting the plaintiff to sell said land to defendant, upon certain terms therein set forth, and agreeing to be security for all that the said Jaffeux might be indebted to plaintiff in case he accepted the terms proposed. That plaintiff sent a message to the defendant the next day, agreeing to sell him the land upon the terms set forth in said letter, with a slight modification in the rate of interest. That these terms were accepted by the defendant, and this plaintiff made a title to said land to the defendant in accordance with the terms of said agreement." The complaint then goes on to allege an indebted-

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ness on the \*part of Jaffeux, which, however, was not proved at the trial; and also that he had been compelled to pay the note to Davis, as well as the other liabilities mentioned above, and demands judgment for the amount so due by Jaffeux, together with the



amount so paid for him by plaintiff, as surety.

The defendant, in his answer, admits writing the letter referred to, a copy of which is set out in the "Case," "in which certain terms were offered the plaintiff for the purchase of the tract of land mentioned in the complaint, as also certain terms upon which the defendant would be willing to bind himself as surety for such debts of the said Jaffeux as were specified in the said letter, but the defendant denies that said terms have ever been accepted or complied with;" and he also denies all the other allegations contained in the complaint.

The only testimony offered at the trial was that of the plaintiff himself, and the letter of defendant above referred to. Amongst other things, the plaintiff testified "that it was the understanding between him and the defendant that the defendant was to re-imburse him for every liability, of every kind whatsoever, which he had incurred for Jaffeux, and that he would not have sold the land to the defendant, at the price agreed upon, on any other terms, as he could have sold the land to other parties at an advance of \$150."

At the close of the testimony defendant moved for a nonsuit, on the following grounds: "1. That it had not been shown that the terms offered in the letter of defendant had been complied with, and unless it were shown that the amount claimed by the plaintiff had been acknowledged by Jaffeux, and made payable on January 1st, 1879, as required by the terms of said letter, the defendant could not be held liable. 2. That by the very terms of the letter itself, the defendant could not be held liable for any debts of the said Jaffeux, paid by the plaintiff after July 24th, 1878." The motion for a non-suit was refused and the defendant offered no testimony.

The Circuit judge, amongst other things, charged the jury as follows: "Now, the question for you is, What was the contract? Did the defendant, Carpin, promise to pay the plaintiff, DeCamps, the \$500, and, in addi-

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tion, what Jaffeux owed him \*for money advanced, and also for what he was liable to pay on his account?" The jury rendered a verdict for plaintiff, and defendant appeals upon various grounds, which, in substance, allege error in refusing the motion for nonsuit, and in leaving it to the jury to say what was the contract between the parties.

There can be no doubt that the plaintiff brought his action upon the contract as stated in the defendant's letter, only modified as to the rate of interest, about which there seems to be no dispute, for that is the only contract mentioned in the complaint and there is no allegation that it was in any way modified except as to the rate of interest. On the contrary, it is expressly alleged that the contract was "upon the terms set forth in said letter, with a slight modification as

to the rate of interest." By that contract, therefore, must the plaintiff stand or fall.

The rule is well settled that the construction of the terms of a written contract is a question for the court and not for the jury, (*Mowry v. Stogner*, 3 S. C. 251; *Hammond v. Port Royal and Augusta R. R. Co.*, 15 S. C. 10; *Russell v. Arthur*, 17 Id. 477.) and therefore we think that the Circuit judge erred in referring it to the jury to say what was the contract between the parties. The contract sued upon was the one stated in the letter, and it was for the court, and not for the jury, to say what was the proper construction of the terms in which it was stated in the letter. The real point in dispute between the parties was, whether, under the terms of the contract sued upon, the defendant agreed to pay simply what was due by Jaffeux to the plaintiff at the time, or whether he did not also agree to pay whatever debts the plaintiff might then be liable for as the surety of Jaffeux, and which might afterwards be paid by the plaintiff. The plaintiff contends for the latter, while the defendant insists that the former is the true construction of the terms of the contract.

We think that the construction contended for by the defendant is the correct one. The terms proposed in the letter of the defendant, which were acceded to by the plaintiff and which have hereinbefore been stated, conclusively show that the agreement was that defendant was to pay whatever Jaffeux might then owe the plaintiff, and not what he

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might subsequently become \*indebted for by reason of a surety debt subsequently paid or otherwise. This is evident from the fact that the proposition was to pay on January 1st, 1879, what Jaffeux then owed to plaintiff, and confirmed by the further fact that defendant went on to say if his terms were accepted the plaintiff could settle with Jaffeux "to date," July 24th, 1878, "all he owes you," and make him acknowledge the same payable January 1st, 1879. This certainly could not have been done if the intention was to include not only what Jaffeux then owed plaintiff, but also what he might subsequently owe him on account of a surety debt subsequently paid by plaintiff for him.

Until the plaintiff paid the debt upon which he was surety for Jaffeux, the latter could not be said to owe the plaintiff anything on account of such debt, for it might turn out that Jaffeux would himself pay the debt and thus relieve his surety, or it might be that the surety never would pay the debt; and, hence, as it is well settled, it cannot be said that Jaffeux owed anything to the plaintiff at the time, on account of the debts for which the plaintiff was surety for Jaffeux. The indebtedness of Jaffeux to the plaintiff on account of these debts did not arise until nearly a year after the contract in question was made, to wit, on June 28th, 1879, when the plaintiff paid these debts, and we do not

see how such indebtedness could have been brought into a settlement, to be made with Jaffeux in July, 1878, in which he was to acknowledge the sum due, which was to be payable January 1st, 1879. It seems, too, that such must have been the intention of the parties at the time, for it appears from plaintiff's own testimony that when the contract with defendant was closed, that he had a settlement with Jaffeux, as proposed by defendant in his letter, in which it was ascertained that Jaffeux then owed him nothing.

It is true that the plaintiff, in his testimony, did say "that it was the understanding, between him and the defendant, that the defendant was to reimburse him for every liability of every kind whatsoever which he had incurred for Jaffeux," but this amounts to nothing more than an attempt on the part of the plaintiff to give construction to the terms of the contract in question, and nothing is better settled than that, when parties

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\*contract in writing, they must abide by the terms as written, and cannot interpolate into the contract the "understanding" which the parties had of the meaning of those terms. We must look alone to the writing to ascertain what were the words used by the parties, and then it is for the court, and certainly not for one of the parties, to give a proper construction to the words used.

Inasmuch, therefore, as the plaintiff not only failed to prove that Jaffeux owed him anything at the time the contract with defendant was made, but, on the contrary, did prove that he then owed him nothing, the motion for a non-suit should have been granted. And as it is not a case of a want of evidence merely, but one in which the nature of the demand, as set up by plaintiff, is such that he cannot in any event recover, under the authority of the case of Sampson & Wyatt v. Singer Manufacturing Company, 5 S. C. 465, the complaint must be dismissed.

This case differs from the case of Carter v. Columbia and Greenville R. R. Co., [19 S. C. 20, 45 Am. Rep. 754], and Carrier & Harris v. Dorrance, ante p. 30, decided at the present term, in this respect: In those cases the motions for non-suit were based solely upon the want of evidence tending to establish material allegations in the complaints, while here the nature of the demand, as set up by plaintiff, is such that he could not in any event, recover. The real cause of action is the indebtedness of Jaffeux to plaintiff, arising from the payment by plaintiff of certain debts for which he was liable as surety for Jaffeux, and, as we have seen, the defendant could not be made liable, under a proper construction of the agreement upon which the complaint is based, for such indebtedness, no matter how well established.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

19 S. C. 126

Ex parte TRENHOLM.  
(November Term, 1882.)

[1. *Trusts* ⇨89.]

In order to establish a resulting trust in lands conveyed to the grantee, it is necessary that an actual payment of the purchase-money, or some definite portion of it, should be clearly proved to have been made by the cestui que trust at the time of the purchase.

[Ed. Note.—Cited in Richardson v. Day, 20 S. C. 418; Mims v. Chandler, 21 S. C. 491; Brown v. Cave, 23 S. C. 257; Boozer v. Teague, 27 S. C. 368, 3 S. E. 551; Watson v. Young, 30 S. C. 151, 8 S. E. 706; Jones v. Hughey, 46 S. C. 193, 196, 24 S. E. 178; Gaines v. Drakeford, 51 S. C. 38, 27 S. E. 960; Rogers v. Rogers, 52 S. C. 391, 29 S. E. 812; Green v. Green, 56 S. C. 213, 34 S. E. 249, 46 L. R. A. 525; Miller v. Saxton, 75 S. C. 245, 55 S. E. 310; Surasky v. Weintraub, 90 S. C. 532, 73 S. E. 1029.

For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇨89.]

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[2. *Judgment* ⇨772.]

\*Lands conveyed to a judgment debtor become instantly subject to the lien of the judgment, unless there be some equity then existing superior to such lien; it cannot be defeated by a subsequent payment of the purchase-money by a third party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1335; Dec. Dig. ⇨772.]

[3. *Trusts* ⇨70.]

A., against whom there was an outstanding judgment, purchased land in his own name, and paid for it with a check upon funds in bank to his credit, and charged the same on his books to an account with certain adjacent property owned by himself and B. jointly, the income from which A. alone collected, and which was then in credit with him—there being at the time no agreement between the two concerning the matter. After deducting such payments, divisions of profits from the property so held in common, and also from the new purchase, were made, and balances due to B. were credited to his indebtedness on another account in A.'s books against B., who, upon a full adjustment of his several accounts with A., was indebted at all times until after the death of A. Held, that in the land so purchased there was no resulting trust in favor of B., and that it was subject to the lien of the outstanding judgment against A.

[Ed. Note.—Cited in Lamar v. Wright, 31 S. C. 73, 9 S. E. 736.

For other cases, see Trusts, Cent. Dig. § 95; Dec. Dig. ⇨70.]

Before Thomson, J., Charleston, June, 1880.

The opinion states the case. The Circuit decree, omitting its statement of the petition, was as follows:

The case was referred to the master, Hon. W. D. Porter, who, upon examination, held that a trust resulted in favor of the petitioner, and so reported. The case comes before the Circuit Court upon exceptions to the master's report, filed by Christopher F. Hampton, administrator and creditor of George A. Trenholm, by judgment in the United States Circuit Court. This judgment was recovered in June, 1869, against George A. Trenholm individually and as a member of the firm of John Fraser & Co.



The first exception is, that the money which was paid for the property was not the money of Frank H. Trenholm when the payments were made; and that George A. Trenholm did not make the purchases as a nominal purchaser with the money of Frank H. Trenholm as the real purchaser. There seems to be little difference of opinion as to facts. The exception is that, in fact, the testimony does not prove a resulting trust.

The principal facts relied on by the judgment creditor are found in the books of George A. Trenholm & Son (William L. Trenholm), which exhibit accounts kept with the petitioner under three heads or divisions,

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namely: 1. That for "Atlantic \*Wharves." 2. That for "Individual Account," and, 3. That for "Security Account." The money with which the purchases were paid was charged to "Atlantic Wharves." The judgment creditor charges that, upon the other accounts, the petitioner was in arrears; and was so for a long time after the purchases and until 1877. That the three accounts should be aggregated and show a balance in the petitioner's favor, before George A. Trenholm could have any money of the petitioner's in his hands, from the use of which a trust could result.

As a fact, however, there do not seem to have been stated any regular adjustments of these three accounts, with intent to show that the parties regarded a general balance, at certain periods, necessary to declare and fix the indebtedness of one to the other. For, although a balance may have been carried from one of the accounts to the other, still it appears upon the settlements of the account of "Atlantic Wharves," that the net balance was struck and divided, and the fourth of F. H. Trenholm carried to the "Security Account," without reference to what would be the general balance upon the three accounts.

The right of the judgment creditor cannot be greater than that of George A. Trenholm, were he living. It must be taken for granted that entries in the books of George A. Trenholm & Son were known to George A. Trenholm. The charge to "Atlantic Wharves" of the purchase-money, is a deliberate entry by George A. Trenholm, that he took to pay for his purchases, money, one-fourth of which he knew was the petitioner's. The striking of the balance afterwards, and division of the net proceeds, was a confirmation of this use of the money. The money, at the time when charged to "Atlantic Wharves," was the money of George A. Trenholm and of the petitioner; and the petitioner's right to his part could not be affected by balances struck afterwards or the state of the general account.

The second exception is, that Frank H. Trenholm was not personally a party to the transaction (purchase), in name or fact, and

the money was paid by a check of George A. Trenholm & Son. Admitting that Frank H. Trenholm was not personally connected with the transaction, that is only to state what often occurs in cases of resulting trusts.

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The right or title does not \*depend upon a contract made; it rests in equity upon the ground that he is the owner who paid the money, though he may not be connected, personally, with the purchase. Though the payments were made by checks of George A. Trenholm & Son, still the source from which the money was drawn or derived is shown, namely, by the charge on "Atlantic Wharves." Admitting that some transaction, intermediate or temporary, occurred, the payment rests upon the profits of "Atlantic Wharves," according to the proof.

The third exception is, that the judgment of C. H. Hampton attached upon the legal interest in the lots the moment they were conveyed to George A. Trenholm, in 1873 and 1874; also on his equitable interest, for the reason that he paid his own money therefor—and that such interest could not be divested by any settlement made with F. H. Trenholm after his father's death. This exception and the fourth are so nearly connected that they may be considered together. There is no doubt but that, to the extent of three-fourths of the property purchased, the interest vested in George A. Trenholm. The whole legal estate was conveyed to him, and, so far as it was not affected by F. H. Trenholm's equity, the judgment bound the property.

But it is plain that an assumption that the judgment bound the whole equitable interest because George A. Trenholm paid the whole purchase-money, is taking the point in dispute for granted. The foundation of the petitioner's claim is a denial that George A. Trenholm did pay the whole price of the lots with his own money. The petitioner's claim is, that at the same moment George A. Trenholm paid the purchase-money from profits of "Atlantic Wharves," he became trustee for the petitioner. In other words, the money that acquired the legal estate for George A. Trenholm acquired at the same time to the extent of one-fourth the equitable interest for the petitioner.

It is not to be overlooked that the money—the profits of "Atlantic Wharves"—was undivided, and that until division the money was the money of both, though in parts unequal in value. Had the money been separated into parts—three-fourths to George A. Trenholm and one-fourth to the petitioner—and G. A. Trenholm, believing that his son would

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unite with him in \*the purchases, had from his own part paid the whole, and, after payment to the vendor and title made to himself, the son had paid his father the one-fourth, it might well be doubted if there

would be a resulting trust. Before the judgment could attach upon the lots the title in George A. Trenholm must be complete. Here the legal estate vested in G. A. Trenholm and the equitable estate in one-fourth in F. H. Trenholm.

In regard to the fifth exception, it may be said that there is no question of the principle that the money of the party claiming a resulting trust must, in the beginning, enter into the transaction. If there were material accounts between parties which awaited a settlement, and upon adjustment it was found that the debtor had invested money in lands instead of paying his creditor, the creditor could have no claim on the lands as a resulting trust. The reason is obvious that until such settlement the creditor had no money in his debtor's hands which he could call his; but in the present case in every dollar of profits of "Atlantic Wharves" when made, the petitioner was entitled to his quarter in the same right that G. A. Trenholm was to his three-quarters, provided he had not overdrawn it, etc.

As to the sixth exception, it is to be observed that the judgment was obtained before the lots were purchased. It follows, of course, that the contract on which the judgment rests must have existed before the judgment. Then no credit was given to G. A. Trenholm on the appearance of ownership of property by possession, or upon unrecorded deeds. The complaint, then, is that forbearance was extended to G. A. Trenholm, upon the belief he was the owner of property (of which he was indeed in great part) when he was not wholly the owner. The gravamen of the complaint as affecting F. H. Trenholm in this exception is, that he was silent when he should have spoken out. But the elements of this species of covin are wanting. Whatever may have been said by G. A. Trenholm, deceased, (and death has closed his lips,) there is no proof that any action of the judgment creditor rested upon either the silence or action of F. H. Trenholm. He never was in a situation that bound him to speak out, and when silence would be a wrong.

If George A. Trenholm did speak as if he

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had been the sole claimer of the property purchased, this surely does not alter the fact. What is alleged he said, has not the force of a denial of F. H. Trenholm's right. In any event it can be no more. The claim itself is not adverse. The declarations admit a right in F. H. Trenholm whilst declaring the uses to which the purchases would be applied, namely, to attach them to "Atlantic Wharves" or convey to his son at some future time.

Striking out the testimony of F. H. Trenholm as to conversations had with his father in his life-time, the other proof appears sufficient to establish a resulting trust for the

petitioner in the lots of land described in the petition, conveyed to George A. Trenholm. It is ordered, adjudged and decreed that the exceptions of C. F. Hampton, the judgment creditor, be overruled, and the findings of fact and conclusions of law of the master made the judgment of the court.

C. F. Hampton, administrator, the judgment creditor of Geo. A. Trenholm, appealed to this court upon several exceptions, raising the precise points determined by this court, and others not considered.

Messrs. Simonton & Barker, for appellant, cited 2 Johns. Ch. 405; 4 East 577; 2 Atk. 71, 150; 15 Ves. 350; 1 Spenc. Eq. Jur. 508, 510, note c; 4 Kent 305; 3 Paige 390; 10 Bac. Abr. 209; 4 Watts & S. 149; Ad. Eq. 138; Sugd. Vend. & P., ch. XXI., § 1; 6 Cowen 726; 4 Desaus. 505; 17 Wall. 59; 3 Desaus. 539; 19 Iowa 325; 7 Brown P. C. 279; 8 DeG., M. & G. 787; 5 Watts 451; 18 Penn. St. 283; 8 Serg. & R. 485.

Messrs. DeSaussure & Son, contra, cited Perry Trusts, §§ 124, 125, 134; 2 Story Eq. Jur., § 1201; Tiff. & B. Trusts 22, 31; 1 Desaus. 289; 4 Id. 487; 3 Greenl. Evid., § 365; 1 Strobh. Eq. 112; 6 S. C. 102; 1 Johns. Ch. 582; Ad. Eq. 167, note; Rich. Eq. Cas. 172; 16 S. C. 632.

March 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. F. H. Trenholm, by this petition, asks that he may be allowed

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to intervene in the cause above stated, which was a proceeding for the settlement of the estate of George A. Trenholm, under which the lots of land hereinafter referred to have been sold as part of his estate, for the purpose of setting up a resulting trust in the petitioner, and claiming one-fourth of the proceeds of the sale of said lots. The facts upon which this claim is based do not seem to be disputed, and the real controversy is as to the proper legal conclusion to be deduced from the facts.

It seems that George A. Trenholm and the petitioner, F. H. Trenholm, were tenants in common of certain property in the city of Charleston, known as the Atlantic Wharves, the former being entitled to three undivided fourths and the latter to one undivided fourth, and that George A. Trenholm, who, for the purposes of this case, may be regarded as doing business under the name and style of George A. Trenholm & Son, (the son, Wm. L. Trenholm, being merely a salaried partner and having no further interest in the concern,) had the management and control of said property, receiving the income, and, at stated periods, dividing the same between himself and the petitioner in the proportions above stated.

There were three accounts on the books of George A. Trenholm & Son in which F. H.



Trenholm was interested, viz.: (1) Atlantic Wharves account, in which he was interested to the extent of one-fourth; (2) account of F. H. Trenholm individually; (3) F. H. Trenholm security account. The books show that the portions of the credit balances on Atlantic Wharves account, to wit, one-fourth, which F. H. Trenholm was entitled to, were regularly transferred to the credit of the F. H. Trenholm security account, and "that at no time, from the beginning of this account, had there been any balance on the security account, or on the three accounts taken together, in favor of F. H. Trenholm, until July, 1877, when his account was closed by entry of a credit from distribution of profits of Atlantic Wharves." The books also show "that with the exception of February 10th, 1873, Atlantic Wharves were always in credit with George A. Trenholm & Son, when the payments were made for the lots, and that all payments on account of the wharves were made by checks of George A. Trenholm & Son."

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\*On January 25th, 1873, George A. Trenholm purchased from George Gibbon one of the lots in question, paying one-third cash, and securing the balance by his own bond and mortgage, payable in two equal annual installments, and taking the titles in his own name, the papers bearing date January 25th, 1873. The cash payment was made on February 10th, 1873, by a check of George A. Trenholm & Son on the bank in favor of the purchaser, and the amount of said payment was, on the same day, charged to Atlantic Wharves account, and as the other installments became due they were paid in the same way, and the amounts thereof likewise charged to the same account. On May 30th, 1874, George A. Trenholm purchased the other lot in question from J. M. Shackelford, for cash, taking titles in his own name and paying the purchase-money by a check of George A. Trenholm & Son on the bank, the amount of which was also charged on the same day to Atlantic Wharves account. These lots, "from the time of purchase, were incorporated with or made a part of Atlantic Wharves, and the income from them was divided, in common with the other income from the wharves, between George A. Trenholm and F. H. Trenholm in the proportion of three-fourths to one-fourth."

The foregoing statement, condensed from the report of the master, to whom the case was referred, embraces substantially the material facts upon which he bases his conclusion. There is, however, an additional fact found in the testimony of Wm. L. Trenholm, which seems to have escaped the attention both of the master and the Circuit judge, and which appears to us to be of some significance. That witness says: "His father bought four pieces of property after the purchase of Atlantic Wharves, because they

were on, or connected with, the wharves. These pieces were paid for out of the income of the wharves, and were incorporated with it. The two pieces now in hand were conveyed to him; the others were conveyed, three-fourths to George A. Trenholm and one-fourth to F. H. Trenholm, those being the proportions in which Atlantic Wharves were held. He knows of no reason for the distinction made, and supposes it was a mere inadvertence that the one-fourth was not subsequently conveyed to F. H. Trenholm."

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\*Upon this state of facts the master reported in favor of the resulting trust, and the Circuit judge sustained the view taken by the master and rendered judgment establishing the trust in favor of the petitioner. From this judgment C. F. Hampton, as administrator of Frank Hampton, a judgment creditor of George A. Trenholm, appeals upon various grounds set out in the "Case," which we do not deem it necessary to repeat here. The sole question for our determination is whether the facts found in the record are sufficient to establish a resulting trust in favor of the petitioner. This is not a case in which we are called upon to review and reverse the findings of fact by the court below, for, as we have stated, there does not seem to be any dispute as to what the facts are, but the real controversy is, as to the legal conclusion to be drawn from undisputed facts.

The legal principles applicable to the question under consideration are so fully and clearly stated in the authorities cited by the counsel for appellant, that we are relieved from the necessity of doing more than simply quoting from some of the cases referred to. In the leading case of *Botsford v. Burr*, 2 Johns. Ch. at page 408, Chancellor Kent says: "If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A. because he paid the money. The whole foundation of the trust is the payment of the money. *Willis v. Willis*, 2 Atk. 71. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit or on his account." Again he says: "Nor would a subsequent advance of money to the purchaser, after the purchase is thus complete and ended, alter the case. It might be the evidence of a new loan, or be the ground of some new agreement, but it would not attach by relation a trust to the original purchase; for the trust arises out of the circumstance that the money of the real, and not of the nominal, purchaser formed at the time the consideration of that purchase, and became converted into the land."

In *Willis v. Willis*, supra, Lord Hardwick says, in speaking of this class of resulting trusts: "Now trusts of this nature are when the legal interest is in another, but the pur-

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chase-money has \*been paid by a third person: this is a resulting trust for him who paid the money, but then he must clearly prove the payment." As is said by Kent, Ch., in *Boyd v. McLean*, 1 Johns. Ch. at page 590, in speaking of the admissibility of parol evidence to establish a resulting trust: "The cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof as tending to perjury and the insecurity of paper titles, and they have required the payment by the cestui que trust to be clearly proved.

In 4 Kent Com. 305 (fifth edition) it is said, upon the authority of a number of cases there cited: "Where an estate is purchased in the name of A., and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B., provided the payment of the money be clearly proved. The payment at the time is indispensable to the creation of the trust."

In *Olcott v. Bynum*, 17 Wall. 59 [21 L. Ed. 570], it is said: "Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after-advances or funds subsequently furnished. It does not arise upon subsequent payments under a contract by another to purchase."

In our own case of *Taylor v. Mayrant*, 4 Desaus. 516, it is said: "It appears from the authorities quoted that a resulting trust cannot be raised by construction. It must be grounded on plain proof of the application of the funds of the party for whom it is raised."

From these authorities, as well as others cited in appellant's brief, it seems to be well settled that, in order to establish a resulting trust of the kind here sought to be set up, which, as Chancellor Kent said, in *Boyd v. McLean*, *supra*, tends so much to impair the security of paper titles, it is necessary that the payment of the purchase-money, or some definite portion of it, by the cestui que trust, should be clearly proved; that it must be an actual payment, and not a payment by construction merely; and that the payment must be at the time of the purchase.

Testing this case by these principles, we think it clear that the petitioner has failed to establish any resulting trust in his favor.

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\*So far from the payment of any portion of the purchase-money by the petitioner, at the time of the purchase, being clearly proved, we think the testimony shows that the entire purchase-money was paid by George A. Trenholm & Son, who, as we have said, for the purposes of this case, may be regarded as identical with George A. Trenholm. As to the lot bought from Gibbon, there can be no doubt. The title to George A. Trenholm was made on January 25th, 1873, and the purchase-money was not paid until Febru-

ary 10th, following. The moment the legal title became vested in George A. Trenholm, as it did so soon as the deed was executed, the property became subject to the lien of Hampton's judgment, unless there was then some existing equity in some one else superior to such lien.

The assumption of the master, based upon some alleged custom by which two or three weeks are allowed for the examination of titles, that the purchase was not fully consummated until February 10th, when the cash payment was made, is without evidence to sustain it, and we are bound to assume, until there is some evidence to the contrary, that the deed was delivered at its date and that the title then passed. So that, even if it had been proved beyond the possibility of a doubt that F. H. Trenholm furnished his father, ten days or more after the title thus became vested in George A. Trenholm, with the money with which the payment was made, no resulting trust in his favor would arise, because the money was not paid at the time of the purchase; for, as one of the cases expresses it, the trust must be coeval with the deed, and cannot arise from any subsequent transactions.

The other lot, bought from Shackleford, seems to have been paid for on the same day that the title was made, and therefore, it becomes necessary to inquire whether any of the money belonged, at that time, to F. H. Trenholm. It is not pretended that he, in fact, actually furnished his father with any of the money used in paying for this lot, but the contention is, that inasmuch as the amount of the purchase-money was charged on the same day to the Atlantic Wharves account, in which F. H. Trenholm was interested to the extent of one-fourth, he, in effect, must be regarded as having, at least, constructively, paid one-fourth of the purchase-money. But, as we have seen, there

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must \*be an actual payment, and a mere constructive payment will not be sufficient to raise a resulting trust. Even were this not so, can it be properly said that any money belonging [to] F. H. Trenholm was used in paying the purchase-money of this lot? The payment was made by a check of George A. Trenholm & Son, or, in effect, of George A. Trenholm himself, on the bank, and, therefore, when the purchaser got the money, he got the money of George A. Trenholm & Son, lying to their credit in bank, and the purchase-money was actually made, not with the money of F. H. Trenholm, but with the money of George A. Trenholm & Son, practically of George A. Trenholm.

When did it become the money of F. H. Trenholm? It belonged to George A. Trenholm when it was deposited in bank, and was his until it was drawn out on his check and paid to the vendor. It was not money belonging to the Atlantic Wharves, which, it



must be remembered, was mere property, and not a corporation or other artificial person. It does not appear that there was any account kept in the bank in the name of Atlantic Wharves, upon which the check could be drawn, but it does appear that, even if there was such an account, the payment was not made by a check drawn on such account; but it was drawn on the account of George A. Trenholm & Son—in reality, George A. Trenholm—and the payment must, therefore, be regarded as made with his money. The fact that the amount for which the check was drawn was, on the same day, charged to Atlantic Wharves account, cannot have the effect of converting it into the money of that concern, even if such concern had been, not mere property, but a legal entity, having an artificial existence as a legal person. The most that can be said is that George A. Trenholm, being a tenant in common with F. H. Trenholm, of the property known as Atlantic Wharves, and in receipt of the entire income from that property, thereby became a debtor to F. H. Trenholm to the amount of his interest in such income, and liable to account to him for the same; and surely it cannot be said that, because a debtor buys property and pays for it before settling with his creditor, he has used some of the money of his creditor in paying for the property, and that thereby a trust results to the creditor.

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\*As matter of fact, however, George A. Trenholm was not indebted to F. H. Trenholm at the time either of these lots was bought, for it is conceded that, at the time the first lot was bought, there was no balance to the credit even of the Atlantic Wharves account; and that at no time, until July, 1877, which was after the death of George A. Trenholm, would he have been indebted to F. H. Trenholm upon an adjustment of all three of the accounts in which F. H. Trenholm was interested. All that F. H. Trenholm could, at any time, have required of George A. Trenholm would have been an accounting for the income of Atlantic Wharves, and, of course, upon such accounting, George A. Trenholm would have been entitled to set off against any balance appearing to be due F. H. Trenholm on the Atlantic Wharves account, such balances as were due by F. H. Trenholm on the other two accounts.

The view presented by the master and concurred in by the Circuit judge, that George A. Trenholm must be regarded as having advanced for F. H. Trenholm his one-fourth of the purchase-money, cannot be sustained, especially when there is no testimony to support such a view, except the fact that the amount of the purchase-money was charged to Atlantic Wharves account; and the further fact that the lots in question were incorporated with that property. There is no

evidence tending to show that there was any agreement between George A. Trenholm and F. H. Trenholm that such an advance should be made for the latter. On the contrary, if we look at the testimony of F. H. Trenholm, which is incorporated in the "Case," though ruled to be incompetent, such an idea is negatived, and the only understanding was that a one-fourth interest should be transferred to F. H. Trenholm "after the payments were made, \* \* \* if it should appear to be advantageous before payments were completed."

It would seem from this, that so far from there being at the time even an understanding that the purchase was made on joint account, much less that the money of F. H. Trenholm should be used in paying one-fourth of the purchase-money, the true inference would be that it was to depend upon future contingencies, whether F. H. Tren-

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holm was to have any interest in the purchase. This view is very much strengthened by the testimony of William L. Trenholm, that although four pieces of property were purchased by George A. Trenholm and incorporated with Atlantic Wharves, the two lots in question were conveyed to George A. Trenholm, while the other two were conveyed—three-fourths to George A. Trenholm and one-fourth to F. H. Trenholm; and the witness was unable to give any reason for the distinction, except his supposition (which, of course, cannot be regarded as evidence,) that it was a mere inadvertence. We think the more reasonable supposition is that while a definite conclusion was reached as to the two lots conveyed to the parties jointly, there was no conclusion reached at the time as to the two lots now in question, but the disposition that was to be made of them was left to be determined by subsequent contingencies.

So that we think it clear that, so far from the money of F. H. Trenholm having been used in paying for the lots in question, there was not even any settled understanding reached at the time that F. H. Trenholm was to have any interest in the purchase, but that whether he should thereafter be admitted to such interest depended upon whether subsequent events should prove the purchase to be an advantageous one; and that George A. Trenholm, in charging the purchase-money to Atlantic Wharves account, only intended to afford the means of an easy settlement of the matter in case it should be subsequently determined that F. H. Trenholm was to have an interest in the purchase, he knowing that if it should be determined otherwise, the accounts between the parties could be easily rectified in the adjustment of other accounts.

Convinced, as we are, that the petitioner has failed to establish any resulting trust in his favor, the other questions discussed in

the argument cannot arise, and need not be considered.

The judgment of this court is that the judgment of the Circuit Court be reversed.

### 19 S. C. \*140

\*STATE v. SHULER.

(November Term, 1882.)

[*Indictment and Information* ⌘110.]

An indictment that charges the stealing of corn "in the field," is fatally defective as an indictment under a statute which makes stealing "from the field" a felony.

[*Ed. Note.*—Cited in *State v. Nelson*, 28 S. C. 17, 4 S. E. 792.

For other cases, see *Indictment and Information*, Cent. Dig. § 291; Dec. Dig. ⌘110.]

[This case is also cited in *State v. Young*, 30 S. C. 407, 9 S. E. 355, and *State v. Washington*, 26 S. C. 606, 2 S. E. 623, without specific application, and distinguished therefrom.]

Before Pressley, J., Orangeburg, October, 1882.

This was an indictment against Adam Shuler. The opinion states the case.

Mr. Solicitor Jervy, for appellant.

Mr. D. A. Straker, contra.

March 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant was indicted under section 2487, General Statutes of 1882, for stealing corn "in the field" of one Riley, and upon conviction moved in arrest of judgment, because the indictment was fatally defective in that it charged that the corn was stolen "in the field," instead of "from the field," in the language of the statute. The Circuit judge refused to arrest the judgment on the ground that the indictment was good as an indictment for petit larceny, the property stolen being under the value of twenty dollars, but held that the indictment was defective under the statute, in that it did not contain the words used in the statute—"from the field"—and accordingly sentenced the defendant for petit larceny. The State appeals from this ruling, upon the ground that the offense, which was made a felony by the statute, was sufficiently set forth in the indictment.

For a proper understanding of the question raised by this appeal, a brief review of the legislation upon this subject will be instructive. As far back as 1826 (6 Stat. 284) the legislature, impressed with the necessity for providing a remedy for what was, doubtless, a growing evil, passed an act for the purpose of making it larceny to steal any

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grain or cotton—the staple products of the State—before it was severed from the soil upon which it grew, inasmuch as, by the common law, that species of property was

not the subject of larceny, being regarded as part of the realty. It is curious to observe that, while the title of that act expressly pointed to the conclusion that the object was to punish, criminally, that which, by the common law, would have been a mere trespass, to wit, the taking of corn or grain before it was severed from the soil, the body of the act contained no such pointed words. The title is as follows: "An act to make the fraudulent and secret taking of cotton, corn and other grain, before severance from the soil, larceny," while the language of the body of the act is as follows: "If any person shall take from any field, not belonging to such person, any cotton, corn, rice, or other grain, fraudulently, with intent secretly to convert the same to the use of such person taking the same, such person, so offending, shall be guilty of larceny, either grand or petit, as the value of the property may be."

In 1866 (13 Stat. 405) the legislature passed an act to amend the criminal law, by the fourth section of which the offense created by the foregoing act was prohibited in the following language: "Stealing from the field any grain or cotton, not yet severed from the freehold, is hereby made a felony with benefit of clergy." This change of phraseology from that found in the act of 1826 was, doubtless, mainly for the purpose not only of increasing the grade of the offense, but also for the purpose of making it plain that the object was to punish the fraudulent taking of grain or cotton from the field, even though it had not been severed from the soil at the time it was taken, inasmuch as, in the body of the previous act, nothing had been said as to severance from the soil.

In 1872, when the General Statutes of that year was adopted, the fourth section of the act of 1866 was incorporated therein without any substantial change in its language.

In 1879 (17 Stat. 77) the legislature, perhaps under the apprehension that offenders might often escape, by reason of the difficulty of proving that the grain or cotton had not been severed from the freehold at the time of the taking, amended the act so as to make it a felony to steal cotton or grain

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from the \*field, whether severed from the freehold or not, and in this form the act was incorporated in the General Statutes of 1882 as section 2487, which reads as follows: "Whoever shall steal from the field any grain or cotton, whether severed from the soil or not, shall be deemed guilty of felony; and, on conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years, or in the jail for not less than three months nor more than six months, or by fine, not less than fifty dollars nor more than five hundred dollars."



From this review of the legislation upon the subject, we think it plain that the true intent of the act was not to punish the stealing of the particular kind of property there mentioned in a particular place, but to punish the stealing of a particular kind of property, to wit: the products of the soil mentioned in the act—the staple products of the State—before they were gathered by the owner, inasmuch as that kind of property would necessarily be more exposed to the depredations of thieves than that which the owner had the means of guarding and protecting more securely, just as the legislature, doubtless actuated by the same motive, has, from time to time, made the larceny of cattle and other live stock, which were accustomed to roam at large beyond the reach of the owner's protecting care, the subject of special legislation.

We think, therefore, that the real purpose in using the words "from the field," was to point to a particular kind of property, to wit: the products of, or outgrowth from the field, of the kind designated, before they were gathered by the owner, and not to the stealing of that kind of property in any particular locality. Thus, if a bag of corn, taken from the owner's barn, or purchased in market, should be carelessly left by him in an open field, and stolen while in such field, the offender could not be indicted under this section of the general statutes because that would not, in our judgment, be the offense there denounced. The object of the statute was not to protect, specially, property which the owner had thus carelessly exposed to the depredations of thieves, because the common law afforded sufficient protection for that kind of property by an

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ordinary indictment for larceny, \*but the object was to extend special protection to a kind of property which the owner could not so carefully guard and protect from theft, as it must necessarily remain exposed in an open field until it could be gathered.

Under this view of the scope and intent of the statute, it is very obvious that the word "from," as used in the act, is a material word, and the word "in," used in the indictment, cannot be regarded as a sufficient substitute for it, and therefore, the indictment was properly adjudged to be fatally defective, as an indictment under the statute. This court has so recently considered the rule as to how far it is necessary to follow the words of a statute, in an indictment for an offense created by such statute, in the case of *State v. Padgett*, 18 S. C. 317, where Mr. Justice McGowan has very fully and satisfactorily discussed the subject, that we do not deem it necessary to go into that matter now further than to say that it is well settled that an indictment under a statute must follow the material words found in

the statute, or use words which are substantially equivalent thereto.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 143

DOTY & CO. v. DUVAL.

(November Term, 1882.)

[1. *Justices of the Peace* ⇨116.]

A trial justice's court has no jurisdiction of a motion for a new trial unless the motion is made within five days from the rendering of the judgment. Such inferior court has no inherent power of relieving against its own judgments—its powers are wholly statutory.

[Ed. Note.—Cited in *Lawrence v. Isear*, 27 S. C. 246, 3 S. E. 222; *Benson v. Carrier*, 28 S. C. 121, 5 S. E. 272; *Whetstone v. Livingston*, 54 S. C. 541, 32 S. E. 561.

For other cases, see *Justices of the Peace*, Cent. Dig. § 371; Dec. Dig. ⇨116.]

[2. *Justices of the Peace* ⇨127.]

Section 195 of the code of procedure which authorizes the court in certain cases to relieve a party from a judgment taken against him, does not relate to courts of trial justices.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. ⇨127.]

3. The second part of the code applies only to the Court of Common Pleas, except where express reference is made to the inferior courts.

[Ed. Note.—Cited in *Mitchell v. Bates*, 57 S. C. 50, 35 S. E. 420.]

[4. *Judgment* ⇨363.]

Appeal to the Circuit Court, within the time allowed by law, is the only mode of relief from a trial justice's judgment rendered against a party through his mistake, inadvertence, surprise or excusable neglect.

[Ed. Note.—Cited in *Speer v. Meschine*, 46 S. C. 505, 510, 24 S. E. 329; *Williams v. Rickembaker*, 79 S. C. 469, 60 S. E. 1122.

For other cases, see *Judgment*, Cent. Dig. § 705; Dec. Dig. ⇨363.]

[This case is also cited in *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930, and distinguished therefrom.]

Before Wallace, J., Fairfield, June, 1882.

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\*This was a motion by Mary A. Duvall for relief against a judgment obtained against her by W. R. Doty & Co., in a trial justice's court. The opinion states the case.

Mr. J. H. Rion, for appellant.

Mr. A. S. Douglass, contra.

March 30th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant was sued before a trial justice; was summoned to appear on August 5th, 1881; went to see her lawyer, but he was absent at the time; and, as she states, supposing that the case would not be tried until the next regular term of the Court of Common Pleas for the county, she failed to be present before the trial justice on the day named for trial,

and judgment was rendered against her by default, although she had a good defense.

On September 5th, thirty days after the rendition of the judgment, the attorney of the defendant, having returned and learned the facts, served notice upon the plaintiff that, on September 10th, he would move the trial justice for an order vacating the judgment for the purpose of having the action tried on its merits under section 195 of the code. The trial justice refused the motion upon the ground that he had no authority beyond hearing a case, except to hear a motion for a new trial within the time prescribed by law. From this refusal to hear the motion, the defendant appealed to the Court of Common Pleas.

Judge Wallace affirmed the order of the trial justice, and the defendant appeals to this court upon the following grounds: 1. "Because his Honor dismissed the appeal from the court of trial justice. 2. For that his Honor held that there is no statute giving to a court of trial justice power to grant the motion made in the case. 3. For that his Honor held that the trial justice had no power to vacate a judgment by default and direct a trial upon the merits upon a motion made thirty days after the judgment was rendered."

Considered as a motion for a new trial, there can be no doubt that the trial justice was right in refusing to hear it, for the

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\*reason that sub-division 18 of section 88 of the code, which gives the right to a trial justice to grant such a motion, declares that "no motion for a new trial shall be heard unless made within five days from the rendering of the judgment; provided, that the right of appeal from the judgment shall exist for five days after the refusal of a motion for a new trial." This is jurisdictional, and was absolutely mandatory upon the trial justice. *Davis v. Vaughan*, 7 S. C. 342; *Scott v. Pratt*, 9 S. C. 82; *Russell & Co. v. Follin*, MS. Dec., No. 729.

It is suggested, however, that the motion was not for a new trial under the statute, but to the court which rendered the judgment, to give relief against said judgment in order to prevent injustice, as it was rendered against the defendant through her excusable neglect, which was claimed to be a common law power possessed by all courts having the right to try cases after summons to the parties. Without disputing the principle which applies to all inferior courts of limited jurisdiction, that all authority claimed must be pointed out in the express law, and nothing can be supplied by intendment, it is insisted that the rule only applies to matters which are jurisdictional in their nature, and that as soon as jurisdiction attaches, these courts have the right, without special authority given, to proceed according to the

principles and practice which govern all other courts; and that the amount involved being under \$100, it was within this inherent general power for the trial justice to grant the motion.

A judgment, regularly obtained and entered of record, should not be set aside without good cause, according to the established practice, based upon clear and full authority. The framers of the code thought it necessary to declare and define by statute the right to relieve a party from a judgment taken against him through his excusable neglect, even as to the Court of Common Pleas, which has general jurisdiction; and we cannot hold that a trial justice's court, being of inferior and limited jurisdiction, has such inherent power, without limit of time, as to all cases within its jurisdiction in amount, merely as an incident to the right given by statute to hear and determine them in the first instance.

But, assuming that the trial justice could

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not exercise the \*authority claimed without express authority of law, it is insisted that the power was given to him by section 195 of the code of procedure, which provides that "the court may also, in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," &c. It is argued that this provision includes "the court" of a trial justice as well as that of the Common Pleas, and the question is, whether that is the proper construction.

Certainly the power is given to "the court" in terms very general without any limitation expressed, and, upon principle, it would seem that the same reason for its exercise, in some form or other, should exist alike as to the proceedings of all courts which have occasion to render judgment after summons to the parties; but we cannot think that this provision was intended to be applied to the court of a trial justice. If such court is included, we do not see why the Court of Probate should not also be included; but that would not be in conformity with the plan of the code, which treats of these inferior courts under separate heads, and, as it seems to us, outside of the chapters which make special provisions for these courts, generally uses the unexplained phrase of "the court," in reference to the Court of Common Pleas, as having general jurisdiction and being the most important.

The code of procedure is divided into two general parts. The first treats "of the courts of justice and their jurisdiction," viz.: the Supreme Court, the Circuit Courts, Probate Court, the courts of trial justices, &c. In regard to the last named, the jurisdiction is expressly given and defined in title 5, and in



section 88 in that title it is enacted that "the following rules shall be observed in the courts of trial justices." Among these rules are the following: No. 8 provides "that in case the defendant does not appear and answer, the plaintiff cannot recover without proving his case." No. 15 declares that "the provisions of this code of procedure respecting forms of actions, parties to actions, the rules of evidence, the times of commencing actions and the service of process upon incorpora-

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tions shall apply to these \*courts." No. 17 enacts that "any trial justice's court of this State shall have the power to grant a new trial in any case tried in the said court for reasons for which new trials have usually been granted in the courts of law of this State; provided, however, the case shall only be heard and tried anew by the trial justice before whom the case was first tried," &c.

The second part of the code treats "of civil actions." Title I., as to the forms of actions; title II., as to the time of commencing; title III., as to parties; title IV., as to the place of trial; title V., as to the manner of commencing; and title VI., as to "the pleadings in actions." This last title has six subdivisions, or chapters: First, as to the complaint; second, the demurrer; third, the answer; fourth, reply; fifth, general rules of pleading; and sixth, "mistakes and amendments;" and under this last chapter appears the section (195) which, it is contended, embraces "the court" of trial justice as well as of the Common Pleas. It will be observed that the courts of trial justices had been dealt with specially in part I., and their jurisdiction clearly defined.

It seems to us that all the provisions of part II., were intended to apply only to the Court of Common Pleas, except where express reference is made to the inferior courts, which is done in title II., chapter 3, upon the subject of "appeals to the Circuit Court from inferior courts," of which we will speak hereafter. Many of these provisions would be inappropriate to courts of trial justices, and were manifestly not intended to apply to them. Indeed, equivalents in simple form had already been provided for them, and the declaration made in sub-division 15 of section 88, as to what provisions of the code "should apply to these courts," was in effect a declaration that all other general provisions of the code should not so apply. It is a case for the application of the maxim, "*Expressio unius est exclusio alterius*." As was said in the case of *Brown v. Buttz*, 15 S. C. 490: "The act defining the civil jurisdiction of trial justices is found incorporated in the code. In this act the jurisdiction of these courts is specially defined and limited."

There is, in the second part of the code, title II., chapter 3, express provision made for the courts of trial justices in regard

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\*to "appeals to the Circuit Court from inferior courts." These are very specific as to the time and manner of taking appeals, as to what matters are appealable, and how the appeals should be heard by the Circuit judge, acting as appellate court. These provisions give the identical relief, by appeal, which was sought here by motion to the trial justice. We think that the relief asked for in this case, by applying to the trial justice to open a judgment rendered by himself, was not in his power to grant under section 195 of the code of procedure; but that the only way to obtain that relief was by appeal, in the time allowed for appeal under subdivision 1, section 368 of the code, which provides as follows: "Upon hearing the appeal (from the judgment of a trial justice) the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects, which do not affect the merits. \* \* \* If the defendant failed to appear before the trial justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment and order a new trial before the same or any other trial justice, in the same county, at such time and place and on such terms as the court may deem proper," &c.

As we understand it, this view, that the relief can only be granted by way of an appeal from the trial justice court, is not inconsistent with the New York practice. We have not been referred to a case, nor have we been able to find one, in which the relief was granted by the justice himself, on direct application to him. In all the cases where the judgment of the justice has been opened, it seems to have been done by the appellate tribunal. Such was the course in the case of *Wavel v. Wiles*, 24 N. Y. 635 (10 Smith), Court of Appeals, 1862, stated at the bar to be the exact counterpart of the case before us, and confidently relied on by the appellant.

In that case judgment by default was rendered by a justice of the peace. Defendant appealed to the county court, which ordered a new trial. The Supreme Court reversed this. An appeal was then taken to the appeal court of the State, which reversed the judgment of the Supreme Court, leaving in

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force \*the order of the county court directing a new trial, and in doing so used this language: "If in this case the county court had held that it had no power to hear and decide the question of error in fact upon the affidavits, it would have been proper for the Supreme Court to have reversed such decision and remitted the case to the county court for the correction of such errors. But the county court did act: it heard the application and made the appropriate order, in its discretion, to give relief to the defendant.

It granted a new trial and the defendant was bound to pursue that remedy, otherwise he is remediless so far as relates to any proceeding to review the judgment," &c. That is to say, the county court, on appeal, had the power to decide the question, and, although it decided wrong in granting a new trial, the defendant was bound to pursue that remedy or have none to review the judgment.

Precisely so in the case before us. If the application had been made to the Circuit Court (county court in New York) by way of appeal from the judgment of the justice, the Circuit judge would have been bound to decide the question, and his judgment, although wrong, could not have been corrected on appeal to this court. There was, in one sense, an appeal before the Circuit judge in this case, but it was not an appeal regularly taken from the judgment of the trial justice, but from his refusal to open the judgment (after the time for an appeal from the judgment had passed), under the section of the code giving a year.

In Voorhies' Code 464, under the head of "Appeal to Common Pleas or to a county court," it is said: "If the defendant failed to appear before the justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same or any other justice in the same county, at such time and place and on such terms as the court may deem proper." And in 4 Wait's Practice 464, as to "Appeals to the county courts," it is said: "Under the present practice, the appellate court may always relieve a defendant where he excuses his default and shows that man-

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ifest injustice has been done to him in the rendition of the judgment. In seeking relief from a judgment by default there are several points in the practice which must be observed. And, in the first place, it is to be remembered that there is no relief except by way of appeal from the judgment. It is only by an appeal that the county court acquires any jurisdiction of the cause, or has any power to afford relief. A mere motion in the county court, in a case in which no appeal has been taken from the judgment, would be useless and would be denied because of a want of power to interfere with the judgment rendered by the court below. *Donnell v. Carroll*, 1 Code Rep. (N. S.) 288. In the next place, the notice of appeal ought to assign, as one of the grounds of appeal, that manifest injustice has been done by the judgment, and that the defendant's default is excusable," &c.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

19 S. C. 150

Ex parte ROBERTS.

(November Term, 1882.)

[1. Judgment  $\hookrightarrow$  627.]

A., after the death of his wife and her surviving children, filed a bill in the Court of Equity, claiming all the property included in his marriage settlement, the next of kin then living of his deceased wife being parties defendant. The court decreed that, as to a moiety, it descended, at his death, to those persons who at that time would be the heirs-at-law of the deceased wife. After the death of A., the children of P., who was an aunt of the wife and a party to the former action, but who died before A., filed their petition in the original cause, claiming a share of this moiety, their mother at the time of the wife's death being one of her next of kin. *Held*, that the matter was res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1141; Dec. Dig.  $\hookrightarrow$  627.]

2. The decision in *Gaillard v. Porcher*, McMull. Eq. 358, stated and defined.

[3. Judgment  $\hookrightarrow$  688.]

The principles of res judicata considered and declared.

[Ed. Note.—Cited in *Earle v. Earle*, 33 S. C. 504, 12 S. E. 164; *Rhoad v. Patrick*, 37 S. C. 519, 16 S. E. 536; *Babb v. Sullivan*, 43 S. C. 440, 21 S. E. 277; *Wagner & Co. v. Kirven*, 52 S. C. 35, 29 S. E. 390; *Willoughby v. North-eastern R. R. Co.*, 52 S. C. 175, 29 S. E. 629; *Sovereign Camp of the Woodmen of the World v. Means*, 87 S. C. 133, 69 S. E. 85.

For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig.  $\hookrightarrow$  688.]

[4. Husband and Wife  $\hookrightarrow$  31.]

Under a marriage bond, the husband bound himself to convey certain property to trustees when his wife attained her majority, to be held in trust for himself during life, and in case his wife died first without issue living at her death, or such issue should die in his life-time, then in trust (1) as to one moiety for whomsoever he should by will appoint, or, in default of appointment, to his heirs; and (2) as to the other moiety, for the heirs-at-law of the said wife. The wife died leaving children, all of whom died in the husband's life-time. *Held*, that the remainder to her heirs was contingent and not vested.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig.  $\hookrightarrow$  31.]

[This case is also cited in *McMakin v. Fowler*, 34 S. C. 287, 13 S. E. 534, as to proof of former judgment.]

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\*Before Hudson, J., Charleston, December, 1881.

The opinion states the case. The Circuit decree was as follows:

The petition in this case has been filed to obtain the construction of the marriage article between Samuel Porcher Gaillard and Mary M. Peyre, his wife: all technical objection to the regularity of the proceeding being waived with a view to obtaining the judgment of this court.

In the principal cause in which the petition is filed, the bill was filed to have from the court a construction of the same articles. To it were made parties all who were



or might be interested in that construction, including the mother of the petitioners, Betsey S. Porcher, who, by her intermarriage, subsequently became Betsey S. Roberts. The construction so given included the question now raised by this petition, and required the judgment of the court to be rendered as to the question, At what time were the persons to be ascertained, who would answer the description of "her heirs-at-law?" Whether at her death, or at his death? And the judgment of the Circuit Court was affirmed by the Appeal Court, that "then," as used in the marriage articles, referred to his death and not to hers.

That judgment was against S. P. Gaillard, who thus raised precisely the same issue as is now raised by these petitioners, and was in favor of Betsey S. Porcher, who, in that controversy, was found on the side opposite to that held by these petitioners. The court held contrary to Gaillard's construction, that Betsey S. Porcher might in futuro be heir-at-law to Mary M. Peyre, i. e., if she survived S. P. Gaillard, but otherwise not.

At his death the heirs-at-law of Mary M. Peyre were Anna M. Stoney and Isabella S. Porcher. Betsey S. Porcher (by her marriage Betsey S. Roberts), the mother of the petitioners, had died before Samuel P. Gaillard; and at his death, therefore, did not answer the description of an heir-at-law of his wife, Mary M. Peyre. She was, therefore, not entitled to share in the distribution of the property of Mary M. Peyre, and the petitioners who claim through her, as her representatives, are, therefore, excluded according to the judgment of the highest appellate

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tribunal in the State, at the time when the case was before it. A reference to the case as reported will show that the point now before this court was distinctly raised in the pleadings, and as distinctly decided by the court. Gaillard v. Porcher, McMull. Eq. 359.

When, therefore, the plea of *res judicata* is interposed, and under it objection made to the consideration of the petition and the relief asked, it must prevail. After the lapse of nearly forty years, to re-open a case and renew a controversy solemnly decided by the highest judicial authority in the State, on behalf of the representatives of one who was before the court, a party to that controversy, cannot be allowed. The judgment of the court, is that the matter of the petition and the relief asked is *res adjudicata*, and that the petition must be dismissed and the relief it asks be refused.

For the purposes of this case, it would not be necessary to say more. But the counsel for the petitioners have pressed on the argument and urged the opinion of the court upon the question before the Court of Appeals, as if it were *res nova*. It is only necessary for me to say, that while the judgment of that court would control me under any circum-

stances, yet if the petition were before me as *res nova*, I would consider that the construction given by the Court of Appeals is the proper construction, and fully sustained by the adjudged cases.

The counsel for petitioners are in error in supposing that this construction is at variance with the rule laid down in *Rutledge v. Rutledge*, *Dudley Eq. 201*; in *Hicks v. Pegues*, and *Buist v. Dawes*, 4 Rich. Eq. 413 and 421, and in *Glover v. Adams*, 11 Rich. Eq. 264. There is no conflict discoverable upon an examination of the written instruments construed in each case. *Rutledge v. Rutledge* was at that time familiarly known to the court and bar, and was doubtless advanced as a leading authority by counsel of S. P. Gaillard, but without effect on the court.

Let the petitions be dismissed, with costs.

Messrs. McCrady & Sons, for appellants.  
Messrs. DeSaussure & Sons, contra.

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\*March 31st, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. In the year 1835, S. Porcher Gaillard and Mary M. Peyre, in contemplation of marriage, entered into an agreement that the property of the said Mary should be settled to certain uses. The marriage settlement was not, in fact, executed; but, by way of articles for a settlement, the said S. P. Gaillard executed what is styled "a marriage bond" to William Mazzyck Porcher, Peter C. Porcher and Thomas Walter Peyre, in the penalty of \$40,000, conditioned that as soon as the said Mary attained the age of twenty-one years, he would convey the property mentioned to the aforesaid payees of the bond in trust, as follows, to the said S. Porcher Gaillard, for life, for the maintenance of Mary M. Peyre and her children. "But in case the said M. M. Peyre should die before the said S. P. Gaillard, leaving no issue living at her death, or in case she should leave any child or children, grandchild or grandchildren, living at her death, and they should all die in the lifetime of the said S. P. Gaillard, unmarried and without issue, then in trust, (1) as it regards one-half of the said property, real and personal, to and for the use and behoof of such person or persons, their, his or her heirs, executors and assigns, as the said S. P. Gaillard shall, by his last will and testament, to be executed in the presence of three or more credible witnesses, appoint to take the same; and in default of such appointment then to and for the use and behoof of the heirs-at-law of the said S. P. Gaillard, their heirs, executors, administrators and assigns forever; and, (2) as it regards the other moiety or half of the said property, to and for the use and behoof of the heirs-at-law of the said M. M. Peyre, their heirs, executors, administrators and assigns forever."

Mary M. Peyre, the wife, died about Octo-

her, 1839, in the life-time of her husband, S. P. Gaillard, leaving three children, all of whom died shortly after, unmarried and without issue, but leaving collateral heirs (an uncle, Thomas Porcher, and an aunt, Elizabeth C. Ravenel,) of the whole blood, and numerous uncles and aunts of the half blood, among whom was a maternal aunt, Betsey S. Porcher, who afterwards intermarried with John J. Roberts, and died in the life-time of

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S. P. Gaillard, leaving \*surviving her husband and two children, Jane D. Roberts and Martha D. Roberts, who, as will be stated hereafter, are the petitioners.

After the death of the said Mary M. Peyre and her children, to wit, on or about the year 1842, the said Samuel P. Gaillard filed his bill of complaint (being the same revived in which this petition was filed) in the Court of Equity for Charleston district, against the trustees named in the marriage bond, and against all of the aunts and uncles of the said Mary M. Peyre, including the said Betsey S. Porcher, who were all regularly made parties: in which bill he asked construction of the marriage bond, and claimed the whole property as only heir-at-law of his deceased wife and children. Upon the bill and answer, the cause was heard by Chancellor Harper, who dismissed the bill, saying: "If the terms of these articles had been upon the husband's surviving and dying without issue, then, as to one moiety, the persons who shall, at that time, answer the description of the wife's heirs-at-law, there would have been nothing ambiguous, and nothing to prevent the dispositions having effect. I imagine that no one ever read the words in question, who doubted that such were their meaning, and no other. The words are: 'If he survives her, and dies, leaving no issue of the marriage living at his death, then, as to one-half of the property, for the use of such persons as he shall appoint by his will; and if he make no appointment, then to his heirs-at-law; as to the other half, to her heirs-at-law.' The word 'then' plainly relates to the whole of the clause, and in the ordinary and popular acceptance of the terms, they would be taken to mean the persons who shall at that time be her heirs-at-law. \* \* \* The legal title of the property never having been transferred to the trustees, the complainant needs no relief. He may enjoy it according to the terms of his contract. Upon the application of the trustees, or of the parties who may be entitled at his death, the proper relief will be granted. It is ordered and decreed that the bill be dismissed."

From this decree the complainant appealed, on the ground "That the intention of the parties, as indicated by the terms of the bond to execute a marriage settlement, was

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that the heirs should be fixed \*at her death, or, at all events, at the death of her last

surviving child, unmarried and without issue." Upon the appeal being heard, the old appeal court in equity decided as follows: "We concur in the decree of the Circuit Court. Appeal dismissed." *Gaillard v. Porcher*, McMull. Eq. 358.

Samuel Porcher Gaillard died in August, 1880, leaving a will which disposed of his half of the property. In the meantime all the aforesaid uncles and aunts of Mary M. Peyre, including Betsey S. Porcher, who were parties to the bill of Gaillard, had died, except two, viz.: Anna M. Stoney and Isabella S. Porcher, who, at the time of the death of S. P. Gaillard, were the only persons living who answered the description of her heirs, as the children of those who had died—first cousins—were too far removed to take, while the two aunts, before named, were living.

In June, 1881, Jane DuB. Roberts and Martha D. Roberts, children, as before stated, of Betsey S. Porcher, who had died before S. P. Gaillard, filed this petition in re, claiming the share to which their mother, if living, would have been entitled, and asking the court "to require William Mazyek Porcher, the only surviving trustee, to apportion and pay over to them as the share of the estate to which they may be entitled." The surviving trustee answered, denying the claim, upon the ground that, by the articles of marriage settlement, the property was given for life to S. P. Gaillard, and then, as to one moiety, over to those persons who, at the time of the death of said Gaillard, answered the description of heirs of Mary M. Peyre; that the articles had been so construed by a competent tribunal, and the question was res adjudicata so long as 1842 in the proceedings above referred to; that the only persons who answered the description of heirs of the said Mary M., at the death of Gaillard, her husband—Anna M. Stoney and Isabella S. Porcher—are entitled to the whole of the other half of the property, and that the petitioners, not now being heirs, have no interest, and their petition should be dismissed.

The petition and answer were heard by Judge Hudson, who dismissed the petition, holding that the matter was adjudged by the former proceedings in 1842; but, if the ques-

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tion were still \*res integra, he concurred with Chancellor Harper, that the proper time for ascertaining who were the persons to take, under the description of "heirs of Mary M. Peyre," was at the falling in of the life estate—the death of S. P. Gaillard. From this decree the petitioners appeal to this court upon the following grounds:

First, "Because his Honor erred in holding that the question presented to the court is res judicata, for the reasons that his Honor erred in holding: (1). That in the principal cause the question presented was, 'At what time were the persons to be ascertained who would answer the description of her



heirs-at-law,' whether at her death or his death?' The real question presented being whether the husband should not take the whole property, to the exclusion of the wife's relations—not which of the wife's relations should take. (2). That the decree in the principal cause decided 'That Betsey S. Porcher might, in future, be heir-at-law to Mary M. Peyre, i. e., if she survived S. P. Gaillard, but not otherwise.' (3). That the question now before the court is precisely the same as that before the court in the principal cause.

"Second. Because his Honor erred in holding that 'at his death (S. P. Gaillard) the heirs-at-law of Mary M. Peyre were Anna M. Stoney and Isabella S. Porcher,' and that the legal representatives of Betsey S. Porcher were not heirs-at-law at that time, and not entitled to share in the distribution."

The exceptions charge error in the Circuit decree in sustaining the defense of *res adjudicata*, upon the ground that neither the subject-matter nor the parties in this suit are the same as those in the former proceeding. To determine this it will be necessary to have a clear view of the scope and limit of the doctrine. This court has lately had occasion in several cases to consider that subject, and in the case of *Hart v. Bates*, 17 S. C. 40, announced the principle in the following terms: "The doctrine of *res adjudicata* is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or those claiming through them. \* \* \* As we understand it, the rule established in the *Duchess of Kingston's Case* is: First.

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That the \*judgment of a court of competent jurisdiction, directly on the point, is as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter, directly in question, in another court. Second. That the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question, in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. 2 Sm. Lead. Cas. 494 and notes. It seems, therefore, that to make out the defense at least three things are necessary: the parties must be the same, or their privies; the subject-matter must be the same; and the precise point must have been ruled."

Taking this as our guide, Was it error in the Circuit judge to hold that the petitioners were estopped by the principle of *res adjudicata*? As to the question whether the parties are the same: This petition is filed in re in

the identical proceeding in which the former judgment was pronounced. It is true that S. P. Gaillard, the complainant in that case, and many of the other parties are now dead, but all of the original parties who are still living must be considered as now before the court. It is also true that the petitioners were not parties to the former proceeding. At that time they were not born, but their mother, Betsey S. Porcher, through and under whom they claim, was a party to the proceeding, and, being her privies, both in blood and estate, they stand in her place and are bound by whatever would bind her. *Tate v. Hunter*, 3 Strobb. Eq. 136; *Watson v. Columbia Bridge Co.*, 13 S. C. 436; *Hart v. Bates*, supra.

Then, as to the subject-matter. We suppose there can be no doubt that the principal question made in the former case was as to the proper construction of the marriage articles, and that such is the question now made. But it is earnestly urged that the former case did not decide negatively the precise point made here, viz.: that the interest of the persons described as heirs of Mary M. Peyre vested in them as heirs upon her

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death, and, \*being so vested, was transmissible to their representatives, so that the children of one of them, who died in the lifetime of S. P. Gaillard, may now after her death recover the share of that predeceased parent. Whether this precise point was decided by the former judgment may be determined in one of two ways—either by the record or extrinsic proof, showing whether as a matter of fact the point was expressly made; or, if not, by showing from the nature of the issue that the point must of necessity have been determined by the judgment. As expressed by Mr. Justice Miller, in his dissenting opinion in the case of *Aurora City v. West*, 7 Wall. 106 [19 L. Ed. 42], "The rule is, that where a former judgment is relied on it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the last eight years by this court, viz.: in the *Steam Packet Co. v. Sickles*, 24 How. 333 [16 L. Ed. 650]; *Same v. Same*, 5 Wall. 580 [18 L. Ed. 550]; *Miles v. Caldwell*, 2 Wall. 35 [17 L. Ed. 755]."

Extrinsic evidence was not offered in this case, and the question is, whether the record shows that the precise point above indicated was expressly made in the former proceeding, or was substantially involved and necessarily decided by the judgment therein. The bill was filed by S. P. Gaillard after the death of his wife and children, claiming the whole property absolutely, first as heir of his wife along with his children, and then as sole heir to them. It stated that "If the heirs-at-law of your orator's late wife, with-

in the meaning of the said bond, are to be fixed at the time of her death, then your orator claims as her sole surviving heir-at-law and the sole surviving heir of her children also to be entitled to the whole of the trust property absolutely. But if the heirs-at-law of your orator's late wife are to be fixed at the time of the death of her last surviving child, then your orator submits that he is entitled absolutely to one moiety under the express terms of the bond, and to two-thirds of the other half as favored heir-at-law, she having, besides your orator, left no nearer kindred than uncles of the whole and half blood," &c.

To this claim the answer was, that "By

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the events which \*have occurred the estate is to remain in trust for the use of the said complainant (S. P. Gaillard) for his life, and after his death then, as to one moiety thereof, for such person as he shall appoint by his last will, and in default of such appointment for his heirs-at-law; and as to the other moiety, for such persons as shall at the time of the said complainant's death answer the description of heirs-at-law of his deceased wife," &c. Upon the issue thus made, Chancellor Harper rendered the decree before stated, holding that the word "'then' plainly relates to the whole of the clause, and, in the ordinary and popular acceptance of the terms, they would be taken to mean the persons who shall at that time be heirs-at-law," and dismissed the bill.

Looking to the issue made in the pleadings and the terms of the decree itself, it seems to us that the judgment necessarily decided the exact point—that the death of S. P. Gaillard, and not any period anterior to that event, was the time at which the persons described as heirs of Mary M. Peyre were to be ascertained. In dismissing the bill of S. P. Gaillard, the court certainly did decide that he, the person indicated by the law as the principal heir of his wife, did not acquire any fee-simple vested interest in any part of the property as such heir. And so deciding as to him, did not the decision include and determine the same rights of all others who were then in the category of heirs? He claimed the whole as heir and would have recovered it, in addition to his own moiety, if the principle asserted in the case of *Glover v. Adams*, 11 Rich. Eq. 267, had been applied by the court.

In that case, relied on by the petitioners, it was held by a divided court that "the husband, in addition to the provision made for him as survivor of his wife, took an interest along with her distributors upon her death, an interest cumulative to that held under the deed." It is plain that the court did not think that principle applied to this case, otherwise they would have sustained the bill and granted the relief prayed for.

They decided the contrary, and in effect held that the interest over did not vest until the death of S. P. Gaillard.

It is urged, however, that while this may be true as to Gaillard, it does not follow as

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to the other heirs, for he was excluded \*as an heir because he was already provided for in having the use of a life-estate in the whole. As was said in the case of *Glover v. Adams*, supra, "It will hardly do to blot out one express provision because there is another express provision." We know of no authority for such a distinction between him and the other heirs. The marriage articles certainly made none such; but, on the contrary, gave the aforesaid moiety in general and unqualified terms "to and for the use and behoof of the heirs-at-law of the said Mary M. Peyre." The very fact that no distinction was made excluding the person—already in the use of the whole for life—from also taking, as heir, the greater part, if not the whole of the property absolutely, may have had its influence in bringing the mind of the court to the conclusion which they expressed, that it was the intention of the parties that no inquiry for heirs should be made until the death of S. P. Gaillard, and that the aforesaid moiety was for such persons as should at that time answer the description of "heirs-at-law of his deceased wife."

The interest over was never, in any sense, a vested remainder; but, on the contrary, very contingent. The persons who were described as the "heirs-at-law of Mary M. Peyre" were not to take by descent as her heirs, but as purchasers per formam doni; the description of the persons to take as "the heirs of Mary M. Peyre" being intended, probably, to indicate as recipients her blood relations as contra-distinguished from her husband, who had the use of the whole for life, and his relations who were otherwise provided for.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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WILSON v. KELLY.

(November Term, 1882.)

[1. *Appeal and Error* ⇨267.]

This court cannot consider points not shown to have been made in the court below, or in the exceptions to the judgment appealed from.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1572; Dec. Dig. ⇨267.]

[2. *Executors and Administrators* ⇨454.]

That lands of a decedent may be sold under a judgment obtained against the administrator alone, is the settled law of this State, but the doctrine should not be extended fur-



ther than the decided cases imperatively demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1909-1928; Dec. Dig. ⚡54.]

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[3. *Executors and Administrators* ⚡253; *Judgment* ⚡688.]

\* When a creditor, who has obtained judgment against the administrator alone, on a debt due by the intestate, presents his claim in that form, under a call for creditors in a proceeding in the nature of a creditor's bill, he cannot object to an examination, by the heirs or other creditors, into the validity and amount of such claim. His judgment may be prima facie evidence of the validity of the claim, but is not conclusive.

[Ed. Note.—Cited in *Huggins v. Oliver*, 21 S. C. 153; *Campbell v. Sloan & Seignious*, Id. 308; *McKinlay v. Gaddy*, 26 S. C. 579, 2 S. E. 497; *Hopper v. Hopper*, 61 S. C. 138, 39 S. E. 366; *Brock v. Kirkpatrick*, 72 S. C. 501, 502, 52 S. E. 592.

For other cases, see Executors and Administrators, Cent. Dig. § 904; Dec. Dig. ⚡253; Judgment, Cent. Dig. § 1211; Dec. Dig. ⚡688.]

[4. *Bonds* ⚡63; *Interest* ⚡60.]

A bond dated January 24th, 1861, "payable in three years in equal annual installments, with lawful interest thereon from January 21st, 1861, payable annually, and the first installment, with interest on the whole principal sum due, payable on January 21st, 1862," draws annual interest until its maturity, but simple interest afterwards.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 66; Dec. Dig. ⚡63; Interest, Cent. Dig. § 136; Dec. Dig. ⚡60.]

[This case is also cited in *Fraser & Dill v. City Council of Charleston*, 19 S. C. 385, 23 S. E. 379, and distinguished therefrom.]

Before Witherspoon, J., Kershaw, June, 1882.

The opinion states the case.

Mr. Ernest Moore, for appellant.

Mr. J. T. Hay, contra.

April 3d, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action commenced in the Court of Common Pleas for Kershaw county, "for the settlement, partition and distribution of the estate of Wiley Kelly, deceased." The administrator and heirs-at-law are parties, and the creditors were called in to establish their demands before the master. The appellant, D. A. Williams, as administrator de bonis non cum testamento annexo of William McKenna, deceased, came in under this order and presented a claim, and this gave rise to the questions presented by this appeal.

The claim was in the form of a judgment recovered by the predecessor in office of the said D. A. Williams, in Lancaster county, a transcript of which was lodged in the office of the clerk of the Court of Common Pleas for Kershaw county, before the present action was commenced. The judgment was based upon a bond of Wiley Kelly, bearing

date January 24th, 1861, conditioned for the payment of \$1,282.25, "payable in three years, in equal annual installments, with lawful interest thereon from January 21st, 1861, payable annually, and the first installment, with interest on the whole principal sum due, pay-

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able on January 21st, 1862," which bond was secured by a mortgage of real estate situate in Lancaster county.

To the action on this bond, brought for a foreclosure of the mortgage, the administrator of Wiley Kelly, as well as the administrator and heirs-at-law of J. A. Cunningham, to whom the said Wiley Kelly had conveyed the mortgaged premises, were made parties, but the heirs-at-law of Wiley Kelly were not parties. The prayer was not only for judgment of foreclosure, but also that execution be awarded against the administrator of Wiley Kelly for any balance that might remain unpaid by the proceeds of the sale of the mortgaged premises. To that action the administrator of Wiley Kelly appeared, by attorney, but made no answer, and, judgment having been recovered, the mortgaged premises were sold, and, upon a report to the court of the balance remaining unpaid, after applying the proceeds of the sale, judgment was entered for such balance against the administrator of Kelly.

Upon an accounting had in this case the administrator of Kelly has been found indebted to the estate of his intestate in amount more than sufficient to pay the claim presented by D. A. Williams, as administrator as aforesaid, and the lands of the intestate, Wiley Kelly, have been sold under an order in this cause, and the proceeds are now in the hands of the court.

The master, to whom it was referred to take proof of the claims presented, after setting forth the origin and nature of this claim, stated that the respondents alleged that the judgment was taken for a larger amount than was really due, by reason of two errors in the calculation: First, in computing annual interest on the bond after its maturity; and second, in omitting to credit the net proceeds of the sale of the mortgaged premises; and claimed to have the amount of the claim reduced to what it would be after correcting these alleged errors. The master, while finding that these errors had been committed, reported that he did not think that he had any authority to open the judgment and correct the errors, and he therefore declined to do so; but, at the request of counsel, he appended to his report a statement of what he regarded as a correct calculation of the amount due on the bond, in which he stopped the computation of the

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annual interest at the maturity of the bond, only allowing simple interest after that date, and also gave credit for the amount of the

net proceeds of the sale of the mortgaged premises.

To this report both parties excepted—the respondents substantially upon the ground that the master erred in declining to correct the errors above mentioned; and the appellant upon the grounds, substantially, that the judgment was conclusive, and that the master should have reported the claim, as established, for the full amount; that, even if the judgment should be opened, there was no error in the mode of computing the interest, inasmuch as, by a proper construction of the terms of the bond, it bore interest, payable annually after as well as before maturity; and, lastly, because the master erred in finding that the net proceeds of the sale of the mortgaged premises had not been credited.

The Circuit judge, agreeing with the master that the errors pointed out did exist, held that the heirs of Wiley Kelly, not having been parties to the action in which the judgment was recovered, “are not estopped or precluded thereby from showing any error therein,” and that, under a proper construction of the terms of the bond, it ceased to bear interest payable annually after its maturity. He therefore allowed the claim only for the amount as ascertained by the statement appended to the master’s report, in which the alleged errors had been corrected, and ordered it paid out of any money in the hands of the court.

From this judgment D. A. Williams, as administrator as aforesaid, appeals upon two grounds, substantially: First. Because the Circuit judge erred in holding that the heirs-at-law of Wiley Kelly were not precluded from showing error in the amount of the judgment recovered against the administrator of Wiley Kelly, insisting that he should, on the contrary, have held that the judgment was conclusive. Second. That there was error in holding that the interest on the bond did not continue to be payable annually after its maturity.

It is true that, in the appellant’s exceptions to the report of the master, which he adopts in his grounds of appeal, it is alleged that there was error in finding that the net proceeds of the sale of the mortgaged premises were not credited, but as nothing was

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\*said about this matter in the argument, we presume it was abandoned. At all events, whether abandoned or not, all that we know about it is what is said in the master’s report, and he found, as matter of fact, that this credit had been omitted, which finding is concurred in by the Circuit judge. Therefore, even if such an exception had been urged, it could not be sustained.

The appellant also, in his argument, makes the point that, inasmuch as it appears from an accounting in this case that the administrator of Kelly is indebted to the estate of

his intestate in an amount more than sufficient to pay the full amount of the judgment, he, at least, should be entitled to an order for the payment of the full amount of the judgment out of such balance, the administrator having been a party to the action in which such judgment was recovered, and, therefore, bound thereby. We are unable to find where any such point was made in the court below, or in the exceptions to the judgment appealed from, and, therefore, we are not at liberty to consider any such point.

There are then but two questions presented for our consideration: First. As to the effect of the judgment presented by the appellant. Second. If we shall conclude that the judgment presents no bar to such an inquiry, as to the proper mode of calculating the interest on the bond.

In considering the first question, it would be interesting, though we do not regard it as either necessary or important, to go into an examination of the various cases in this State, in which questions relating to the effect of a judgment obtained against the administrator in a proceeding to which the heirs were not parties, upon the rights of the heirs in the lands of the ancestor, have been considered; but in the pressure of business now before this court, we are admonished that our duty will best be performed by confining our attention strictly to the real points necessary to be determined in the cases presented for our consideration. It is sufficient to say, that from the time of the case of D’Urphay v. Nelson, 1 Brev. 289, decided in 1803, down to the case of Rogers v. Huggins, 6 S. C. 356, decided in 1874, it has been uniformly held that the lands of a decedent may be sold under a judgment obtained against the administrator, even

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\*though the heirs were not parties to the proceeding in which the judgment was recovered.

It is true that, upon more than one occasion, regrets have been expressed by some of our most eminent judges that such a doctrine should ever have become a rule of law, and although we may be fully convinced that it would be extremely difficult, if not impossible, to vindicate such a doctrine if it were now an open question, yet a due regard to the rule of stare decisis forbids any interference with it at this late day. But believing, as we do, that it is difficult to reconcile this well-settled doctrine with certain other equally well-established fundamental principles, we are not disposed to extend the doctrine beyond what the decided cases imperatively demand. Those cases do not, in our judgment, determine the question now presented for our consideration, and, therefore, without in any way intending to impair the authority of D’Urphay v. Nelson, and other cases which have followed it—but, on the contrary, fully recognizing their binding force—we



shall enter upon the discussion of the question presented by this appeal.

If the appellant had undertaken to levy and sell the lands of the intestate under his judgment recovered against the administrator, and the heirs had instituted a proceeding to enjoin the sale, upon the allegation that the judgment had been recovered for an amount larger than what was justly and lawfully due, a very different question would have been presented. But that is not the case we are called upon to consider. The precise question now before the court is whether, when a creditor, who has obtained judgment against an administrator for a debt due by his intestate, presents his claim, in that form, in a proceeding in the nature of a creditor's bill, under an order calling in creditors, he can object to an examination into the amount or validity of such claims by the heirs or by other creditors who were not parties to the proceeding in which his judgment was obtained, upon the ground that such judgment is conclusive.

There is no doubt that the heirs are necessary parties to a creditor's bill, and this is because they hold the legal title to the lands sought to be sold under such bill; and, there-

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fore, in order \*that their title, which is held subject to the claims of the creditors of the ancestor, may be divested by the sale which the court is asked to order for the purpose of paying the debts of the ancestor, it is necessary that they should be made parties upon the well-settled fundamental principle that a man is not to be deprived of his property, even at the instance of one who may have some just and legal claim upon it, until he has had an opportunity of being heard. Being parties, it would seem to follow, necessarily, that they would have the right to be heard upon every issue arising in the case upon which they have not already been heard, either in person or by some one authorized to represent their interests, otherwise it would be altogether nugatory to bring them before the court.

Now, while it may be true, so far as the personal estate is concerned, that the administrator does represent the distributees, who, under our statute, are the same persons as the heirs, inasmuch as the legal title to that kind of property vests in the administrator upon the death of the intestate, the same cannot be said as to the real estate, for with that the administrator has nothing to do. *Mauldin v. Gossett*, 15 S. C. 578. The heirs, not having been represented by the administrator in the action in which the judgment in question was obtained, have never been heard, or had an opportunity of being heard, upon the issues in that action; and, therefore, it would seem to follow that they ought now to be allowed the opportunity of being heard upon such issues, one of which is as to the amount legally due upon the bond, and

that they will not be estopped by a judgment obtained in an action to which they were not parties or privies.

Upon the same principle it is well settled that, in a proceeding to subject descended real estate in the hands of the heirs to the payment of the debts of the ancestor, a judgment obtained against the administrator does not preclude the heirs from making any defense to which the claim upon which such judgment has been obtained, may be subject. *Gilliland v. Caldwell*, 1 S. C. 198, and the cases therein cited. As is said in that case, "The statute of George II. does make de-

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scended lands in the \*possession of the heirs liable for the payment of the debts of the ancestor; but the cause of action must be established against them in a suit to which they are parties, and they are not bound by a judgment against the administrator to which they are neither parties nor privies."

Again, it is well settled that the assets of a deceased debtor are distributable among his creditors, according to the rank and condition of their demands at the time of the death of such debtor. *Morton & Courteny v. Caldwell*, 3 Strobb. Eq. 161; *Tucker v. Condy*, 7 Rich. Eq. 281; *Wilson v. McConnell*, 9 Rich. Eq. 500; *Edwards v. Sanders*, 6 S. C. 316; and the only exception to this rule, so far as we are informed, if it can in fact be called an exception, is that established by the act of 1878 (16 Stat. 686), which declares that, after the property of an intestate covered by a mortgage is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure.

As is said by Chancellor Johnston, in *Wilson v. McConnell*, supra in stating the principle established by the case of *Morton & Courteny v. Caldwell*, in which the same chancellor had delivered an elaborate and able opinion, "demands are presentable against the estate of an intestate in the precise condition in which they existed at his death." Hence, when creditors are called in under a proceeding in the Court of Equity to present their demands against the estate of an intestate, one who has reduced his claim to judgment against the administrator stands in no higher or better position by reason of that fact, but his claim must be examined as it stood at the time of the death of the intestate, and its rank must be assigned and its amount determined by such examination. The judgment is at most only prima facie evidence of the validity of the claim, which is liable to be overcome by other evidence.

Thus, if a creditor by a joint and several bond should, after the death of the intestate, receive payments from the surety, thereby reducing the amount really due on the bond, he would still be entitled to have his debt estimated at its full amount, as it stood at the death of the intestate, in determining

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the pro rata of the assets of the estate to which he would be entitled, without any deduction of the payments made by the surety. Upon the same principle, if after such payments were made by the surety he should obtain judgment against the administrator for the balance then due, he would, when called in to establish his demand against the estate, be entitled to present it in the condition in which it was before such payments were made and before such judgment was recovered, and his pro rata share of the assets of the intestate's estate would be estimated upon the amount of the debt as it stood at the time of the death of the intestate, without deducting the payments subsequently made by the surety. In other words, his claim should be presented as a bond debt, and not as a judgment. This being so, it would follow, necessarily, that the claim thus presented would be open to any assault that might be made upon it, either by the heirs or by the other creditors. The issues presented would be whether the intestate was indebted, at the time of his death, upon the claim, and, if so, what was then the true amount of such indebtedness.

We think, therefore, that there was no error on the part of the Circuit judge in holding that the judgment against the administrator of Kelly, set up by the appellant, presented no obstacle to the investigation of the amount really due on the claim.

The only remaining inquiry is as to the proper mode of computing the interest, and upon this point also we agree with the Circuit judge. This question has been so recently before this Court upon several occasions, and the principles upon which it is to be determined are so well established, that we do not deem it necessary to go into any extended discussion of the subject. See *Sharpe v. Lee*, 14 S. C. 341; *Mobley v. Davega*, 16 S. C. 73 [42 Am. Rep. 632]; *Watkins v. Lang*, 17 S. C. 13. These cases determine that the question is one of intention to be deduced from the terms of the instrument upon which the question arises. If the promise is to pay a given amount at or within twelve months from date, with interest payable annually, then, in order to give the words italicized any force or effect at all, it is necessary to conclude that the intention was that the in-

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terest shall continue to be payable annually after as well as before maturity; but if the promise is to pay in installments extending over a period of two or more years, or to pay the whole sum two or more years after date, with interest from date, payable annually, then those words may be given full force and effect without extending that mode of calculating the interest beyond the maturity of the bond, and hence the computation of interest with annual rests will then cease,

and from that time only simple interest on the amount then due is chargeable, unless there are other words in the instrument—for example, "until the whole be paid," or other equivalent words—indicating an intention that interest should continue to be payable annually as long as the debt or any part thereof remained unpaid.

The practical question, therefore, in this case is whether there are any words in the bond indicating an intention that the interest should continue to be payable annually after as well as before maturity. The words of the bond are "payable in three years, in equal annual installments, with lawful interest thereon from January 21st, 1861, payable annually, and the first installment, with interest on the whole principal sum due, payable on January 21st, 1862," and the words relied upon by the appellant are those which we have italicized. These words are certainly not the equivalent of the words "until the whole be paid," found in *Watkins v. Lang*; nor are they of the same purport as the words found in *Wright v. Eaves*, 10 Rich. Eq. 582, where the language was to "pay interest on said sum of \$2,300 from this date, and pay said interest annually as it becomes due."

In fact we see no reason why the words relied upon in this case should be regarded as indicating an intention that the interest should continue to be payable annually after the maturity of the bond, or as indicating that the parties contemplated an indefinite extension of credit beyond the period fixed for the payment of the last installment. On the contrary, it seems to us that the sole purpose in inserting the words relied upon was to state expressly what, without some such words, would have been left to inference, viz.: the exact date at which the first installment should become payable; for it will be observed that the bond bore date January 24th, 1861, while the interest was

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to run from January 21st, 1861, and hence it might have been a matter of doubt at what precise date the first installment would become payable, without the addition of some such words as those in question.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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MAGEE v. O'NEILL.

(November Term, 1882.)

1. Whether a child has been reared in the faith of the Roman Catholic Church is an inquiry susceptible of judicial ascertainment.

[2. *Wills* 624.]

A testator bequeathed a fund to trustees, the income whereof was to be appropriated to the maintenance and education of his granddaughter, then an infant, "provided she is ed-



uated in some Roman Catholic female seminary, or school, and is raised as a Roman Catholic, in the faith and communion of her deceased father," the whole amount to be paid to her at her majority or marriage, freed from all trusts; but, if she "is not educated in a Catholic seminary or school, or raised as a Roman Catholic, in the faith of the Roman Catholic Church, then" to testator's daughters. *Held*, that the words here used created a conditional limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1446; Dec. Dig. ⚬624.]

[3. Wills ⚬664.]

Neither the inadequacy of the interest to defray the expenses of an education at such a school, nor the infancy of the granddaughter, rendered the condition so impossible as to defeat the conditions imposed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1560; Dec. Dig. ⚬664.]

[4. Wills ⚬664.]

A sum out of this fund having been offered by the trustees to the mother to maintain her daughter at a Roman Catholic school for some months, and declined, the condition cannot be disregarded upon the ground that it could not be performed, at least in part, however limited the mother's own means may have been.

[Ed. Note.—Cited in *Shuman v. Heldman*, 63 S. C. 493, 41 S. E. 510.]

For other cases, see Wills, Cent. Dig. §§ 953, 1560; Dec. Dig. ⚬664.]

[5. Wills ⚬643.]

The condition was not void, as being in contravention of public policy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1529; Dec. Dig. ⚬643.]

[6. *Constitutional Law* ⚬84.]

The constitutional provisions which prohibit the establishment of any one denomination of Christians protect each and all in the peaceable enjoyment of its own mode of worship; instead of renouncing all religious denominations, they protect all.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 152; Dec. Dig. ⚬84.]

[7. Wills ⚬665.]

The granddaughter not having been educated in a Roman Catholic school, or raised as a Roman Catholic, in the faith of the Roman Catholic Church, the fund, at her majority, became vested in testator's daughters, under the terms of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1561–1569; Dec. Dig. ⚬665.]

Before Hudson, J., Charleston, December, 1881.

The Circuit decree in this case, omitting its statement of facts, which are fully set out in the opinion of this court, was as follows:

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\*In the second of the exceptions, according to the order in which they are stated, and in which it is said that there is error in the conclusion of law, that it cannot be judicially ascertained whether Mrs. Magee (the plaintiff) was or not reared in the faith of the Roman Catholic Church, the judgment of the court is that in this there was error, and the exception is sustained.

The remaining exceptions are that the conclusions of law are error when they declare

that the conditions already stated are to be held as subsequent, and that the testator intended to create them as conditions precedent; that the referee erred in his conclusion that the estate or interest in the legacy is to be construed as if no such conditions had been attached thereto; that the conditions set forth in the will had never been fulfilled, and the legacy never vested; that if considered as conditions subsequent, they have never been and cannot now be complied with; and that the estate limited over upon the fulfillment of the condition, the evidence being that the condition has not and cannot be now fulfilled, takes effect.

These, then, are the questions upon which the judgment of this court is asked and now stated. Are these conditions to be considered as conditions precedent or subsequent, and, in either view, to be considered as conditions which this court will enforce, either to require performance before vesting the legacy, or subsequent to divest it, if not performed. And the judgment of the court is that upon the point whether they will be considered as conditions subsequent or precedent, they must be held as conditions subsequent; and next, that they are inoperative as conditions subsequent to divest the interest in the legacy. The non-performance of them cannot affect the right of Elizabeth Magee (now Harris) to the legacy in question.

It must be presumed that the relationship which existed between the testator and this infant of very tender years would prompt him to make the provision he did, as a bounty to her, who stood in that close connection of the only child of his deceased and only son. It would not be consistent with any natural feeling that another motive should either prompt or control him in what he did. He gives it to be appropriated "to the maintenance and education of my grandchild,

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Elizabeth \*Magee, the daughter of my deceased son." She was then not yet three years of age. Her "maintenance" was to be provided for, and that "maintenance," under any circumstances, he intended to be provided for; but her age required provision for her "maintenance" before her education could commence. And provision for that "maintenance" can only be carried out if the interest in the legacy was vested at the death of the testator.

The application of the income to her "maintenance" was, at least, as positive as that relating to her "education"—under the circumstances it was more pressing, and could only be fulfilled if the interest in the legacy was vested. Her education might be postponed for years, but the obligation of the testator to his grandchild was recognized by him in the provision for her maintenance. To affirm that, no matter how severe and pressing might be or was the need for apply-

ing this income to maintenance, it should be deferred until the need for education should arrive, would be to reject the motive which, it may be well supposed, prompted the provision, and subject it to a motive which would be hard and cruel.

In this case it will be seen that the position of the testator's estate, which he intends for the benefit of his granddaughter, is distinctly separated from the rest of his estate. "One-twentieth part" is so set apart and given to these trustees for the "maintenance and education" of his grandchild, the plaintiff. The severance is not postponed; it is at once done, and the purpose of that severance is at once declared to be for the "maintenance and education" of a child, then of very tender years; and one, the most immediately present of these declared purposes for which this provision had been made, was in its nature such that it would require the interest to be vested in order that the purpose might be accomplished. Without extending further this part of the case, by reference to the decisions cited in argument to support it, it is the judgment of the court that the conditions set forth in the will of John Magee, connected with this legacy to the plaintiff, are conditions subsequent, and the exceptions are on this point overruled.

The nature and effect of these conditions, because of non-fulfillment, to divest that

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interest, will now be considered. The \*question of performance of these conditions as subsequent, and, if valid as such, divesting an interest vested, may be considered in two views: First. Can the plaintiff, Elizabeth Magee, now Harris, be required to forfeit her interest because they have not been complied with or performed? Second. Are they such conditions as will be recognized as proper to be enforced?

The testimony of the trustees is very explicit on this point that the provision made for the grandchild did not admit in itself of the performance of the condition. In the reply to the letter of the mother, the trustees plainly state that the income was not sufficient to admit that to be done which it is contended should be done, or, if not done, that this legacy shall be lost to the plaintiff. That compliance, therefore, with the conditions was impossible, because the provision made for it was wholly inadequate, is simply to state the proposition that a bequest which is valid and was vested may be divested because of that not being done which the testator himself made impossible of performance. In a case *inter vivos* a donor or grantor could not claim to have a gift or grant in the enjoyment of the donee or grantee avoided, because of the omission to do that the doing of which had been rendered impossible by the act of such donor or grantor. And the rule would apply as well to a bequest or

devise, and operate on those who, by deed or will, claim under the donor, grantor or deviser.

But there are objections to the enforcement of these conditions to divest the interest of the plaintiff so strong that they cannot but prevail. The mother of this child, the surviving parent, is not attached to the faith of the Roman Catholic Church. She is a member of a church entertaining religious views which differ widely from those inculcated in the Roman Catholic Church. She cannot be the proper person to rear her child in the belief of the Roman Catholic Church. With her religious opinions it may well be assumed that to undertake such a duty would be a very great wrong. To rear this child as she then was in the faith of the Roman Catholic Church would involve the separation of the child from the mother; the custody and care to be taken from the mother and transferred to those whose religious faith was that in

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which it is said this child was \*intended to be reared. And this, then, is the separation of the child from the mother—the relinquishment of the highest duty which is connected with the domestic relations, and the parting asunder of ties than which none are stronger or even more sacred in human life.

In the consideration of this part of the case, it would be only necessary to change the terms of this condition, and suppose that this was the child of a mother who was a member of the Roman Catholic Church, and the condition annexed to a legacy like this was that the child should turn from the care and religious teachings of its mother, from attending religious worship with its mother, and conform itself to other teachings wholly different from its mother's; that involving a separation in all things from its mother, would it not be considered as the greatest of wrongs to that mother and that child? It is only necessary to state the case to show that the same rule which here it is sought to enforce against this plaintiff, applied to persons who prefer any other religious belief, would in that case, as in this, violate those domestic relations which the law maintains and protects in their most perfect development.

If a condition in restraint of marriage, or that a wife shall live separate from her husband, or that a legacy be used to promote ambitious views or purchase official position, or, as in many other instances which may be cited, affect the public policy, and are held void—in which of them is to be found that which more violates public policy than is the condition in a case like this, where violence is done to the conscience alike of the mother and the child; where it breaks the ties which the great interests of humanity require should be carefully cherished, and tends to disturb, if not overthrow, the foundation on which society rests? That public policy which is seriously affected in a case like this



is not the opinion of one or more men as to a particular question, social, political or religious, but that sense of public welfare which is derived from the preservation in all their force of the institutions upon which rest the whole fabric of society as it exists with us.

It is not the circumstances of this particular case which should guide us in our judgment. It is the principle that is involved,

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\*and in which the living and their posterity are deeply concerned. If this testator can annex such a condition to this gift to a grandchild, then to all parents is extended the legal right to deal likewise with their children, whether infants or adults. To every bequest and devise can be annexed this frightful condition: That the same shall be void unless the legatee, if an infant, shall be reared in a specified religious faith, or, if an adult, shall renounce a deeply-rooted faith, and adopt the religion of the testator. Could a policy be conceived better calculated to disrupt domestic ties and sow the seeds of family feud and religious hypocrisy? Yet are we asked to announce from this tribunal that an American court solemnly sanctions so frightful a power in testators and to decree it consistent with public welfare, public policy and the genius and spirit of our laws.

Nor is this in any wise to curtail the powers which one has, to exercise his will in the disposition of that which belongs to him; for that will is ever to be measured by that power, and that must be consistent with the general welfare. The law under which the power to give, grant or devise is given, is a part of the system which is, in all its parts, created to promote the general welfare. Nor can it be better expressed than in the language of the eminent judge cited in the argument: "No man can leave his property clogged and conditioned by his own personal views of public affairs, or by his posthumous ambition (if I may so call it); he cannot make his political opinions run (like a covenant) with his land. He may leave it to whom he pleases, but it must be unfettered by any condition bearing upon matters connected with the public welfare." Egerton v. Brownlow, 4 H. L. Cas. 149.

Conspicuously in the constitution of the United States and of this State is the positive inhibition of all control over religious opinions, and the protection given to the enjoyment of it is forcibly and plainly expressed. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," is the language of the constitution of the United States. The language of the constitution of this State is, if possible, even more emphatic: "No person shall be deprived of the right to worship God

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according to the dictates \*of his own conscience. No form of religion shall be estab-

lished by law; but it shall be the duty of the general assembly to protect every religious denomination in the peaceable enjoyment of its own mode of worship." If the power to control the conscience in matters of religious belief is thus renounced by the government, Federal as well as State, it is thus the highest and most authoritative exposition of what is in this connection regarded as the public welfare.

Will it then be claimed that this power, which is so renounced, because conducive to the public welfare, can be, nevertheless, exercised by an individual? Can he make that the condition of a gift, which the government could not do? Does not this great provision of the organic law enter into and qualify the exercise of the power of disposition which belongs to the owner of property? He cannot do that indirectly which he cannot do directly. He cannot, by a temptation held out to the ambition, the cupidity, or, perhaps, more than all, the wants and necessities of another, do that which the government has said shall not be done by itself. If the protection of religious belief be essential to the permanency of good government; if religious belief to be honest and deserving of being so called, must be the result of the free, untrammelled, unthought exercise of the faculties given to us, he who forces, trammels or buys for himself, no matter for what purpose, the control of the religious belief of another, in that violates the law which declares that "No person shall be deprived of the right to worship God according to the dictates of his own conscience."

The exceptions to the report, if the conditions are to be considered as subsequent, are overruled. But whether these conditions be precedent or subsequent, holding them void, because against public policy, they would be as ineffectual to prevent this legacy from vesting, as to divest it if previously vested. "When a condition is bad on grounds of public policy, it must be obviously bad whether it be precedent or subsequent. The law will no more allow any thing contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession." *Cooke v. Turner*,

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15 Mees & W. 726. \*"And this rule is specially recognized when the condition relates to personal property, as in this case." 1 Story Eq., § 289. If the legacy be of personal estate, under the like circumstances, (that is, of illegal condition,) the legacy will be held good and absolute as if no conditions whatever had been annexed to it.

The judgment of the court is that the plaintiff is entitled to the legacy given under the will of John Magee; that she took therein a vested interest; that the condition annexed is a condition subsequent; that the non-performance thereof does not affect her

interest, because its subsequent non-performance, if it be valid, was owing to no fault of the infant nor of those having control of the income and of her education, as we have before stated, but chiefly because the condition is void and inoperative as against public policy, and that the legacy, with the accumulation of the interest thereon, be paid over to the plaintiff by the special depositaries with whom it has been placed, under and subject to the order of this court.

Messrs. Simonton & Barker, for appellants.

Mr. A. G. Magrath, contra, cited 37 Eng. Com. L. Rep. 437; 7 Cl. & F. 509; 4 H. L. Cas. 1; 7 Id. 707; 15 Mees. & W. 727; 8 Rich. Eq. 241; 2 DeG. & S. 49; 1 Eden 140; 2 Redf. Wills 673; 2 Wms. Ex. 1110, 1119, 1124; 3 Myl. & K. 411; 1 Story Eq. Jur. 288 et seq.; 3 Atk. 332; 2 Vern. 416; 11 Gratt. 804.

April 17th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. John Magee, of Charleston, by a clause of his will, devised as follows: "Item. I bequeath one-twentieth part of the remaining collections and proceeds arising from the debts collected and the sales of all my personal property and real estate to my friends John F. O'Neill and Thomas O'Brien, to them and their heirs, in trust, to invest the same in property yielding a certain interest, which said income or interest shall be appropriated to the maintenance and education of my grandchild Elizabeth Magee, daughter of my deceased

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son, the \*late Captain Arthur Magee, until her day of marriage or when she attains the age of twenty-one years, provided she is educated in some Roman Catholic female seminary or school, and is reared as a Roman Catholic in the communion and faith of her deceased father, the said Arthur Magee; and on her day of marriage, or attaining the age of twenty-one years, the bequest—the whole amount—shall be paid over to her and her heirs, forever freed from all trusts whatever. But if the said Elizabeth Magee is not educated at a Catholic seminary or school, and reared as a Roman Catholic in the faith of the Roman Catholic Church, then it is my intention, will and direction that the bequest shall accumulate, the interest or income as it arises shall be added to the principal until the said Elizabeth Magee's death or marriage or attaining the age of twenty-one years, when, on the happening of either of these events, the whole amount—principal and interest—shall be divided and paid over to the trustees of my daughter Elizabeth West, the wife of Preston West, and Mary Brown, the wife of Isaac Brown," &c., and then specifying the limitations and conditions to which the said property should be subject.

When the said Elizabeth Magee arrived at the age of twenty-one years (she is now the wife of J. E. Harris), she filed the complaint in this case against the trustees named in the will, asking that they should account for the said bequest, with the accumulated interest, and upon that accounting pay over the same to her under the will of her grandfather, John Magee. The trustees of Elizabeth West and her children, and of Mary Brown and her children, were also made parties, and they all answered, claiming that the bequest should be paid to them, for the reason that the express terms and conditions upon which the legacy had been given to the trustees for the plaintiff had not been complied with—that Elizabeth Magee was not "educated at a Roman Catholic female seminary or school, and reared as a Roman Catholic in the faith of the Roman Catholic Church," as expressly provided by the will.

The cause was referred to Isaac Hayne, Esq., as special referee to take the testimony and report on the law and facts involved in the case, who took the testimony and report-

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ed among other \*things as follows: "That when the said Elizabeth Magee was about four years old, and while her father was still alive, she was baptized in the Roman Catholic Church, but she had not been 'educated at a Roman Catholic seminary or school,' and the evidence does not establish that she was 'reared in the faith of the Roman Catholic Church.' That nothing was said or done either by her mother or the said trustees prior to the year 1869 in regard to appropriating the interest and income of the trust estate to the maintenance and education of the said Elizabeth Magee. About that time Mrs. Magee (the widow of Arthur Magee), who was then living with her daughter at Greenville, S. C., applied to the trustees and requested them to assist her from the trust estate in the education of her daughter. Mr. O'Neill referred her to Mr. O'Brien, who stated that the interest and income of the estate was inadequate to maintain and educate Miss Magee at a Roman Catholic institute or school. He proposed, however, that Mrs. Magee should furnish Miss Magee with the necessary clothing and defray her traveling expenses in going to such an institution or school (there being no such school located in Greenville), and that the trustees should then pay her expenses at the institute or school for a limited period, say for about six months. This, he said, was as much as the trustees could undertake to do, in view of the small income which the trust estate yielded," &c.

And the referee concluded his report as follows: "It would seem, then, that the continuance of the estate, bequeathed to Miss Magee, having been made to depend upon a condition which is, in its nature, too vague and uncertain to be made the subject of



judicial investigation, the condition is void for uncertainty, my conclusion being that it cannot be judicially ascertained whether Miss Magee was or was not 'reared in the faith of the Roman Catholic Church'; and, further, that she cannot be deprived of her legacy, unless the court shall decide that this condition, as well as the condition which required her to be 'educated at a Roman Catholic school,' has or has not been performed. I report, as my conclusion of law, that her estate and interest in the legacy continues as if no such condition had been attached

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\*thereto, and that she is entitled to have the trust estate hereinbefore mentioned transferred and paid over to her absolutely."

Exceptions were filed to this report, and the cause came on to be heard by Judge Hudson, who decided that the plaintiff was entitled to the legacy given under the will of John Magee; that she took therein a vested interest, that the condition annexed is a condition subsequent, that the non-performance thereof does not affect her interest, because its subsequent non-performance, if it be valid, was owing to no fault of the infant, nor of those having control of the income and of her education, as we have before stated, but chiefly because the condition is void and inoperative as against public policy; and that the legacy, with the accumulation of the interest thereon, be paid over to the plaintiff by the special depositaries with whom it has been placed under and subject to the order of the court.

From this decree the defendants appeal to this court upon the following grounds:

1. "That his Honor was mistaken in his apprehension of the testimony as to the attitude of the trustees to the plaintiff and her mother, and of their reply to her application in 1869; neither of the trustees, in their written reply, having stated that the fund was not sufficient to maintain her at a Roman Catholic school for more than six months.

2. "That the statements of Mrs. Magee bore on their face the evidence of bias, and were wholly insufficient to support or justify any conclusion of fact in the case.

3. "That his Honor erred in holding that 'the testimony of the trustees is very explicit on this point: that the provision made for the grandchild did not admit, in itself, of the performance of the condition, and that, in reply to the letter of the mother, the trustees plainly state that the income was not sufficient to admit that to be done which, it is contended, should have been done, or, if not done, that the legacy should be lost to the plaintiff.' That, on the contrary, the letter of Mr. O'Brien shows that the fund had increased from \$1,500 to \$4,000 in 1869, and says not a word of its insufficiency.

4. "That his Honor erred in holding that 'compliance with the conditions was impos-

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sible, because the provision made for it \*was wholly inadequate,' and that the testator himself made the conditions of the will impossible of performance.

5. "That his Honor erred in holding that the plaintiff took in the legacy under the will a vested interest, and that, as a consequence, the conditions attached were, in their nature, subsequent and not precedent.

6. "That his Honor erred in holding that the conditions of the bequest are void as against public policy.

7. "That his Honor erred in holding that the condition annexed is a condition subsequent, and that the non-performance thereof does not affect her interest because the condition is void and inoperative as against public policy."

The Circuit judge held that the referee committed error in deciding as matter of law, that "it could not be judicially ascertained whether Elizabeth Magee, the plaintiff, was not reared in the faith of the Roman Catholic Church;" and in this we concur with the Circuit judge. We think the phrase alluded to in the testator's will meant no more than that Elizabeth should be reared within the circle and under the influences of the Roman Catholic Church, in which she had already been baptized, and that was susceptible of proof like any other fact. So that it is clear that the proviso in the will of her grandfather was not carried out, and the only question is one of law, whether, under all the circumstances of the case, the court will adjudge the plaintiff, notwithstanding the condition in the will was not performed, to be entitled to the legacy, or that it goes over to the defendants, her aunts, by way of substitution or limitation.

As the legacy was not given directly to Elizabeth, but to trustees with directions to pay it over to her "on the day of her marriage or attaining the age of twenty-one years," provided certain conditions were complied with, it is insisted that she had no vested interest in the legacy, but it remained contingent until the time arrived for its payment, and as a consequence that the conditions which were imposed were conditions precedent in their character, and their non-performance, from any cause whatever, prevented the interest in the legacy from ever attaching. All the authorities agree that

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conditions precedent must be strictly \*construed, and that nothing vests until the thing happens, whether it be possible or impossible, legal or illegal, or in conformity to public policy or against it. And in this regard we confess that we do not clearly see the distinction contended for between this case and that of *Drayton v. Grinke*, Rich. Eq. Cas. 321 [24 Am. Dec. 419], where it was held that a bequest to two grandsons "on their arrival at the age of twenty-one years

and assuming testator's name at that period," was held to be contingent, and that the grandsons were not entitled to the profits arising before compliance with the conditions.

But, as in this case, the income was appropriated for "maintenance" as well as education of the legatee, the necessity for which might precede the time for the performance of the condition as to education, and as our view makes it unnecessary, we will not go into the refined and somewhat artificial learning upon the subject of conditions precedent and subsequent, but consider the case as one in which an equitable interest vested, subject to be defeated by the non-performance of the condition imposed. Still the plaintiff cannot recover without showing performance of the condition, if it was possible to be performed and not objectionable in itself as being against law or public policy. There is a limitation over upon failure of the condition, and in such case the rule is that the testator shall be held to mean precisely what he says—that the words will not be considered as creating a technical condition, but rather what is called a conditional limitation. "But in regard to estates over, dependent upon the non-performance of conditions subsequent, where it is expressly provided that the estate shall go over upon the failure of the conditions, the donor is held to mean precisely what he declares, and the estate over takes effect." 2 Redf. Wills, § 66 and notes; 2 Jarm. Wills (5 Am. Ed.) 527; Fox v. Phelps, 20 Wend. 437; Finlay v. King's Lessee, 3 Peters 346 [7 L. Ed. 701]; Newell v. Nichols, 75 N. Y. 78; 1 Rep. Leg. 750.

In the first place, it is urged that the condition was impossible, and, therefore, should be disregarded. It was certainly not impossible in the sense in which that term is usually applied to conditions. "In the view of the common law a condition is said to be impossible only when it cannot, by any human

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means, take effect." 2 Story Eq. 1304. But we gather that the term "impossible" is used here in another sense, viz.: that the thing required was not to be done by the beneficiary herself, who was an infant, but by her mother or those who had charge of her education, and the bequest itself did not give the means of obtaining the education required; and that such inadequacy made it impossible, and was caused by the testator himself. We do not take the view that the bequest was given for the purpose of educating the grandchild. It seems to us that the condition as to the manner in which she should be educated was independent of the source from which the means were to be derived. It will be observed that the corpus was not to be paid to Elizabeth until she attained her majority, at which time, in the ordinary course of events, it was probable her education would be completed.

The whole tenor of the will shows that the testator did not intend the trustees to take charge of his granddaughter and send her to school, providing the means to do so out of the legacy. He attached the condition and left it to the mother to do as she pleased to act in regard to the education of her daughter in such way as to secure or renounce the legacy. It is true that he directed the income which might arise from the "one-twentieth part" of his estate (which turned out to be \$1,500) to be appropriated to the "maintenance and education" of his grandchild, but he did not thereby undertake that such interest would be sufficient for that purpose, or mean anything more than to supplement the means of the mother, and even this assistance was only to be rendered on condition that the child was to be sent to a Catholic school; and, if not so sent, the interest was to be then retained and accumulate, as clearly appears in the limitation over. "But, if the said Elizabeth Magee is not educated in a Catholic seminary or school, or reared as a Roman Catholic, in the faith of the Roman Catholic Church, then it is my intention, will and direction, that this bequest shall accumulate, the interest or income, as it shall be, added to the principal until the said Elizabeth Magee's death or marriage, &c., when, on the happening of either of these events, the whole amount, principal and interest," &c., to go over.

Taking this to be the proper construction

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of the will, it is still suggested that the condition was "impossible" from the fact that Mrs. Magee, the mother, was unable, pecuniarily, to send her daughter away from home to a Catholic school. The rule is, that he who affirms must prove, and we do not see satisfactory evidence of the fact; but, passing that, it certainly does appear that Mrs. Magee could have utilized the interest in the hands of the trustees for that purpose, which would have been, at least, part performance, and, as suggested by one of the trustees, might have been taken as full performance. "When a literal compliance with the conditions becomes impossible, from unavoidable circumstances, and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or, as it is technically called, *cy pres*." 1 Story Eq. 291.

Mrs. Magee removed from Charleston to Greenville, where there was no Catholic female seminary, and, knowing the terms of the will, made no application for interest or income except on one occasion, when she wrote to the trustees, asking assistance in the education of her daughter, not to send her, however, to a Catholic school, but to one at home of a different faith. The trustees assented to the use of the interest for the purpose of her education, but interposing the known condition that she should be sent to



a Catholic school. Mrs. Magee testified, "That when Mr. O'Brien made the proposition above referred to, in 1869, he merely said that the fund was not sufficient to do more than has been stated for a period of six months. In that conversation Mr. O'Brien said that he was anxious that Miss Magee should get the legacy, and that carrying out the plan suggested it would give the trustees a pretext for turning over the fund to her, that he did not propose to educate her," &c. In the delicate position in which they were placed, the trustees seem to have done their whole duty, and they have accounted and been discharged, leaving the fund for whoever may be decided to be entitled to it. Nothing more was heard of a desire to receive the interest, and we cannot resist the conclusion that it was declined on the condition of sending Elizabeth to a Catholic school, either in aid of her own means, or for the limited portion of the year the amount authorized. So that the condition

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cannot be disregarded upon the ground that it could not be performed in whole or at least in part.

But, assuming this to be so, it is urged that the condition itself was void as being in contravention of public policy. The phrase "public policy" is very vague, and we are not sure that we clearly understand what is meant by it, as propounding a rule for judicial action in deciding the rights of property. It is the duty of the legislature to make laws and of the court to expound them, but it is not so clearly perceived what is the duty of the court when there is no law to be expounded, and the court is called upon to declare one. It is true that there are certain matters which courts, by decisions often repeated, have declared void as against public policy, such as contracts in restraint of trade, against marriage generally, marriage brokerage bonds, gambling debts, &c.; but it seems to us that the subjects in which the court undertakes to make the law by mere declaration, should not be increased in number without the clearest reasons and the most pressing necessity.

We agree entirely with the authorities on the subject which point out the danger of relying on general notions of public expediency or policy, which, from time to time, may vary so much. As to that public policy which is within the cognizance of courts, we cannot conceive of a better definition than that given by a distinguished English judge, viz.: "It cannot be the mere opinion of the judge upon any general question of public policy, or, in other words, whether the judges think that the interests of the public would be better advanced by tolerating or refusing to tolerate such provisos, but whether they are in contravention of any established law, or in contravention of the spirit, though not against the letter of the law."

This definition approaches something like clearness, and is in conformity, as we conceive, with our decisions in *Willis v. Jolliffe*, 11 Rich. Eq. 447; *Dudley v. Odom*, 5 S. C. 136 [22 Am. Rep. 6].

It is not claimed that this condition is in contravention of any established law. We know of none which prohibits a citizen from using his own means in educating a grandchild, and, in doing so, to make his own choice of a school, and have the education given under particular influences, religious

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or otherwise. We have no hierarchy—no particular form of religious worship made lawful, and, thereby, all others made unlawful. The State knows no religious denominations further than to protect them in their rights. The members of all, as well as those who are members of none, are equally her citizens, and she has enacted no law forbidding education under the forms and influence of any of them.

The law undoubtedly is, that any person of sound mind and of full age may, by his last will and testament, duly executed, dispose of the whole or any part of his estate at his own will and pleasure, except in two or three cases specially mentioned. Our books are full of authority for saying that, for many reasons, it is regarded important to maintain in its full integrity the right which belongs to a testator to dispose of his property as he pleases, provided only his disposition is not in violation of law. This right is secured alike to every citizen, whatever is his religious faith, be he Jew or Gentile, Protestant or Catholic. This testator exercised that right, and there is certainly no express law which requires us to declare any part of his will void.

But was the condition in this will as to the manner in which the legatees should be reared and educated, in contravention of the spirit of our law? As we understand the argument, the precise point is that, as we have no form of religious worship established by law, but the constitution declares that "No person shall be deprived of the right to worship God according to the dictates of his own conscience," any requirement attached to a bequest that the legatee shall be educated and reared at a school and under the influence of a particular denomination of Christians, is in violation of the perfect liberty of conscience vouchsafed to all; and there being no express law upon the subject, the court should declare it void as against public policy. Presented in this form it is certainly a new question in this State, if not in the United States, and one, in some aspects, not without difficulty.

The constitution does declare in the bill of rights, section 9, that "No person shall be deprived of the right to worship God according to the dictates of his own conscience;" but it also declares, in section 10,

that "No form of religion shall be estab-

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lished by law, but it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of worship," &c. And the constitution of the United States declares that "Congress shall make no law respecting an establishment of religious, or prohibiting the free exercise thereof." Art. I., Amend. Constitution.

Taking these provisions together, we are not authorized to infer from the prohibition against an established church, that the government is indifferent to religion in all its forms. It must be supposed that the founders of our government knew that the religious sentiment, besides involving the highest interest and duty of man, has always been a potent agency in giving strength to law and permanency to order. We assume that the separation of church and State was made because it was conceived that matters of faith are too elevated and spiritual for human control, and possibly for the additional reason that the diversity of creeds rendered hopeless the task of giving authoritative sanction to one without unjustly depressing others; all being equally sound and essential in the views of those entertaining them respectively. Instead of saying that the government has renounced all, it is more correct to say that the government recognizes all religious denominations. The constitution, which prohibits the establishment of any one, protects each and all "in the peaceable enjoyment of its own mode of worship." It is not denied that one of the most marked and distinctive features of our institutions is the perfect and unqualified freedom of opinion in matters of religion which they secure to all who dwell under them.

It seems to us that the leading purpose was to prohibit the establishment of any particular form of religion which would deprive persons not belonging to the favored church, of the right to worship according to the dictates of their own consciences, but to go no further, except to protect all. Can it be properly said to be against the spirit of the constitution, for a member of one of these religious denominations, so protected, to endeavor by peaceable and legal means to extend his faith and to influence his children and grandchildren to adhere to the church of their fathers—for one belonging to the

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Presbyterian or Methodist, or \*any other denomination, to use such influences as argument, association, schools, colleges, donations, &c., to impress the minds of others, and particularly the youth of the country? Because such things may have some effect in determining religious opinions, can it be truly said that, therefore, they violate liberty of conscience, and are productive of evil

consequences to the public—against public policy?

As we understand it, the good work of the ministers of the different denominations, under the highest commission, is directed to the promotion of morality, the increase of religion, and making converts to their own particular tenets, and upon this privilege rests the justification of all voluntary contributions to denominational schools and colleges, which the distinguished counsel for the plaintiff admitted were legal. He said: "If the testator had, in place of the plaintiff, given his money to establish a Roman Catholic school or college, his perfect right to do so could not have been disputed. In England a trust to establish a place of worship for Protestant dissenters was held good; and also a bequest for enabling persons professing the Jewish faith to observe its rights. 1 Jarm. Will. 190. \* \* \* But the toleration, and I use the term in no invidious sense, of the right of one to dispose of his property is different from the use made of it when it becomes a means of coercion," &c.

It seems to us that in principle the distinction is rather shadowy between a donation for a school to be conducted according to certain religious forms, and one to a person to be educated in that school. It is admitted that such a condition as that under consideration would be held good in England, provided the church indicated was the Church of England (*Clavering v. Ellison*, 7 H. of L. Cas. 707); but it is said that it would be held good there only for the reason that that church is established by law, "because such a condition would be the public policy declared by the government, carried out in the disposition of the property." Apply this principle to our condition. We have no established church, and therefore, in the proper sense of the term, no "dissenters." Our constitution recognizes all denominations,

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and directs that the general \*assembly shall pass laws for their protection. If recognition by law is the ground upon which courts are authorized to declare what is termed the public policy of the State, it would seem that what is allowed in England as to one, because recognized by law, might here be allowed as to all, equally recognized by the fundamental law.

We do not regard this case as analogous to that of *Egerton v. Earl Brownlow*, 4 H. of L. Cas. 149. In that case John William, Seventh Earl of Bridgewater, held under the crown a great dignity, in the nature of a public office, which was about to expire with him. He desired to have this dignity revived in his family, and for that express purpose devised his immense estates to Lord Brownlow, but if he should die "without having acquired the title of Duke or Marquis of Bridgewater, then the devise should be void." The condition of the devise was held to be



void as against the public policy of England, in regard to the acquisition of dignities at the disposal of the crown. The terms of the condition made it an important matter of state. On the contrary, the matter here is purely one of private right, in regard to private property.

The power of disposition is general. The power to give includes the right to withhold or to fix the terms of gift, no matter how whimsical or capricious they may be, only provided they do not in any way violate the law. Mr. Magee, in his life-time, could have given money to educate his granddaughter at a particular school, or he could have withheld it at his pleasure. Suppose he had entered into a covenant with Elizabeth or her mother, that if she was educated at a particular school named, and under certain religious influences, he would, upon her attaining twenty-one years, pay to her five thousand dollars, we suppose that if she were not so educated, she could not go into the court and recover the money. Suppose, further, that before the time for payment arrived, John Magee had died, would that strengthen her claim to recover the money against his personal representatives? We are unable to see any material difference in regard to the necessity of complying with the terms imposed, between this supposed case and that of a voluntary gift by will.

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\*We can not say that the terms of this will so far exceed the license which is allowed the citizen in the disposition of his own property, as to render it void as against public policy. We do not understand that there was anything in this bequest which can be properly called coercion, or that Elizabeth was "deprived" of the liberty of conscience. Terms were attached to the bequest which may seem to us exacting, unkind and unnecessary, but we cannot say they were unlawful or that they were complied with. If they were declined from conscientious motives, far be it from us to say that such conduct was wrong; but, from our view of the law, we are constrained to hold that the legacy, with its accumulations of interest, must go to those to whom, in the event which has happened, it was given by the will.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for such further orders as may be necessary.

19 S. C. 190

KOHIN v. MEYER.

(November Term, 1882.)

[1. *Appeal and Error* ⇨1012.]

Findings of fact by the Circuit judge, partly from written evidence submitted to him, and

partly from the testimony of witnesses orally examined before him, reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3990; Dec. Dig. ⇨1012.]

[2. *Fraudulent Conveyances* ⇨69.]

A judgment confessed by one not then otherwise in debt, with a view to protect his property from debts which he expects to contract, or from liabilities which he apprehends may be established against him, may be set aside at the instance of subsequent creditors, as a fraud upon them.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 179; Dec. Dig. ⇨69.]

[3. *Judgment* ⇨48.]

Where the statement of facts out of which the indebtedness arose, contained in a confession of judgment, is false, or so grossly inaccurate as to mislead inquirers, the confession is void as to creditors of the judgment defendant.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 73; Dec. Dig. ⇨48.]

[4. *Execution* ⇨116.]

A judgment never was a lien upon personal property, and since the adoption of the code of procedure an execution has no such lien until levy made.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 266-271; Dec. Dig. ⇨116.]

[5. *Fraudulent Conveyances* ⇨132, 139.]

Semble: When a debtor makes a transfer of all or a large portion of his personal property without notice to his creditors, and retains possession, using and claiming it as his own, it will require strong evidence to rebut the presumption of fraud arising from such retention of possession.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 407, 439; Dec. Dig. ⇨132, 139.]

Before Aldrich, J., Orangeburg, May, 1882.

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\*This was an action by Morris Kohn and other creditors of E. M. Meyer against E. M. Meyer, A. W. Meyer and others, creditors of E. M. Meyer, commenced October 8th, 1881, to set aside a confession of judgment, and also a sale of personal property, made by E. M. Meyer to A. W. Meyer. Upon the complaint and answers and affidavits, and the examination of E. M. Meyer, taken in open court before him, under sections 407-409 of the code of procedure, Judge Hudson granted a preliminary injunction restraining the sheriff from paying out the proceeds of the sale of E. M. Meyer's stock of goods. The case was heard on its merits before Judge Aldrich, the testimony of E. M. Meyer, taken as above stated, being used as evidence, and other witnesses being examined in open court before the presiding judge. Other facts are stated in the opinion.

Messrs. A. C. Dibble, W. L. Glaze and Lathrop & Webster, for plaintiffs, appellants.

Messrs. J. F. Izlar and S. Dibble, for defendant creditors, appellants.

Messrs. De Treville & Glover and M. I. Browning, contra.

April 17th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action brought by the plaintiffs in behalf of themselves and other creditors of the defendant, E. Milton Meyer, for the purpose of setting aside a judgment confessed by him to his father, Augustus W. Meyer, one of the defendants, upon the ground of fraud; and, also, for the purpose of setting aside the sale of certain personal property, claimed to have been made by E. M. Meyer to A. W. Meyer, on April 25th, 1881.

The judgment in question was confessed on June 9th, 1880, for the sum of \$2,800, but no execution was issued thereon until September 12th, 1881. The statement required by section 400, Lynch's Code (now section 384), is as follows: "Upon the 31st day of May, A. D. 1880, the plaintiff sold and delivered to defendant his certain share in the stock in trade in a certain store on Russell street, in the town of Orangeburg, which was

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valued \*at, and for which the defendant agreed to pay, the sum of \$2,800, and for which amount the defendant has made his note to plaintiff, dated June 9th, 1880, payable one day after date, no part of which note has been paid; and the sum of \$2,800, with interest from said date, as specified in said note, is now due and owing the plaintiff."

This statement was duly sworn to by said E. M. Meyer on the same day that the judgment was confessed, but in his answer to the complaint in this case he gives a totally different account of the origin and consideration of the debt for which the judgment was confessed, and says "that on June 9th, 1880, he made a confession of judgment to A. W. Meyer for the sum of \$2,800, for certain sums lent and advanced to him by the said A. W. Meyer, for the purpose of carrying on his business in the town of Orangeburg, in the mercantile trade. First, he (the defendant) borrowed \$1,800 from said A. W. Meyer when he first commenced his business aforesaid, which was put in the stock in trade of his store, and afterwards \$1,000 more were advanced by the said A. W. Meyer to this defendant for the same purpose, to wit: to carry on the said business." A. W. Meyer, in his answer, only says in reference to the confession of judgment, "that the same was made for a bona fide debt due to this defendant for money advanced to said E. M. Meyer, and given at a time said E. M. Meyer owed no debts, to protect this defendant."

E. M. Meyer, in his testimony, gives substantially the same account of the origin and consideration of the debt to his father as that which he gave in his answer, but goes rather more into details as to the time when and circumstances under which the alleged loans were made. It appears from his testimony that he commenced business some time in the latter part of the year 1878, (in October, as it was conceded at the hearing,) and that the first loan of \$1,800 was made to

him to enable him to start in business, but no note or other memorandum of such loan was taken by his father until nearly two years afterwards, when the amount, without interest, was incorporated in the judgment. The next loan of \$1,000, according to his testimony, was made just before he was married, which was on May 27th, 1880, about

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two weeks \*before the judgment was confessed, when the witness said he was in need of more money.

A. W. Meyer, in his testimony, says that the confession of judgment was given for money loaned his son (\$1,800) when he started business, and \$1,000 just before his marriage. He took the confession of judgment so that E. M. Meyer's wife would know it was borrowed money and witness' younger children would not suffer. He further says, that when his son borrowed the \$1,000 he had a note coming due and had to raise money to pay it. When the judgment was confessed would have waited twenty years, or as long as witness liked, if no one else disturbed him.

It seems, also, from E. M. Meyer's testimony, that during the time he was in business, he usually carried a stock of from \$3,500 to \$4,000; that he sold mostly for cash, and that his sales ranged from \$300 to \$800 per week, upon which he usually made a profit of 25 per cent., and yet, in the course of about three years, upon being closed up by the sheriff on September 12th, 1881, when the execution in favor of A. W. Meyer, as well as an execution in favor of Steffens & Werner, were levied upon his stock of goods, it appeared that his total indebtedness amounted to something over \$6,500, while his assets, consisting solely of the stock of goods, were only estimated by himself at \$3,500, and actually brought, at sheriff's sale, \$2,416.

It seems, also, from the testimony of both father and son, that on April 25th, 1881, the father took a bill of sale of all the personal property of the son, outside of the stock of goods, consisting of work animals, farming implements, and the crop then just planted, but the son remained in possession, and subsequently traded one of the animals, with the knowledge and consent of the father. The origin of this transaction, as stated by both father and son, is that the son was again in need of money, and sold this property to his father for the sum of \$615, a part of which (\$315) was paid in cash, and the balance in May following the date of the receipt or bill of sale; but the son remained in possession of these articles until they were levied on by the sheriff, as the

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property of the son, under an execution \*in favor of Bruff, Faulkner & Co., when A. W.



Meyer forbade the sale, and they were left in the possession of E. M. Meyer.

The debts due the creditors established in these proceedings were mostly, if not entirely, for goods sold by them to E. M. Meyer, and were contracted at different dates, ranging from February 17th, 1881, to June 18th, 1881, and it nowhere appears in the evidence that any of the creditors had any actual notice of the confession of judgment until July 27th, 1881, when it was mentioned to the witness, Green, a salesman in the employ of Bruff, Faulkner & Co., who are the largest creditors; nor does it appear that any of the creditors even knew that the son was indebted to the father in any form until E. M. Meyer mentioned in a letter of June 30th, 1881, to Bruff, Faulkner & Co., that he had been compelled to borrow money from his father to pay a debt which pressed him.

The foregoing is a general outline of the testimony upon which the case was heard by the Circuit judge, who held that the confession of judgment was based upon a bona fide indebtedness of the son to the father; that there was no fraud in the transaction, and that the judgment was a valid lien. He also held that the creditors who were seeking to set aside the judgment, being subsequent creditors, could not do so. He further held that the defect in the statement upon which the judgment was confessed was a mere irregularity which could not be taken advantage of in this form of proceeding, and that no one but the defendant in such judgment could take advantage of it. As to the alleged sale of the personal property, he held that there was no necessity to consider it, for, having established the judgment to be a valid lien, the personal property would be bound by it, and, hence, it was immaterial to consider whether the transfer could be sustained, though he does go on to discuss the validity of the transfer, and plainly intimates his opinion that it was unimpeachable.

From this judgment, the plaintiffs, as well as such of the defendants as are identified in interest with them, appeal upon numerous grounds, which allege error both in the conclusion of law and fact reached by the Cir-

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cuit judge, but, from the view \*which we take of the case, it will not be necessary to consider, in detail, the various grounds of appeal.

We must confess that the testimony, coming as it does almost entirely from E. M. Meyer and A. W. Meyer, has made a very different impression upon our minds from that which it seems to have made upon the mind of the Circuit judge, who has certainly, upon at least two important points, entirely misconceived the testimony. In speaking of the transfer of the crop and work animals, he uses this language: "The father says, I

do not want them, but if you will confess a judgment, so that your wife will understand this is a loan and not a gift, I will take the property and raise the \$1,000, provided you manage the farm and crop. The son agrees to it, the confession is entered, the transfer made, the money paid, he remains in possession, and has not a creditor in the world but his father. No one is or can be hurt by this transaction. A year after, these creditors sell the son \$4,000 worth of goods."

It is quite manifest that here two entirely distinct and different transactions have been confounded, viz.: the loan of the \$1,000, and the alleged sale of the personal property for \$615. The former took place nearly a year before the latter, for both of the Meyers testify that the loan of \$1,000 was made just before the marriage of E. M. Meyer, the date of which is fixed at May 27th, 1880, and the judgment embracing this \$1,000 was confessed on June 9th, 1880, while the alleged sale did not take place until April 25th, 1881, as shown by the receipt or bill of sale offered in evidence. These two different matters are not only confounded, but the statement that the son, at the time of the alleged sale, had not a creditor in the world is not only without any evidence to sustain it, but is directly in conflict with the undisputed testimony, which shows that a large part of his present indebtedness was contracted prior to April 25th, 1881.

But there is another more important misconception of the testimony. It is assumed, throughout the discussion in the Circuit decree as to the validity of the judgment, that the creditors had actual notice of the confession of judgment before they sold goods and extended credit to E. M. Meyer; as it is

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expressed in \*one place, "The elder Meyer did not hold out inducements to them to sell to his son; did not encourage them; on the contrary, he warned them of his prior lien; his son and these creditors made the confession a subject of discussion at the time the debts were contracted." And again, "These creditors came to Orangeburg a year or more after the confession was entered; they saw it; they knew it; they talked about it, and then extended their credit." It is difficult to see how the Circuit judge could have so far misconceived the uncontradicted testimony in the case except upon the supposition that two totally distinct matters have again been confounded. The debts were contracted, as we have seen, at different dates, from February 15th, 1881, to June 18th, 1881, and there is not a particle of testimony even tending to show that any one of the creditors ever knew or heard of the confession of judgment until July 27th, 1881, after which date, so far as appears, not a single debt was contracted. Indeed, until the letter of E. M. Meyer of June 30th, 1881, to Bruff, Faulkner & Co., which was after the last

debt was contracted, it does not appear that any of the creditors ever heard that E. M. Meyer was indebted to his father in any form.

The Circuit judge, therefore, in making the statements which we have quoted from his decree, must have confounded what occurred after the creditors had learned of the confession of judgment, when they were endeavoring to secure their debts, with what occurred when such debts were contracted. In view of these manifest errors in the Circuit decree, we feel less hesitation in taking our own view of the testimony than we would otherwise feel. It is true that both the Meyers testify that this son, E. M. Meyer, was not in debt to any one at the time the confession of judgment was taken, and the Circuit judge has adopted their testimony as establishing that fact in the case, upon which his whole judgment mainly rests. How A. W. Meyer could know this fact it is not easy to see, especially when, by his own account, he seems to have been singularly ignorant of the business of his son, although living in the same town with him, carrying on a similar business but a few doors from him, and not only claiming to be

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by far his largest creditor, but having good reason to know, from the applications to him for help, that the son was certainly not managing well.

It seems to us incomprehensible how, in the short space of three years, the younger Meyer could have become so involved in debt as he represents himself to be, if he has given a correct account of the manner in which he has managed his business. According to his account, he started business in the latter part of 1878, with a cash capital, borrowed from his father, of \$1,800, upon which he was not required to pay any interest for nearly two years—nearly one-half of the amount of stock which he usually carried; that he sold goods almost entirely for cash, usually at a profit of twenty-five per cent.; that his capital, in less than two years afterwards, was increased by a further loan of \$1,000, and yet, at the expiration of about three years, he finds himself hopelessly involved—owing debts amounting to something more than \$6,500, and with assets only estimated to be worth \$3,500 and actually selling for \$2,416, and this, too, without the slightest evidence that he had been engaged in any speculation or that he was addicted to gambling or any other bad habits which would lead to a waste of his means. Looking at these facts, which, of course, E. M. Meyer cannot dispute, as they are gathered from his own testimony, we think that the most charitable construction which can be put upon them is, that, while his bald declaration that he owed no debts at the time the judgment was confessed, may possibly be nominally true, yet that he must have been

constantly making debts, and paying one by making a debt to another.

But be this as it may, we think that the Circuit judge erred in holding that a confession of judgment cannot be set aside for fraud, except at the instance of creditors whose debts were contracted before such confession was taken, and that subsequent creditors cannot attack it. If a person, though not in debt at the time, confesses a judgment with a view to protect his property from debts which he expects to contract, or from a liability which he apprehends he will be subsequently subjected to, the judgment may be set aside as a fraud upon such subsequent creditors. *State v. Fife*, 2 Bail. 337; *Lowry v. Pinson*, 2 Bail. 324 [23 Am. Dec. 140]. Moreover, the testimony of both

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father and son \*distinctly shows that at the time of the alleged loan of \$1,000, only a very short time before the confession was taken, the son was in debt and made that a pretext for borrowing that sum, but whether it was used in the payment of such indebtedness does not appear from the testimony of either father or son. The elder Meyer says: "When he borrowed the \$1,000 I did not have the money; he had a note coming due, and had to raise money to pay it." But whether the note became due before the confession was taken, and whether it was paid, is nowhere stated by either father or son, but it does appear from the testimony of Hickman, that A. W. Meyer told him that his son had spent a considerable portion of the \$1,000 in furnishing his house, just before his marriage. We think, therefore, that there is every reason to believe that E. M. Meyer was in debt at the time the \$1,000 was obtained, and at the time when the confession was taken; certainly that the confession was taken to protect the property of the son from future indebtedness which he was constantly contracting.

But aside from all this, there is another fatal objection to the confession of judgment. It does not comply with the requirements of section 400 Lynch's Code (now section 384), inasmuch as it does not state the facts out of which the debt arose, which it was given to secure. As we have said in the recent case of *Ex parte Carroll*, 17 S. C. 450: "The judgment in question derives its origin from a special statutory provision, and to make it valid the requirements of the statute must be strictly complied with. *Freeman on Judgments*, § 543. \* \* \* The object of the statement required by the code is to protect creditors against fraudulent confessions of judgment by giving them such information as will enable them, by inquiry, to ascertain whether the alleged indebtedness is bona fide or pretensive and fraudulent, and if the statement fails to furnish such information, then the judgment based upon it must be regarded as fraudulent and void as to other creditors even though it may be



valid as between the parties to it who may be estopped from questioning its validity." See also the case of *Weinges v. Cash*, 15 S. C. 61, where this subject is discussed.

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\*From what is said in these cases it is clear that the failure to make the statement as required by the section of the code above cited, is not a mere irregularity, but renders the judgment void as to creditors whether antecedent or subsequent; for as to them it is no judgment inasmuch as it fails to comply with one of the essential requirements of the statute, which alone is the authority for taking a judgment in this form; and it is only upon the principle of estoppel that it is good between the parties. If, as is abundantly established by the authorities, a defective statement renders such a judgment void as to creditors, nothing would seem to be clearer than that a false statement, or even one so grossly inaccurate as to mislead the inquirer, would also render the judgment void. Certainly if mere omission to give such information as will enable creditors to prosecute any inquiry into the bona fides of the judgment, is fatal to the validity of the judgment, giving false information, or such as would mislead inquirers, ought to have the same effect. A failure to give any information is less likely to defeat the object of the statute than the giving of false information, or such grossly inaccurate information as to throw the inquirer off instead of putting him on the track.

Applying these principles to the case in hand, it is perfectly manifest that the judgment in question is void as to creditors. If the answers and the testimony of the two Meyers are to be believed, then it is quite clear that the statement upon which the judgment was based was absolutely false, or, to put it in the mildest form, was so grossly inaccurate as to mislead any creditor who should have undertaken to inquire into the bona fides of the judgment. Not a single fact stated in it is true, except as to the amount of the indebtedness. The date of the origin of the indebtedness is fixed in the statement at May 31st, 1880, while the testimony fixes it, as to the larger part, nearly two years before, and of the remainder at some time prior to May 27th, 1880. The consideration alleged in the statement is the sale of A. W. Meyer's share in the stock of goods to E. M. Meyer, while the testimony shows that A. W. Meyer never had any interest in the stock of goods,

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and that the real consideration was money borrowed to buy goods—not the stock which was in the store May 31st, 1880, but the stock purchased when he first started business, nearly two years before.

The attempt, therefore, to reconcile this glaring conflict by the supposition that E. M. Meyer "described the indebtedness as stock in trade of his father, because the goods had been paid for with the money he had borrow-

ed from him," seems to us far-fetched and unreasonable. It could hardly be pretended that the stock of goods in the store on May 31st, 1880, the day fixed by E. M. Meyer, in the statement, as the date of the origin of the indebtedness, was the stock of goods which he had purchased with the \$1,800 loaned him by his father, when he started business in October, 1878. And as to the \$1,000, alleged to have been borrowed just before the confession was taken, there certainly is not a shadow of pretense that it could be represented by the stock of goods then in the store. Perhaps the more reasonable supposition would be, that this radical difference in the account given of the origin of the indebtedness upon which the confession of judgment was based, was due to the allegation of partnership in the complaint. We are entirely satisfied, therefore, that the statement upon which the confession of judgment was based, was either false or so grossly inaccurate as to mislead creditors, rather than assist them in prosecuting their inquiries into the bona fides of the judgment, and that, upon the principles above announced, the judgment is void as to the creditors, and should have been so declared.

As to the alleged sale of the personal property, it is manifest that the judgment below must be reversed, as it is based upon error of law, in holding that as "the judgment is a valid lien, there is no necessity to consider the transfer of personal property, for that is bound by the judgment." Judgments never were a lien upon personal property, and under the code an execution had no lien until it was levied, and it does not appear that there ever was any levy under the execution issued on the judgment by confession, upon the property transferred. It is true that the Circuit judge does go on to indicate very plainly his opinion that the transfer was a valid one, and could not be assailed by the creditors, but his conclusion rests largely

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upon what has \*been seen to be an error of fact, to wit, that E. M. Meyer was not in debt at the time when the transfer was made.

But, inasmuch as no distinct judgment was rendered as to the validity of this transfer, we, perhaps, ought to refer that matter back to the Circuit Court. In doing so, however, we do not wish to be understood as endorsing the views thrown out by the Circuit judge as to this matter. It seems to us that when a person who is in debt at the time, makes a transfer of all, or a large portion of his personal property without notice to his creditors, and retains possession, using and actually claiming it (as was said by one of the witnesses, E. M. Meyer did,) as his own, it will require strong evidence to rebut the presumption arising from such retention of possession. See the case of *Pringle v. Rhame*, 10 Rich. 72 [67 Am. Dec. 569], where the

authorities upon this subject are collected and commented on.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court, with instructions to render judgment declaring the confession of judgment from E. M. Meyer to A. W. Meyer void as to the creditors of the former; and to hear and determine the question whether the alleged transfer of personal property by E. M. Meyer to A. W. Meyer, is valid as against the creditors of said E. M. Meyer.

### 19 S. C. 201

#### CITY COUNCIL OF CHARLESTON v. CAULFIELD.

(November Term, 1882.)

##### [1. *Equity* ⇨410.]

Failure of master to report his conclusions of law and fact, is no ground for an exception. *Bollmann v. Bollmann*, 6 S. C. 30, approved.

[Ed. Note.—Cited in *Stack v. Haigler*, 90 S. C. 322, 73 S. E. 354.

For other cases, see *Equity*, Cent. Dig. § 911; Dec. Dig. ⇨410.]

##### [2. *Mortgages* ⇨25.]

Bonds of a municipal corporation received and sold by the mortgagor are a sufficient consideration to support his mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 29-42, 1364; Dec. Dig. ⇨25; *Contracts*, Cent. Dig. § 268.]

##### [3. *Homestead* ⇨128.]

A claim of homestead cannot be asserted by the mortgagor against his mortgage deed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 224; Dec. Dig. ⇨128.]

##### [4. *Mortgages* ⇨486.]

A mortgage based upon the receipt of certain fire loan bonds cannot, after default, be decreed to be satisfied by the return of like bonds, although the mortgagor was permitted, by the terms of his contract, to discharge his debt before its maturity by a payment in such bonds—especially so, no tender having been made.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1410; Dec. Dig. ⇨486.]

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##### [5. *Dismissal and Nonsuit* ⇨60.]

\*There is no error in refusing to strike from the docket a cause in which no steps have been taken by plaintiff for a year and a day after answer filed.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 140-152; Dec. Dig. ⇨60.]

##### [6. *Mortgages* ⇨575.]

A stay of sale, pending appeal from a decree of foreclosure, is not proper unless the appellant has executed the written undertaking required by section 352 of the code of procedure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1652; Dec. Dig. ⇨575.]

##### [7. *Estoppel* ⇨92.]

A party having given a mortgage to secure payment for certain fire loan bonds, issued by a municipal corporation, which bonds were received by him and sold, and the proceeds used

for his own purposes, is bound by his mortgage, whether the bonds were legally issued or not.

[Ed. Note.—Cited in *Gaston v. Brandenburg*, 42 S. C. 351, 20 S. E. 157.

For other cases, see *Estoppel*, Cent. Dig. § 262; Dec. Dig. ⇨92.]

##### [8. *Mortgages* ⇨431.]

A mortgage given to the city council of Charleston to secure the redemption of certain bonds issued by them to the mortgagor, is properly sued by the city council in its own name.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1268; Dec. Dig. ⇨431.]

##### [9. *Mortgages* ⇨411.]

Notwithstanding a power of sale given in this mortgage, foreclosure, under the stipulations of the contract, and even without any such stipulation expressed, might be had in the Court of Common Pleas.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1181-1184; Dec. Dig. ⇨411.]

##### [10. *Mortgages* ⇨203.]

Under the amendments to the statute which authorized the issue of these bonds, and under the ordinance of the city council, passed in pursuance thereof, the erection of wooden buildings upon the lots mortgaged was permitted.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 539-543; Dec. Dig. ⇨203.]

[This case is also cited in *Feldman & Co. v. City Council of Charleston*, 23 S. C. 69, 55 Am. Rep. 6, and distinguished therefrom.]

Before Hudson, J., Charleston, December, 1881.

The opinion states the case.

Mr. W. M. Thomas, for appellant.

Mr. G. D. Bryan, contra.

April 17th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant, Mr. Caulfield, (the other defendants being parties merely as junior lien creditors,) appeals from a judgment of foreclosure of a mortgage of real estate. The mortgage was given for the purpose of "securing all sum or sums of money which have been or may be loaned to me under the ordinance for rebuilding the burnt district and waste places of the city of Charleston, ratified the twenty-eighth day of August, in the year one thousand eight hundred and sixty-six, with interest, insurance and other proper charges."

The scheme of this ordinance, in general terms, was that bonds of the city, which are usually called fire loan bonds, were to be issued and loaned to owners of lots in the burnt district, which loans were to be secured

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by mortgage of such lots, and not only \*were the faith and funds of the city pledged for the payment of the fire loan bonds, but all sums of money received in payment of loans made to the lot owners were "set apart and appropriated as a special fund for the redemption and extinguishment of said bonds and interest." It was, therefore, manifestly a scheme by which the city was to lend its



credit to the lot owners for the purpose of enabling them to obtain the means of rebuilding on the lots over which a disastrous fire had passed, destroying the buildings in a large portion of the city. With a view to quiet doubts entertained as to the power of the city council to pass such an ordinance, the legislature, on September 19th, 1866, (13 Stat. 371,) passed an act in which the ordinance was set out in full, ratifying and confirming the same. The act also prescribed the form of the mortgage to be taken by the city council as security for any loans made under it, which form seems to have been followed in the case now in hand.

On June 23d, 1870, the mortgage in question was executed to secure the payment of sundry bonds of the appellant, made on that day and on other days up to January 1st, 1871, aggregating, in the whole, the sum of \$8,000, and fire loan bonds of the city were delivered to the appellant in exchange therefor, which last-mentioned bonds were put on the market by him and sold at various prices, ranging from forty-eight to fifty-two cents on the dollar. It appeared in evidence that these loans were effected upon the mortgage of lots upon which wooden buildings were erected. Various defenses were set up by the appellant, which will be stated more particularly when we come to state the exceptions to the judgment appealed from.

The case was placed on the Equity Docket for November Term, 1880, and defendant made a motion to strike it from the docket, upon the ground that more than a year and a day had elapsed since the filing of the answer, without any intervening steps having been taken in the cause. This motion was refused and the appellant excepted.

The master to whom it was referred, to report upon the issues of law and of fact raised in the pleadings, reported that no payments had been made on account of the principal or interest due on the bonds of the ap-

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pellant, since January 1st, 1871, and that \*on July 1st, 1871, as it is stated in the "Case" (though we presume it is a misprint and should be 1881), there was due and payable the sum of \$15,753.97, for principal, interest, taxes and insurance, and that he saw nothing in any of the defenses set up which should operate to defeat the right of the plaintiff to have a sale of the mortgaged premises, which he accordingly recommended. To this report appellant excepted on various grounds, but as they are all adopted as part of his exceptions to the judgment, they need not be set out here. The Circuit judge confirmed the master's report, and gave judgment for foreclosure and sale, and from this judgment the defendant Caulfield appeals upon numerous grounds, which are, in effect, as follows:

1. Because the master did not report the testimony taken in the cause.

2. Because he has not reported his findings of fact and his findings of law.

3. Because he should have reported as a fact that the action was on the penal bond of a private party, payable to the city, conditioned to pay for a loan to him of city fire loan bonds, upon his application, to improve his private property with said bonds.

4. Because he should have reported as law that the city could not maintain an action on such a bond or contract, which is invalid, as conditioned for the faithful application of the city bonds to works which the city had no power to construct, or assist in constructing.

5. Because he should have reported that the fire loan bonds are without authority of law, being for private and not for public objects.

6. Because he should have reported that the bond was in contravention of the act of 1866.

7. That the plaintiff is not the real party in interest, nor has it clean hands in this transaction, so as to enable it to maintain this action, nor can the city be a trustee for the real plaintiffs as to this real estate.

8. That there was no proof of the condition of the bond having been broken, there being no evidence of any money loaned; that the defendant is entitled to a homestead un-

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der any \*decree which may be made in favor of the real parties in interest; that only a decree for payment in fire loan bonds can be rendered, and that there has been no proof of notice under the terms of the ninth section of the act of 1866.

9. Because the decree is in contravention of the eighth and ninth sections, article IX., of the State constitution, and of article V. of amendments to the United States constitution.

10. Because of error in refusing the motion to strike the case from the docket.

11. Because a stay should have been granted under sections 361 or 363 of the code of 1870.

The point raised by the first ground, even if maintainable at all as a ground of appeal, has been obviated by the supplement to the "Case," in which the testimony taken does appear.

The second ground is disposed of by the case of *Bollmann v. Bollmann*, 6 S. C. 44.

None of the several points raised by the eighth ground can be sustained. If the appellant received valuable consideration (as we shall presently see that he did) for his bonds secured by the mortgage sought to be foreclosed in this action, we cannot conceive what difference it makes whether such consideration consisted of money or something else.

That the claim of homestead cannot be sustained against the mortgage is too well settled to admit of dispute. Homestead As-

sociation v. Enslow, 7 S. C. 1; Rosenberg v. Lewi, 7 S. C. 344; Smith v. Mullone, 10 S. C. 22.

Nor is the position that only a decree for payment in fire loan bonds could be rendered, based upon any better foundation. The appellant did not obligate himself to pay in that way. His obligation was to pay so much money, not to return the fire loan bonds which he received. The provision contained in the fifth section of the ordinance, authorizing the borrower to pay in fire loan bonds, only applied to payments in advance of the stated times of payments, and the appellant having failed to avail himself of such provision cannot now claim any benefit therefrom, especially as he does not now tender payment in such bonds.

As to the objection that there was no

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proof of notice, that is fully met by the supplement to the "Case," where it appears that the appellant did receive notice not only from the city treasurer, but also from the corporation counsel.

We are not aware of any statute or rule of court under which the tenth ground can be sustained, and there is nothing in the "Case" which shows that the appellant had taken the necessary steps to entitle him to the stay claimed by the eleventh ground.

Under the view which we take of this case it will not be necessary to consider or determine whether the legislature had the power, under the constitution, to invest the city council with authority to issue the fire loan bonds for the purposes contemplated by the ordinance of the city council of August 28th, 1866, as ratified and confirmed by the act of 1866, hereinbefore cited. But, while not intending to indicate any opinion as to the constitutional question raised in the argument, we shall assume, for the purposes of this case only, that the city council had no lawful authority to issue the fire loan bonds for the purposes contemplated by the ordinance, and that they, therefore, are not valid obligations of the city. But, assuming all this, the question still remains, whether the appellant is not nevertheless liable on his contract with the city council.

To have a clear view of this question it will only be necessary to inquire what was practically the transaction between the city council and the appellant. It was simply this—the appellant not having the means necessary to enable him to rebuild, obtained from the city council the means of doing so; and it seems to us wholly immaterial to the inquiry, whether the city council, in obtaining the means which it furnished to the appellant, went outside of its corporate authority or not. The appellant got what he wanted and what he bargained for, and in equity and good conscience he ought to pay what he agreed to pay for what he got and used. Having received the fire loan bonds

from the city council, sold them and applied the proceeds to his own use, it certainly does not lie in his mouth to say that the bonds which he has thus converted to his own use are not valid obligations of the city, and therefore that he is released from his obligation to pay the amount which he has agreed to pay for them. He received them as

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valid obligations, sold them to others as such, enjoyed the benefits of such sale, and he is now estopped from denying their validity.

This seems to us so plainly in accordance not only with well settled principles of equity, but also with the dictates of common honesty, that we cannot suppose that any authority is needed to support so plain a proposition. But if authority be necessary, we think it can be found in the case of Railroad Companies v. Schutte, 103 U. S. 118 [26 L. Ed. 327]. In that case bonds of the State of Florida, on which were endorsed certificates of the governor, to the effect that they were issued in aid of certain railroad companies, and that the State of Florida held first mortgage bonds of said companies for a like amount as further security to the holders thereof, which had been issued without constitutional authority, were delivered to certain railroad companies in exchange for their own bonds secured by statutory mortgages, and the State bonds were put upon the market and sold by the railroad companies. One of the questions in the case was as to the liability of the railroad companies under their statutory mortgages, and it was held that they were liable notwithstanding the want of validity of the State bonds which they had received in exchange for their own bonds secured by the statutory mortgages.

Chief Justice Waite, in delivering the opinion of the court, after conceding the invalidity of the State bonds, used this language: "But it by no means follows that because the State is not liable on its bonds, the companies are free from responsibility under their statutory mortgages. By the express provisions of the act the State bonds were to be given the company in exchange for its own bonds. The company, not the State, was to use and dispose of the State bonds. The object of the State was to aid the company with its credit. \* \* \* It is clear, therefore, that the intention was that, as between the State and the company, the State was to be the guarantor of the company bonds, and the company the principal debtor. With the public, however, it was different. There the State was the debtor and the company was only known through the statutes under which the bonds were put out, and the certificates endorsed on the bonds themselves, which were that the State

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\*held the first mortgage bonds of the rail-



road company for a like amount, as security to the holder thereof. Such bonds of the State, with such endorsements, the company put on the market and sold. Under these circumstances the certificate of the governor as to the security held by the State is, in legal effect, the certificate of the company itself, and equivalent to an engagement on the part of the company that the bonds, so far as the security is concerned, is the valid obligation of the State. The case is clearly within the reason of the rule which makes every endorser of commercial paper the guarantor of the genuineness and validity of the instrument he endorses. We cannot doubt that under these circumstances the company is estopped, so far as its own liabilities are concerned, from denying the validity of the bonds. Having negotiated them on the faith of such a certificate, the company must be held to have agreed, as part of its own contract, whatever that was, that the bonds were obligatory." Again, at page 144, in disposing of the position that the recovery must be limited to the amount actually received for the State bonds when sold by the companies, he said: "As we have endeavored to show, the bonds, although void as to the State, are valid as to the company that sold them. Having been put on the market by the companies as valid bonds, the companies are estopped from setting up their unconstitutionality. As against the companies they occupy in the market the position of commercial securities, and may be dealt with and enforced as such. \* \* \* In commerce, commercial paper means what on its face it represents, regardless of what its maker or promoter may have got for it."

The fact that there was no such certificate endorsed upon the fire loan bonds as there was upon the Florida State bonds, cannot, as was argued by the appellant, affect the question. The liability arises from having put the bonds on the market as valid, having sold them as such, and having received the proceeds of sale. But, as matter of fact, the recital contained in the fire loan bonds, the form of which is given in the supplement to the "Case," practically amounts to the same thing as the certificates on the Florida bonds. It seems to us clear, therefore, both upon principle, and authority, that the appellant

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\*cannot escape liability, even though it be conceded that the fire loan bonds are not valid obligations of the city.

By the seventh ground the appellant makes the point that the plaintiff is not the real party in interest, and, therefore, cannot maintain this action, nor can it be a trustee for such real party, and in that way maintain the action. Whether the plaintiff is or is not the real party in interest, depends upon facts not developed in the pleadings or evidence. On the face of the papers the city council appears to be the legal owner and

holder of the bonds secured by the mortgage in question, and it was incumbent upon the appellant to show the facts to be otherwise. It will be observed that the faith and funds of the city were pledged for the payment of the fire loan bonds, as well as all sums of money received in payment of loans made to the lot owners. If, therefore, a portion of the fire loan bonds had been redeemed, as was stated at the bar to be the fact, out of the funds of the city derived from taxes, and sources of revenue other than amounts collected on loans to lot owners, the city, to that extent, became the absolute owner of the bonds given to secure loans to an amount equal to the amount of the fire loan bonds so redeemed.

But, waiving this, as it rests upon suppositions and not evidence, we do not see why the city council cannot be regarded as holding the bonds and mortgages to secure the loans made to lot owners, as trustee of a fund for the redemption of the fire loan bonds, and thereby trustee for the holders of such bonds. 2 Dill. Mun. Corp., § 437, et seq., where the leading cases are cited at length, showing that a municipal corporation may hold property in trust. If, then, the plaintiff is such a trustee, the holders of the fire loan bonds would undoubtedly have an equity to compel the city council to collect the bonds given by the lot owners, and apply the proceeds to the purpose for which such bonds were given; and, if so, it would seem to follow, necessarily, that the city council might, of their own motion, do that which they could be compelled to do.

But it is urged that, even if the city council can be regarded as trustee for the fire loan bond holders, the action should have

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\*been brought by the plaintiff, as trustee. We are unable to appreciate the force of this position. The mortgage here sued upon was not given to the city council as trustee, and we see no necessity for making such an addition to the name of the plaintiff in this case. The action is brought, and properly brought, in the name of the obligee of the bonds secured by the mortgage sought to be foreclosed, who is the legal owner and holder thereof. Code of 1882, § 134.

Again, the appellant contends that, as the mortgage contains an authority for the mortgagee to sell the mortgaged premises, in case of default in making payments as they become due, the plaintiff cannot maintain an action for foreclosure, but must resort to the remedy provided by the act in prescribing the form of the mortgage, with a power of sale clause. This provision is merely permissive and not mandatory, as is clearly shown by the provision in section 7 of the ordinance, expressly declaring that if the borrower shall, at any time, be in arrear for one year's interest, his mortgage shall be foreclosed. But, even were this not so, it is well settled.

that the power of sale is merely an additional remedy, and does not preclude a proceeding by action. As is said in 2 Jones Mort., § 1773, "The power is merely a cumulative remedy. It is one species of foreclosure, but it does not exclude jurisdiction in equity."

As we understand the sixth ground, the point intended to be there made is that the loan was invalid because it was made upon a mortgage of lots upon which wooden buildings were erected, the seventh section of the ordinance forbidding such a loan. Aside from the fact that the appellant is, by this position, attempting to take advantage of his own wrong in erecting a wooden building, in violation of that section of the ordinance upon which his point is based, it appears that, by the acts of February 28th, 1870, (14 Stat. 378,) and March 1st, 1870, (14 Stat. 412,) the city council were authorized to alter this provision as to wooden buildings, and that, accordingly, an ordinance to that effect was passed before the loans were made, which the mortgage now in question was given to secure.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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\*McDANIEL v. ANDERSON.

(November Term, 1882.)

[1. *Contracts* ¶35.]

An instrument under seal was signed by certain children of one A., whereby they jointly and severally agreed to account, at the death of said A., at a new valuation, presently to be made, for lands previously received by them, and to pay to A.'s executors whatever sums might be necessary to equalize all of A.'s children. *Held*, from the terms of the paper, itself, and from parol evidence, to be inoperative because not signed by all of A.'s children, who had received lands from their father.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 179; Dec. Dig. ¶35.]

[2. *Deeds* ¶59.]

A deed of conveyance, signed, sealed and recorded, will be considered as delivered, there being nothing to the contrary, except the absence of the conveyee at the time.

[Ed. Note.—Cited in *McGee v. Wells*, 52 S. C. 474, 30 S. E. 602.

For other cases, see *Deeds*, Cent. Dig. §§ 136–139; Dec. Dig. ¶59.]

[3. *Estoppel* ¶92.]

Parties who have received the proceeds of land sold for partition as the property of their deceased brother, cannot deny his title to such land.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 260; Dec. Dig. ¶92.]

[4. *Appeal and Error* ¶1010.]

A finding of fact by the Circuit judge from written testimony, reversed because without any evidence to sustain it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3982; Dec. Dig. ¶1010.]

[5. *Husband and Wife* ¶81.]

Married women are not bound by their execution in 1860 of a personal covenant to ac-

count and make payments of money for equality of shares.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 331; Dec. Dig. ¶81.]

Before Mackey, J., Pickens, September, 1880.

The opinion states the case.

Messrs. Norton, Keith & Hollingsworth and R. A. Child, for appellants.

Messrs. Perry & Perry and J. H. Whitner, contra.

April 17th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. Isaac Anderson, having duly made his last will and testament, of which the defendant, William H. Anderson, is the sole qualified executor, departed this life February 17th, 1867, leaving as his heirs-at-law, his widow, who died in May, 1877, and the following named children, to wit: William H. Anderson, James P. Anderson, John F. Anderson, Polly Anderson (who is an imbecile), Huldah Keith, Nancy Stewart, wife of A. Stewart; Hester Nimmons, wife of William Nimmons; Sarah A. Alexander (a widow), and Alpha Barton, wife of O. E. Barton; and the following grandchildren, to wit: M. E. Kirksey and Ellen E. Mauldin (children of a predeceased son).

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\*and the plaintiffs, who are the children of another son, who likewise predeceased the testator.

In 1859 the testator conveyed, by deed of gift, to his daughter, Mrs. Barton, a tract of land, having previously given to her and most of his other children comparatively small amounts of personal property. On April 10th, 1863, the testator, Isaac Anderson, in consideration of natural love and affection, as well as nominal sums of money, conveyed to several of his children, to wit: John F. Anderson, William H. Anderson, Hester Nimmons, Nancy Stewart and Sarah A. Alexander, respectively, valuable tracts of land, reserving to himself a life-estate therein; all of whom, except John F. Anderson, who was living in California, went into possession of the tracts conveyed to them, respectively, and have ever since retained possession. On November 9th, 1866, the said Isaac Anderson conveyed to his two granddaughters, the defendants, M. E. Kirksey and Ellen E. Mauldin, a tract of land, of which they took and have ever since retained possession.

On November 10th, 1866, an agreement under seal was signed by certain of these parties, of which the following is a copy:

"Whereas, Isaac Anderson, of the State and district aforesaid, on or about the tenth day of April, 1863, for the purpose of advancing his children and making suitable provision for them, did partition and divide cer-



tain tracts of land and assign them to some of his said children, and execute and deliver conveyances thereto, reserving, as was then thought, a sufficient amount of property to equalize his children; and whereas, the unfortunate termination of the recent war has swept away much of the said property, and rendered it almost impossible for justice to be done as the matter now stands, especially as the lands which were conveyed and transferred by him were valued in the then depreciated currency of the country; and whereas, the changed circumstances of the country render a modification of the agreement, then partially entered into, necessary, and, also, another valuation of the said lands; now, know all men by these presents, that, for and in consideration of the above-mentioned premises, and in order to compromise and arrange, and prevent further misunderstanding and disagreement in the undersigned, children of the said Isaac Anderson, and the husbands of such daughters as are married, have covenanted and agreed to

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and with each other, \*and to and with our father, the said Isaac Anderson, that the lands heretofore conveyed to us, or to each and any of us, shall be revalued by commissioners, appointed for that purpose—the same persons to act as commissioners who acted before, if that be possible—and the true value being thus ascertained to be affixed to the said several tracts of land; and we do further agree, severally, to account for the said valuation of the said lands at the death of the said Isaac Anderson, to his executors or administrators. As it is well known and understood to and among all the parties to this agreement that the said lands are, or have been given by the said Isaac Anderson to his children as advancements, and we further, severally, agree to pay over to the said executors or administrators whatever amount may be found necessary to equalize the children in the settlement of the estate of the said Isaac Anderson after his decease. In witness whereof we have hereunto set our hands and seals, this 10th day of November, A. D. 1866.

	her	
(Signed,)	Nancy X	Stewart, [L. S.]
	mark	
	her	
	Hester X	Nimmons, [L. S.]
	mark	
	A. Stewart,	[L. S.]
	Wm. Nimmons,	[L. S.]
	Sarah Alexander,	[L. S.]
	W. H. Anderson,	[L. S.]
	Mary E. Anderson,	[L. S.]
	Ellen E. Anderson,	[L. S.]

This paper was taken charge of by William H. Anderson, who says in his testimony: "It was the intent that all should sign this paper. I kept this paper after it was executed. Thought I was the proper person to

take care of it. Was attending to my father's business. Was not attending to all his business, as a general thing."

On the same day that this paper was signed by the above named parties, Isaac Anderson made his will, the provisions of which need not be stated, further than that they show the desire of the testator to make all his children "equal in the end," and, for this purpose, that each of his children should "render in their advancements." In accordance with the provisions of this paper, the land conveyed to the children and grandchildren who signed the same, as well as the

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tract conveyed to John F. Ander\*son were appraised, but no appraisal was made of the land given to Mrs. Barton.

This action was originally commenced by the plaintiffs on February 9th, 1878, (the amended complaint having been served May 7th, 1879,) for the purpose, mainly, of enforcing the performance of the covenants contained in the agreement above set out, by requiring the parties who had received land from the testator to account for the value of the same, as provided for in said agreement, and also for the purpose of obtaining from the executor an account and settlement of the estate, it being alleged in the complaint that the executor had neglected and refused either to account himself or to require the other covenantors to account for the value of the land received by them respectively, because of his own liability so to account, or because of collusion with one or more of his co-covenantors to deprive the other children of the testator, or their representatives, of their right to an equal share of the estate of the testator.

Various defenses were set up by such of the defendants as are appellants, all of which were overruled by the Circuit judge, who rendered judgment in favor of the plaintiffs, by which he directed the appellants to pay certain specific sums of money to the plaintiffs, for the purpose of equalizing the shares of the testator's estate. From this judgment an appeal has been taken upon several grounds, but under the view which we take of the case, it will not be necessary to set out these grounds in detail.

The fundamental and controlling question in the case is, whether the agreement or covenant of November 10th, 1866, was ever fully executed so as to bind the parties who signed to the performance of its terms. We think it clear, not only from the terms of the paper itself, but also from the parol evidence adduced—which was competent for the purpose of showing that the paper was not fully executed, and which not being objected to would be competent for that reason, if for no other—that the intention was that all the children who had received advancements in land should sign the paper and become bound by its terms, and until this was done the

transaction was inchoate and incomplete, and no obligation attached to those who did sign,

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\*until all who, according to the understanding of the parties at the time were to sign, had done so.

The cases of *Robertson v. Evans*, 3 S. C. 330, and *Arthur v. Anderson*, 9 S. C. 234, cited by the appellants, with the authorities therein referred to, are so perfectly conclusive upon this point that it is wholly unnecessary to add anything upon the subject. In *Robertson v. Evans*, the obligation was in form joint and several, and yet that was not allowed to affect the result. So here the fact that by the paper in question the parties covenanted severally to account for the value of the land given to them respectively, does not take this case out of the rule as settled by those cases. No one of the parties intended to incur any obligation at all, unless all who stood in the same category came into the proposed arrangement. It is assuming the very point in issue to say that the parties who did sign covenanted severally, and therefore it made no difference to them whether others entered into the covenant. The true view is, that there never was any covenant at all, because all who, according to the understanding, were to join did not do so. Where two or more persons agree to enter into a certain covenant as a matter of necessity, one must sign first, and if, after he has signed, the others refuse to do so, his signature amounts to nothing and imposes no obligation upon him.

The scheme, manifestly, was to equalize the shares of all the children, and this could only be effected by all of the children who had received advancements, entering into the proposed covenant, binding themselves each to account for the true value of their respective advancements. But if the terms of the agreement are enforced against those only who signed, the very object which all the parties had in view—equality—would be defeated, and those who did sign would be required to pay more to those who had received nothing than they would have had to do if the arrangement which the parties understood at the time that they were entering into, had been perfected and not left inchoate and incomplete as it was.

It is true that the terms used in the recital would seem to indicate that the intention was that only those were to sign whose lands were appraised on the day the paper was

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signed by some \*of the parties, but when we look to the declared object of the whole transaction, and especially when we consider the undisputed parol testimony, it is clear that the intention was that all, including Mrs. Barton, who had received her advancement several years before, should enter into and become bound by the terms of the arrangement. The testimony is direct to the

point that the intention was that Mrs. Barton should sign the paper, and that a messenger was sent for her for that purpose. Her testimony does not even tend to show that such was not the understanding with which the other parties signed, but only shows that she was unwilling to enter into the proposed arrangement.

But even if be conceded that it was not in the contemplation of the parties that any should sign except those whose lands were appraised, yet the failure of any one of that class to sign the paper would defeat the whole arrangement, and deprive the instrument of any binding force even as to those who did sign it. Now it is apparent that one of that class, John F. Anderson, never signed the paper, and that alone would be sufficient to destroy the validity of the instrument. It is argued, however, that John F. Anderson being in California at the time could not sign the paper, and therefore it cannot be supposed that it was the intention he should sign. We are not able to appreciate the force of such an argument. There was precisely the same reason for his becoming a party to the arrangement as that any of the others should, and the fact of his absence in these days of rapid and easy communication between distant points, presented but a very small obstacle to his joining in the paper, one which could have been very easily overcome.

It will not do to say, as was argued by respondents, that no land was in fact ever given to John F. Anderson, inasmuch as he was in California at the time, and the deed for his tract was never delivered to him; for it was put upon record, and this would be sufficient evidence of delivery, in the absence of anything to the contrary, except that he was away at the time. But in addition to this it appears from the facts as found by the Circuit judge, that the tract of land conveyed to him was, after his death, partitioned as his property and not as a

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part of the \*estate of his father, as stated in the argument for respondents) amongst the parties to this case, as his heirs-at-law, and it is now too late for any of them to deny that it was his land.

Again, it is perfectly clear, and, indeed, is conceded, that Mrs. Stewart and Mrs. Nimmons, being married women at the time, under the law as it stood at the date of the paper, their act in signing the instrument in question was an absolute nullity, and amounted to nothing more than if they had not gone through the form of putting their names to the paper. But, it is contended that, after they had acquired all the rights and powers of a feme sole, by virtue of the present constitution and the subsequent legislation upon the subject, they have, by their acts, recognized their obligations under the covenant, and must, therefore, be held bound to re-



spond to its terms, and the Circuit judge has so found. After a careful examination of the testimony incorporated in the "Case" we have been unable to discover any evidence whatever that either of these ladies have done any act recognizing the binding force of the covenant, by paying money under it or otherwise.

In the absence of any such testimony it becomes unnecessary to consider whether the act of a feme covert, which is absolutely void, can be ratified or confirmed after she becomes discoverd, either in fact or in law, or whether any, and if so what, acts done by her would amount to a re-execution of a deed signed by her while under the disability of coverture. There is evidence that Mrs. Alexander, who seems to have been a widow at the time, did subsequently make payments to the executor for the purpose of bringing about equality in the shares of the children, but there is no evidence that she did so in pursuance of the terms of the covenant, and, on the contrary, she says expressly that she did so because she "thought all were bound to pay back without the paper."

We are satisfied that the covenant which constitutes the basis of the plaintiff's case, was never sufficiently executed to become of any legal or binding force, even as to those of the parties who did sign it; and under this view the other questions presented cannot arise, and need not be considered.

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\*The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

## 19 S. C. 218

## STATE v. PENNY.

(November Term, 1882.)

[1. *Criminal Law* ¶1159.]

Under an indictment charging the offense to have been committed in the county where the indictment was found, a verdict of guilty establishes as true the fact so charged, and this court cannot disturb such finding.

[Ed. Note.—Cited in *State v. Vari*, 35 S. C. 177, 14 S. E. 392.

For other cases, see *Criminal Law*, Cent. Dig. § 3078; Dec. Dig. ¶1159.]

[2. *Pilots* ¶17.]

The penalties prescribed by the act of 1878, section 16, (16 Stat. 420), for crossing the bar, when entering port, without a pilot, or a signal for a pilot worn, applies to masters bringing their own vessels into port.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. § 20; Dec. Dig. ¶17.]

[3. *Commerce* ¶57.]

The statute prescribing a system of pilotage for the ports of this State, requiring the employment of licensed pilots, and establishing the fees to be paid them by incoming and outgoing

vessels, does not conflict with any of the provisions of the constitution of the United States.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 74; Dec. Dig. ¶57.]

[4. *Criminal Law* ¶93.]

The offense of crossing the bar without a pilot, or pilot signal worn, under section 16 of the act of 1878, being less than felony and punishable by fine not exceeding \$100, is not within the jurisdiction of the Court of General Sessions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 161; Dec. Dig. ¶93.]

[5. *Criminal Law* ¶1033.]

An objection to the jurisdiction of the court below, although raised for the first time in this court, must be considered and determined.

[Ed. Note.—Cited in *Bell v. Fludd*, 28 S. C. 315, 5 S. E. 810; *Chapman v. City Council of Charleston*, 28 S. C. 380, 6 S. E. 158, 13 Am. St. Rep. 681; *Hardin v. Trimmer*, 30 S. C. 393, 9 S. E. 342; *Reeder v. Workman*, 37 S. C. 415, 16 S. E. 187; *City Council of Anderson v. Fowler*, 48 S. C. 11, 25 S. E. 900; *Riddle v. Reese*, 53 S. C. 202, 31 S. E. 222; *Nixon & Danforth v. Piedmont Mut. Ins. Co.*, 74 S. C. 440, 54 S. E. 657; *State ex rel. Lyon v. State Dispensary Commission*, 79 S. C. 321, 60 S. E. 928.

For other cases, see *Criminal Law*, Cent. Dig. §§ 2629, 2630; Dec. Dig. ¶1033.]

Before Aldrich, J., Charleston, June, 1882.

This was an indictment against S. J. Penny for a violation of the act of 1878 (now section 1275 of the General Statutes of 1882), committed on April 27th, 1881. The opinion states the case.

Mr. W. M. Thomas, for appellant.

Mr. Solicitor Jervey, contra.

April 19th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was indicted under the act of 1878, entitled, "An act to regulate the pilotage at the port of Charleston." The indictment charged "that on the 27th of April, 1881, at

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Charleston bar, in the county of \*Charleston, the defendant, not having a license as a pilot of the bar and harbor of Charleston, of the board of commissioners of pilotage for the port of Charleston, did unlawfully presume to bring into the aforesaid port, and did unlawfully bring into the aforesaid port a certain vessel, to wit: the schooner William B. Herrick, of which he was master, and which had to cross the bar, there being then and there, on said schooner, no signal for a pilot—against the form of the statute," &c. Upon trial he was convicted.

He then moved in arrest of judgment and for new trial on the grounds stated in the exceptions for this appeal, which motion being overruled the appeal was taken:

1. "Because the court had no jurisdiction over the alleged misdemeanor: (1). It having been done on the high seas and within the exclusive jurisdiction of the United States District Court sitting in admiralty; (2). It

having been done outside of Charleston county; (3). By a person not subject to the State laws.

2. "Because the proper interpretation of the statute of 1878 does not apply to masters of their own vessels.

3. "Because the statute of 1878 is in violation of section 4237, U. S. Rev. Stat. [U. S. Comp. St. 1913, § 7893], in discriminating between vessels of this State and those of other States.

4. "Because the act of 1878 is unconstitutional, being forbidden by article I., section 9 of the United States constitution as an 'impost duty'; (2). Because it does not come within the purview of the laws regulating pilotage, as permitted by congress, no pilot being pre-supposed in the question; (3). Because it is a restriction on trade and commerce; and (4). Because it is contrary to the law of nations.

5. "Because the indictment does not allege that the schooner Herrick was not a vessel regularly trading between ports of this State."

The first exception, with its three specifications, is based upon the assumed fact that it is apparent upon the record that the venue is laid outside of Charleston county, the county in which the defendant was put upon trial. If the record sustained this allegation then this exception would be fatal, but an

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inspection \*of the indictment shows the contrary. The offense is distinctly and in express terms charged to have been committed in Charleston county; not only so, but that being one of the essential facts involved in the issue, the verdict of guilty rendered by the jury has found this as one of the established facts of the case, and we must take this fact as settled, as under the law regulating the powers of this court we cannot go behind a verdict as to the facts of a case. This view disposes of the first exception with its incidents.

It is urged in the second exception that the act of 1878, under which the defendant has been convicted, does not apply to masters of vessels bringing in their own vessels without a pilot, but to parties who shall presume to act as pilots without regular license. I was much impressed with this position during the argument, for several reasons not now necessary to be adverted to, but upon a careful examination of the act I am satisfied that it cannot be sustained. It is in direct conflict with the express terms of the act, inconsistent with the proviso to the section under which the defendant was indicted, and out of harmony with the evident intent and purpose of the act.

The sixteenth section of the act now found in section 1275 of General Statutes, provides first, that no person shall be authorized to conduct \* \* \* except a duly licensed pilot, and then provides further, that every

person not having such license who shall presume to bring in \* \* \* shall be entitled to no fee or reward, and besides shall be liable to fine of \$100 ad valorem or be suspended. The words "ad valorem" or "be suspended" are not found in the original act of 1878, but have been added in General Statutes, for what purpose it is impossible to conceive, especially the words "ad valorem." The proviso to this section declares that the foregoing prohibition shall not extend to prevent any person from assisting a vessel in distress without a pilot on board, if such person shall deliver up such vessel to the first pilot who shall afterwards come on board and offer to conduct such vessel, and also that the captain and crew of the vessel shall be exempt from the fine for conducting her over the bar without a pilot, if in either of the two last-mentioned cases a signal for a pilot is worn.

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\*Now it can not be doubted that the terms "no persons" in that portion of the act which forbids authority to act except by licensed pilots is universal and without exception in its application. Nothing could be broader or more comprehensive. It prohibits all persons except those expressly authorized and licensed. And the terms "every person" in that portion where the consequences of a violation of the act are affixed, are equally comprehensive. "Every" includes all the separate individuals which constitute the whole, regarded one by one. There can be no exception. In this part of the act the penalty for its violation, is not only the fine of \$100, but a forfeiture of all fees, gratuities and rewards for the service rendered is also imposed. Now this part of the penalty could not apply to masters of their own vessels, and the proviso as to these would seem to have been added expressly to show that they were to be included at least as to the fine, because that proviso in terms makes the captain and crew liable to this fine unless a signal for a pilot is worn.

This interpretation of the act is in harmony with its object and purpose. Upon an examination of the whole act regulating the pilotage of the port, its provisions will be found quite stringent and somewhat onerous on the pilots, the intent of the act being that an experienced and perfectly reliable body of pilots shall always be on hand ready and prepared to discharge the important duty of aiding vessels to cross the bar and be conducted with safety into port. The evil to be remedied was the danger resulting from inexperienced and unreliable parties engaged in this work. The remedy was to secure this work to persons who, upon examination \* \* \* furnished the necessary evidence that they were qualified, and to this end it was thought best to subject every vessel coming in or going out to pilotage, except in the cases mentioned and



where the signal is worn, as the pilots would then know the precise field within which they were allowed to operate, and could, therefore, the better prepare themselves for the discharge of their responsible duties. The rule that the evil should be suppressed and the remedy advanced we think sustains the construction hereinabove.

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\*We fail to see the discrimination which is the foundation of the third exception as in violation of the act of congress (section 4237, U. S. Rev. Stat.). The discrimination referred to, if any exists, is found in the thirteenth section of the act which describes a prompt civil remedy for failure to receive on board a pilot. The defendant was not indicted under this section, nor is this a civil proceeding against him. This section is, therefore, not under consideration, and we are not called upon to pass judgment upon the question raised in this exception.

It is urged under the fourth exception that the act of 1878 is unconstitutional, being in violation of sections 9 and 10, article I. of the constitution of the United States, as an impost duty. It is hardly necessary to do more in reference to this exception than to refer to the well-considered case of *Cooley v. Board of Wardens*, 12 How. 299 [13 L. Ed. 996], where a similar law in the State of Pennsylvania was discussed in all the phases of "impost duty," "discrimination" and "regulating commerce." In that case the Supreme Court of Pennsylvania had pronounced judgment sustaining the pilotage act then under consideration, holding that it was not, in any of its provisions involved in the cause, at variance with any provision of the constitution or laws of the United States, but was a constitutional and legal enactment. This judgment was affirmed in the Supreme Court of the United States.

There is nothing in the sixteenth section of the act which made it necessary that it should be alleged in the indictment that schooner *Herriek* was not a vessel regularly trading between the ports of this State. This discrimination is found, as we have already stated, in the thirteenth section, which refers to a different matter.

This disposes of all the questions raised in the exceptions as to the judgment below, and if there was nothing else in the case that judgment should be affirmed. But the appellant in the argument before this court, in his sixth and last ground, interposed a plea to the jurisdiction of the court, claiming that under section 22, article IV. of the constitution, trial justices had exclusive jurisdiction in such cases, it being less than felony and punishable by fine not exceeding \$100. Under article I., section 19 of the constitution, also the act of the general assembly

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\*giving jurisdiction to trial justices' courts

(Gen. Stat. 1872, p. 195,) in criminal matters, construed in *State v. McKettrick*, 14 S. C. 346, we think this objection must prevail. It is true that this question was not passed upon by the Circuit judge, but it involves a question of jurisdiction and may be raised at any time. The court below, in our opinion, not having jurisdiction its judgment cannot be enforced.

And it is the judgment of this court that, for the want of jurisdiction in the court below, the judgment below be reversed.

19 S. C. 223

LIVINGSTON v. EXUM.

(November Term, 1882.)

[1. Injunction ⇨241.]

A plaintiff having failed in his action for damages for trespass, alleged to have been committed by defendants on his lands, under subsequent proceedings to ascertain the damages to which the defendants were entitled under the injunction bond given by the plaintiff, he cannot raise the question of his title to such lands.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 550; Dec. Dig. ⇨241.]

[2. Damages ⇨40; Injunction ⇨252.]

L. obtained a preliminary injunction to restrain P. and E. from getting crude turpentine on lands which he claimed, and gave an injunction bond; final judgment was rendered for defendants and the injunction was dissolved. E. was not engaged in getting crude turpentine, but P. was, and was under contract to furnish to E. for distillation all that he (P.) got. *Held*, that the loss to P. was sustained by reason of the injunction, but that the loss to E. was not the natural and proximate effect of the injunction, and, therefore, could not be recovered by him as damages. But the counsel fee paid by E. for procuring a dissolution of the injunction was properly recoverable under plaintiff's bond.

[Ed. Note.—Cited in *Gentry v. Richmond & D. R. Co.*, 38 S. C. 289, 16 S. E. 893; *Mood v. Western Union Tel. Co.*, 40 S. C. 528, 19 S. E. 67; *Horres v. Berkeley Chemical Co.*, 57 S. C. 191, 35 S. E. 500, 52 L. R. A. 36.

For other cases, see Damages, Cent. Dig. § 72; Dec. Dig. ⇨40; Injunction, Cent. Dig. § 597; Dec. Dig. ⇨252.]

[3. Injunction ⇨252.]

Counsel fees allowed by the master, assumed, in the absence of a contrary statement in the brief, to have been incurred by defendants in having the injunction dissolved; and such fees may be allowed as damages, recoverable under the injunction bond.

[Ed. Note.—Cited in *Hill v. Thomas*, 19 S. C. 236; *First National Bank of Chillicothe v. McSwain*, 93 S. C. 37, 44, 75 S. E. 1106.

For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. ⇨252.]

[4. Appeal and Error ⇨805, 879.]

Parties failing to perfect their appeal taken from an order refusing to refer to the master their claim for damages under an injunction bond, are not entitled to a hearing of their appeal by this court when the cause is subsequently brought up by other appellants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3174, 3582; Dec. Dig. ⇨805, 879.]

[This case is also cited in *Moorer v. Andrews*, 39 S. C. 431, 17 S. E. 948, as to the prac-

tice in actions for damages under injunction bonds, and in *Horres v. Berkeley Chemical Co.*, 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36, and distinguished therefrom.]

Before Mackey, J., Orangeburg, January, 1881.

Action by John H. Livingston against the defendants named in the opinion of this court. The opinion fully states the case.

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\*Messrs. M. I. Browning and S. Dibble, for appellants.

Messrs. A. Lathrop and J. F. Izlar, contra.

April 19th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, claiming to be seized and possessed of certain lands situate in Orangeburg county, brought the action below to recover damages for an alleged trespass by defendants in cutting, hacking and boxing the pine trees growing thereon for crude turpentine, which gave the land its principal value. An injunction was obtained at the beginning of the action, restraining the defendants from further trespass, upon the plaintiff giving an injunction bond in the sum of \$500. Before the trial the amount of this bond was enlarged by order from Judge Fraser.

At the trial, which took place at the January Term, 1880, of the Court of Common Pleas for Orangeburg county, upon the close of the plaintiff's testimony the presiding judge granted a non-suit as to the defendant Kennedy, and it appearing from the evidence that there was no community of acts between the other defendants, Phillips and Davis, the plaintiff was required to elect which he would proceed against. He elected to proceed against Phillips and Exum, whereupon the complaint was dismissed as to Davis and the trial was had against these two defendants, in whose favor the jury rendered a verdict.

At the time the action below was commenced the defendant Phillips was engaged in getting crude turpentine from the trees upon the land in dispute, and he was under contract to furnish defendants Exum and Kennedy, who were running a turpentine still near by, all such crude material as he could make during the year from February, 1879, to March, 1880. The plaintiff was also running a still in the neighborhood.

The verdict having been rendered for the defendants, Exum and Phillips, judgment was ordered in accordance therewith. The injunction was vacated and set aside and an order was passed referring the matter to Thomas W. Glover, Esq., the master, to ascertain the damages to these defendants by reason of the injunction. The defendants

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Kennedy and Davis moved \*at the same time for a similar order as to their damages.

This was refused on the ground that the decision in their cases was not on the merits, a non-suit having been granted as to one and the case dismissed as to the other because the plaintiff had elected not to proceed against him. These defendants excepted and gave notice of appeal, but, as it seems, took no further steps to perfect their appeal except that their names are embraced in this appeal of the other defendants taken as to subsequent matters hereinafter.

The master reported as to the damages of Phillips and Exum, to wit: as to Phillips, the sum of \$976. This estimate was based upon the quantity and value of the crude turpentine collected by Phillips, and which the plaintiff, after obtaining the injunction, appropriated to his own use. It also included a fee of \$75 to his counsel. Exum claimed damages on account of the fact that Phillips had failed, by reason of the injunction, to furnish his distillery with the crude turpentine agreed upon, and also a fee of \$65 paid to his counsel. The master allowed the fee but reported against the claim as to the other damage, because, in his opinion, this was too remote and uncertain, resting entirely upon the question of net profits which Exum might have made had Phillips furnished the crude material which the master thought was speculative, uncertain and dependent upon various contingencies impossible to be determined with any certainty. The master declined to consider the question of title to the premises set up by the plaintiff and made no report in reference thereto.

To this report both plaintiff and the defendants excepted. The exceptions of plaintiff are: 1. Because the master failed to allow to him certain items connected with collecting the crude turpentine after he took possession under the injunction. 2. Because the counsel fee was allowed. And 3. Because the master did not report that plaintiff, at the time the injunction was granted, was the owner in fee of the premises. Exum excepted: Because his claim for damages as to the profits was rejected; and Phillips, Because certain other items were not included in the damages reported for him.

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\*The report of the master, with these exceptions, was heard by Judge Mackey at the January Term of the court, 1881, the attorneys having stipulated with each other that, if the report of the master as to Phillips should be affirmed, the damages should be set down at \$757; and if Exum should be allowed damages because of profits lost by him, the amount should be \$661.84; and, further, if the court should consider the question of title as a matter of defense to the damages, that then the report should be recommitted so as to give Exum and Phillips an opportunity of being heard before the master on that subject with their evidence. These stipulations were brought to the attention of the



judge in connection with the report of the master.

Judge Mackey filed his decree in April, 1881, in which he held: First. That at the time and before the injunction, and during the whole time it was of force, the plaintiff was the owner in fee of all the lands and premises mentioned in said injunction. And second. That the defendants, Exum and Phillips, had sustained no damages by reason of the granting and continuance of said injunction. He, therefore, overruled the exceptions of the defendants, and, sustaining those of the plaintiff, set aside and vacated the master's report in so far as it awarded damages to said defendants, or either of them, ordering judgment to be entered with costs for the plaintiff.

Exum and Phillips appealed: First. Because it was error in his Honor to consider the question of title. And second. Because the report of the master as to Phillips' damages should have been confirmed, and that Exum, also, should have been allowed the damages claimed by him. The real questions arising upon these exceptions and presented for our consideration are: 1st. Whether the question of title to the premises should have been considered by the judge; 2d. Whether the counsel fees of the defendants, reported by the master, should have been allowed as part of the damages sustained by them; and 3d. Whether Exum was entitled to have damages on account of profits lost in the contract with Phillips as to furnishing crude turpentine from the premises in dispute.

We do not see how the question of title was involved in the report of the master, upon

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which the Circuit judge was called \*to pass. The plaintiff's original action may or may not have involved it, but the matter referred to the master was solely the question of damages growing out of this injunction, the verdict of the jury having determined that the plaintiff had no cause of action against these defendants, and, therefore, that the injunction by which they had been restrained from pursuing their legitimate work was improper and illegal. Such being the fact, we think that the plaintiff could not interpose his title in this issue of damages.

The question as to his right to bring an action against the defendants for trespass upon the land, of which he claimed that he was seized and possessed, had been tried and adjudicated against him; from the judgment entered he had not appealed. He had given an injunction bond to be responsible for such damages as might be incurred by the defendants by this action in the event of failure to establish his right to the premises. He had failed, and a new issue arose between himself and the defendants, the issue of damages alone, which was a question of fact to be determined by the testimony pertinent to such issue without regard to the title.

The master could not, under the order of reference, have considered the question of title, and it was not involved in his report made to the Circuit Court. As we understand the decree of the Circuit judge, he held that the defendants were not entitled to damages, not because of the fact that the testimony before the master failed to show damages, but because, as a matter of law, the plaintiff was the owner of the premises and was entitled to the turpentine grown and collected therefrom. We think it was error to permit the title to be thus interposed.

It is contended, however, in argument of respondent, that the Circuit judge, although he did hold that the respondent was the owner in fee of the land, yet it was not upon that ground that he overruled the master's report as to the damages, but that he found, as matter of fact in the testimony, that no damages had been sustained by the defendants; and it is urged that, under the repeated decisions of this court, this finding of the Circuit judge cannot be reversed unless the manifest weight of the evidence is against it. Admit this, and how does the case stand?

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\*As to Phillips, there is certainly no evidence in the case opposed to the findings of fact by the master that a certain quantity of crude turpentine had been taken from him by the plaintiff, and that he had paid or was responsible for a fee to his counsel of \$75, the value of which turpentine, including the fee, by agreement, was estimated at \$757—all this resulting from the injunction.

As to Exum, if the loss of profits could legally be regarded as damages by agreement also, this was to be set down at \$661.84, and there was no doubt as to the fee. As to the facts of the case, then, the findings of the judge on the question of damages were without any testimony to sustain them. Upon the most important the parties have agreed, so that the matter before the Circuit judge involved entirely questions of law, to wit: whether in law the counsel fees were proper claims of damages in such cases, and whether Exum's profits were too remote to be brought in, or otherwise disallowable. These seem to us to be the only questions in the case, and to these we will now direct our attention.

As to the general damages claimed by Exum, we concur with the master. His reasoning upon that subject is full and to the point, and sustained not only by the authorities cited by him, but by many others. He had no contract with the plaintiff, as to furnishing to his distillery crude turpentine, which the plaintiff had broken. His contract was with his co-defendant, and if he sustained any damages in connection with said contract, it was at the hands of his co-defendant, and not from the plaintiff. His damages, if any, arose from the breach of contract by Phillips; that this breach was caused by

plaintiff's injunction, can not transfer Exum's claim over Phillips upon the plaintiff. Besides, his claim for damages being dependent as a matter of fact upon the further fact whether he would have realized any profits out of the contract with Phillips, even had it been complied with, makes the whole claim so uncertain, doubtful and remote as properly demanded its exclusion in the estimate made by the master. See the cases of *La Amistad de Rues*, 5 Wheaton 385 [5 L. Ed. 115]; *The Lively*, 1 Gallison 324 [Fed. Cas. No. 8,403]; *Home Machine Co. v. Bryan*.

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\*24 Am. Rep. 735; *Fuller v. Edings*, 11 Rich. 239, relied on by the master.

It is exceedingly difficult, in fact almost impossible, to define with precision any general rule by which it can be determined with absolute certainty how far liability extends as to the consequences of an act. In general terms it has been frequently said that this liability ceases with its natural and proximate consequences, but facts and their incidents are so frequently the result of combined causes and become in their turn so productive of other events and consequences so clearly interwoven with each other, that it is not always possible to say when they are natural and proximate and when they are too remote and doubtful. Therefore each case must in a great measure be determined by its own facts as compared to other analogous cases where the principle has been applied without referring to the numerous cases in detail where this subject has been discussed.

We think that an examination of the case of *Harrison v. Berkley*, 1 Strobb. 544 [47 Am. Dec. 578], where the principle was carried as far perhaps as it well could be, and the numerous cases cited in the argument of that case by Mr. Gregg, will show that the master here did not err in excluding the claim of Exum. This claim did not belong to the class of loss sustained as the natural and proximate effect of the injunction upon him, but of gains prevented as the result of the injunction upon another party, Phillips, with whom it is alleged he had a certain contract, which the injunction caused him to violate. Here is one cause superinducing in its effects another cause, the effects of which last, and of which Exum complains, being in the highest degree contingent and doubtful to wit: gains prevented. We have found no case where such a claim has been established.

Next, as to the counsel fees. Mr. High, in his work on Injunctions, at section 973-4, page 562, lays down the rule extracted from numerous cases cited in the notes, to be that reasonable compensation as counsel fees in procuring the dissolution may be allowed as damages to be recovered in an action on the injunction bond, but fees paid for defend-

ing the entire action to which the injunction was merely ancillary, can not. This seems to be the true rule. There is nothing

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said in the brief \*showing that the fees allowed by the master here, were for the entire action, and not for resisting the injunction. In the absence of any statement by the parties on that subject, it is fair to presume that the master allowed them as expenses incurred in dissolving the injunction, and, if so, under the authority of Mr. High and the cases cited by him, they were legitimate.

We do not find the appeal of Davis and Kennedy before us in such shape as to be considered. It seems that these parties took no steps to perfect their appeal from the order of Judge Pressley refusing to refer their claim to the master, except simply giving notice of appeal. They filed no return nor did they prepare any case. The order of Judge Pressley was not an intermediate order as to them, but was final, and from that order they should have prosecuted their appeal within the time and under the regulations prescribed by the rules of this court. Having failed to do so they must be regarded as having waived their right.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remitted so that Phillips may be adjudged to be entitled to damages to the amount of \$757, the amount stipulated by the parties, and Exum to the amount of \$65.

19 S. C. 230

HILL v. THOMAS.

(November Term, 1882.)

[1. *Injunction* ⇨241.]

After dissolution of an injunction, the damages sustained by the defendants and recoverable under an injunction bond wherein the parties obligated themselves "pursuant to the statute," may be ascertained by reference under section 243 of the code, and the assessment thus reached may be enforced by order of the court, and by execution against all the obligors, provided they have all been notified of the reference, and thus made parties to such proceeding.

[Ed. Note.—Cited in *Greenville v. Mauldin*, 64 S. C. 444, 42 S. E. 200; *Montague v. Hood*, 78 S. C. 226, 58 S. E. 767.

For other cases, see *Injunction*, Cent. Dig. § 550; Dec. Dig. ⇨241.]

[2. *Injunction* ⇨252.]

It not appearing how much of the counsel fees paid by defendants were incurred in procuring a dissolution of the injunction, and how much for general services, the referee properly excluded them in fixing the damages sustained by reason of the injunction.

[Ed. Note.—Cited in *Loeb v. Mann*, 39 S. C. 470, 18 S. E. 1; *Garlington v. Copeland*, 43 S. C. 393, 21 S. E. 317; *First National Bank of Chillicothe v. McSwain*, 93 S. C. 37, 44, 75 S. E. 1106.

For other cases, see *Injunction*, Cent. Dig. § 597; Dec. Dig. ⇨252.]



[3. *Injunction* ⚡253.]

In such proceeding, errors of the clerk in the taxation of costs, cannot be considered. How much of such costs are recoverable under the injunction bond, not considered.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 599; Dec. Dig. ⚡253.]

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[4. *Execution* ⚡172; *Injunction* ⚡252.]

\*Judgment creditors, who had levied upon their debtor's lands, were enjoined from selling. A year later the sale was made by consent, and the injunction was dissolved—the lands not selling for an amount sufficient to pay the judgments. *Held*, that interest on the purchase-money for the year was a damage sustained by reason of the injunction.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 539; Dec. Dig. ⚡172; *Injunction*, Cent. Dig. § 595; Dec. Dig. ⚡252.]

[5. *Injunction* ⚡254.]

Under proceedings to ascertain the damages sustained by defendants properly recoverable under an injunction bond, and wherein such damages were ascertained to be in excess of the penalty of the bond, the judgment should be for the penalty of the bond and also for the costs † of such proceedings.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 603; Dec. Dig. ⚡254.]

[This case is also cited in *Moorer v. Andrews*, 39 S. C. 431, 17 S. E. 948, as to the practice in actions for damages on injunction bonds.]

Before Aldrich, J., Union, October, 1881. The opinion states the case.

Mr. D. A. Townsend, for appellant.  
Mr. C. C. Culp, contra.

April 19th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Judgment creditors of G. W. Hill levied upon his interest in a tract of land and were proceeding to sell it, when he instituted an action claiming that his children were joint tenants with him in the land, praying partition, and also that a homestead should be set off to him in his part; and in order that the questions might be considered before the land was sold, procured an injunction January 3d, 1878, restraining the sale until the further order of the court. As a condition of getting the injunction, he entered into an undertaking with W. K. Thomas and M. S. Thomas as sureties, in which they undertook, "pursuant to the statute," to pay the defendants "Such damages, not exceeding two hundred dollars, as they may sustain by reason of the injunc-

tion, if the court shall finally decide that the plaintiff is not entitled thereto."

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\*The creditors were numerous, and being represented, generally, by two law firms, filed separate answers making the same points, denying the right to partition, and some of them denying the right to homestead as against their debts which antedated the constitution. Hill's homestead was laid off January 2d, 1878, but was excepted to.

The case was first heard by Judge Hudson, who decided that Hill, the plaintiff, was not a joint tenant with his children, but had a life-estate with limitation over, refused the partition prayed for, but held that he was entitled to homestead, except as to debts which were older than the constitution—said homestead to end with his life-estate—and referring the matter of dates of the different debts to Joseph F. Gist, Esq., as referee; continued the existing injunction "until the further order of the court." On appeal this decree was affirmed (11 S. C. 346) and the life-interest of G. W. Hill in the land was sold in January, 1879, and the costs were taxed, the clerk giving full costs for all the answers to the amount of \$295.50, for which execution was issued against him.

The referee, Gist, reported that the debts of S. M. Dawkins as executor, and of Glenn & Austin as executors, amounting to about \$800, were older than the constitution, and the report coming up before Judge Wallace, April 23d, 1880, he confirmed it, authorizing the creditors above named to enforce their executions against the homestead, "vacated and set aside the injunction heretofore granted," and ordered "that it be referred to D. Johnson, Jr., to ascertain the damages sustained by the creditors by reason of the injunction granted January 8th, 1878," &c.

Under this order to assess the damages against the plaintiff, G. W. Hill, and his sureties, W. K. Thomas and M. S. Thomas, the creditors claimed that they should be allowed as damages: First. The interest on the sum realized from the sale of the land for one year (1878), \$211.57. Second. The whole costs taxed in the case against G. W. Hill, \$295.50. Third. All the counsel fees paid by the creditors in the defense of the case, \$453.30, aggregating \$880.37; and, in addition, the value of one year's use of the life-estate, not reduced to figures. The sure-

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ties on \*the undertaking denied that they could be made liable at all, except by action at law on their undertaking and the verdict of a jury. But, if the form of proceeding by reference was legal, they denied that the creditors had been damaged by reason of the injunction; that they could not be charged with the costs or counsel fees incurred in the general case; and that, as to the delay in the sale of the land, which was the

†After remittitur issued to the Circuit Court of Union, the clerk of that court taxed the costs of this proceeding, allowing to the attorney for the creditors, Mr. Culp, the usual attorney's costs. Upon appeal to the Circuit Court from that taxation, it was held by Judge Kershaw, (June, 1883,) under the authority of *Columbia Water Power Company v. Columbia*, 4 S. C. 388, and *Lawton v. Green*, 64 N. Y. 326 and other cases, that this was a special proceeding, and that therefore the attorney was not entitled to costs.—REPORTER.

result of the injunction, the creditors were actually benefited by it, as in the meantime the lands appreciated in value.

The referee disallowed the counsel fees but allowed the whole tax costs (\$295.50) and the interest on the sum realized from the sale for one year (\$211.57), in the aggregate \$507.07. To this report both the creditors and the obligors on the undertaking excepted, and the case coming on before Judge Aldrich, he confirmed the report as to the tax costs (\$295.50), but overruled it as to the interest (\$211.57) and counsel fees (\$453.30), disallowing the interest but allowing the tax costs and counsel fees, amounting to \$748.80, but limiting his decree to \$200, the amount of the undertaking, ordered "that the defendant creditors have judgment against the plaintiff, G. W. Hill, and his sureties, W. K. Thomas and Margaret S. Thomas, for the sum of two hundred dollars and for the costs of this proceeding, and that the said defendant creditors have leave to issue their execution therefor."

From this order the obligors on the undertaking appeal to this court upon the following grounds:

1. Because his Honor overruled all the exceptions of M. S. Thomas, W. K. Thomas and G. W. Hill to the report of the referee, except the second exception, which related to interest on the fund realized from the sale of G. W. Hill's land.

2. Because his Honor erred in confirming said report in so far as it allows as damages sustained by reason of the injunction the sum of two hundred and ninety-five dollars and fifty cents (\$295.50), the whole of the taxed costs in the action in which the injunction was granted.

3. Because his Honor erred in allowing as such damages the counsel fees paid by the judgment creditors in said suit.

4. Because his Honor erred in not holding

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that only the costs \*and counsel fees incurred in a motion to dissolve the temporary injunction are proper items of damages sustained by reason of the injunction, and not the costs and fees of the main suit.

5. Because his Honor should have held that the increase of twenty-five per centum in the value of G. W. Hill's land during the continuance of the injunction, as shown by the testimony before the referee, should be set off against or deducted from any damages assessed in favor of the judgment creditors.

6. Because his Honor erred in adjudging that G. W. Hill and his sureties on the injunction bond shall pay the whole amount for which said bond was given, to wit: two hundred dollars, in addition to the costs of proceedings to assess damages, two hundred dollars being the greatest amount for which said sureties can be held liable.

7. Because his Honor erred in ordering judgment for any amount at all, one of the

said sureties, to wit: W. K. Thomas, not having been a party to the original action, and the proper course in regard to both the principal on said bond and his sureties being an action on said bond for the amount assessed.

We will not follow the exceptions, but endeavor to consider the questions as they arise in order; and first, Whether the damages could be ascertained by a mere reference, without regular suit at law upon the undertaking, making the obligors parties, and having the question of damages submitted to a jury? This was an equity suit, and although the undertaking sprung from the suit, it was in form a legal obligation. The general rule is, that all questions of damage should be referred to a jury.

We cannot recall a case under the practice of the old Court of Equity in which that court undertook by mere reference to ascertain damages upon an injunction bond against persons who were not parties to the principal action, in which the order was made. The case of *Gadsden v. The Bank of Georgetown*, 5 Rich. 337, was an action at law upon an injunction bond given in an equity suit, and so were the cases of *Norris v. Williams*, 8 Rich. 58; *Aldrich v. Kirkland*, Id. 351, and *Fant v. Martin*, 10 Rich. 428.

But section 243 of the code of civil procedure provides that, "when no provision is

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made by statute as to security upon an \*injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party injured such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct," &c. Since the adoption of this provision, we have had no case involving the precise point; but the New York code has one precisely similar, and the practice there seems to be, that upon the dissolution of the injunction by order of court, a reference under the code to ascertain the damages follows as a matter of course. *Voorhees Annotated Code* (10th Ed.) 325.

But there is some conflict in the authorities as to how the amount so ascertained shall be enforced—by execution or order—and whether, upon the confirmation of the report, the judge may at once order the amount paid or the parties must resort to an action at law upon the undertaking. In the cases of *Fitzpatrick v. Flagg*, 12 Abb. 189, and of *Patterson v. Bloomer*, 37 How. Pr. 450, it was held that, in order to enforce the amount ascertained against the sureties it was necessary that an action should be brought on the undertaking. But it would seem that the most approved authorities there hold that



another action is unnecessary, and that the judge may order the amount paid at once. If, as seems to be conceded, the ascertainment of the amount by the referee takes the place of a trial by jury, we do not see why another action on the undertaking should be necessary. The summary mode of enforcing it is in conformity with the familiar principle that the court of equity having jurisdiction, in order to prevent delays, expenses and circuity of action, will in certain circumstances provide for the assessment and payment of damages. *Adams Equity* 219.

It is true that this court has held in the case of *Earle v. Cureton*, 13 S. C. 19, that a judgment for costs entered against one who was surety for costs, without any proceeding against him to charge him upon his obligation, is wholly void; but that was where no proceeding of any kind had been taken against the surety. By signing the under-

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taking under the law as it now stands, in which the parties obligated themselves "pursuant to the statute," it may be considered that the surety waived a trial by jury in assessing damages, and that the summary proceeding by reference is somewhat analogous to that by which, under the old rule of court, the collection of costs was enforced against a surety whose obligation in terms acknowledged his liability, if the plaintiff failed to recover. It seems to us that there can be no great objection to the summary mode of enforcing the assessment found under reference, by order, without the delay and expense of another action; provided always that the surety is regularly notified, and thus made a party to the proceeding to assess the damages.

Second. Assuming, then, that the issue was made in a manner authorized by law, and that all the obligors were represented, was it error to exclude the counsel fees paid by the creditors as an element of damage done them by the injunction? There may be cases, as in *Livingston v. Exum*, ante p. 223, in which counsel fees for the single act of dissolving the injunction should be allowed; but we think, as a rule, the fees paid for general services in the case are not allowable. The charges made did not distinguish as to how much was for general services in defending the case, and how much was for dissolving the injunction; and we think the referee was right in excluding them. Without going fully into the subject, it is enough to say that this seems to be the settled doctrine not only of this State, but of the Supreme Court of the United States. *Ferguson & Dangerfield v. Dehay*, 2 McMull. 228; *Jeter v. Glenn*, 9 Rich. 374; *Welch v. N. E. Railroad Co.*, 12 Rich. 290; *Oelrichs v. Spain*, 15 Wall. 211 [21 L. Ed. 43]; *Sedgw. on Damages* 99.

In our own case of *Welch v. The Railroad*, supra, which was an action on the case to recover damages for a trunk lost, Judge

O'Neill said speaking of counsel fees: "Such an item has never been allowed in this State. It cannot be said to be a necessary result of the act done by or negligence of the defendant." And in the case from *Wallace*, the Supreme Court gives the rule, and also the reasons for it, thus: "In debt, covenant and assumpsit, damages are recovered, but counsel fees are never included. So, in equi-

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ty cases where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than necessary. A reference to a master, or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Third. As to the costs taxed in the case against the plaintiff, *G. W. Hill*. In considering this question here, we cannot correct any error which may have been made in the taxation of the costs against *G. W. Hill*. If any such error was made, it should have been corrected on appeal from the clerk's taxation. We think it by no means clear, however, that all the tax costs should be considered as damages sustained by the defendants by reason of the injunction. This was not an action exclusively for injunction, but to determine the rights of parties in reference to a tract of land, and the injunction was ancillary thereto. *Hovey v. Rubber Tip Pencil Company*, 50 N. Y. 335; *Disbrow v. Garcia*, 52 N. Y. 654. But, from the views which we take of another of the items of alleged damage, it is unnecessary to determine how much, if any, of the costs taxed against *Hill*, and not yet paid by any party, should be considered as damages sustained by the defendants by reason of the injunction.

Fourth. In regard to the other item claimed as damages, viz.: the interest on the sum realized from the sale of the land for one year, \$211.57; that is to say, the interest lost on the purchase-money by receiving it when the injunction was dissolved, instead of a year sooner, when it was granted.

It appears to us that the loss of this interest by the delay in the sale of the land was

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the direct result of the injunction, and, \*as-

suming that the court decided that the injunction should not have been granted, was correctly charged by the referee. In opposition to this view, it is argued that during this delay, lands in Union county, including these, appreciated in value twenty-five per cent., and, therefore, the defendants were not injured, but, as a matter of fact, were actually benefited by the delay. This fact is not conceded. There was evidence tending to show that the creditors would have given as much in 1868 as in 1869. But suppose the fact was as claimed, it could not alter the case. Such a change in the salable value of land must be merely conjectural, and, so far as these parties are concerned, purely accidental. We are obliged to assume that the land would have brought the same price when the sale was enjoined as it did afterwards when actually sold.

The amount of the undertaking, two hundred dollars, must limit the right of recovery, and as the interest on the purchase-money of the land for a year was more than that sum, the judgment of the Circuit Court should substantially be affirmed. But, whilst that is the limit of the right of recovery upon the part of the creditors, the obligors on the undertaking are liable, in addition, for the costs of the proceedings to ascertain and collect that sum. "In all recoveries upon warranties, where the law has prescribed the purchase-money and interest as the measure of damage, the tax costs of the eviction are added," *Jeter v. Glenn*, supra; and see [*Furman v. Elmore*] 2 N. & McC. 190, note.

With these explanations and qualifications, the judgment of this court is, that the judgment of the Circuit Court, ordering the obligors of the undertaking to pay two hundred dollars and the costs of the proceeding to assess the same, be affirmed.

## 19 S. C. 238

## ELLIOTT v. MACKORELL.

(November Term, 1882.)

[1. *Trusts* ⇨206.]

For a trustee to apply money then impressed with a trust in part payment for land, and to give mortgage for balance due, would be a breach of trust. *Mathews v. Heyward*, 2 S. C. 239. Not so, however, when the trust is created by the deed executed contemporaneously with the mortgage. *Barrett v. Cochran*, 8 S. C. 49 and 11 S. C. 35.

[Ed. Note.—Cited in *Bomar v. Gist*, 25 S. C. 347.

For other cases, see *Trusts*, Cent. Dig. §§ 283-292; Dec. Dig. ⇨206.]

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[2. *Homestead* ⇨3.]

\*The purpose of the homestead provisions in the constitution was not to create any new estate, or to invest estates already existing with any new qualities, or to subject them to any restrictions, but to secure a right of exemption

by forbidding the use of the process of the court to sell certain property for the payment of debts.

[Ed. Note.—Cited in *Stewart v. Blalock*, 45 S. C. 64, 22 S. E. 774; *Beuty v. Richardson*, 56 S. C. 186, 34 S. E. 73, 46 L. R. A. 517; *Sloan v. Hunter*, 65 S. C. 241, 43 S. E. 788; *Davis v. Milady*, 92 S. C. 145, 75 S. E. 363; *Ann. Cas.* 1914B, 267.

For other cases, see *Homestead*, Cent. Dig. §§ 4, 5; Dec. Dig. ⇨3.]

[3. *Homestead* ⇨1.]

A homestead is not an estate but a mere right of exemption from seizure and sale for the payment of debt.

[Ed. Note.—Cited in *Ex parte Ray*, 20 S. C. 248; *Chafee & Co. v. Rainey*, 21 S. C. 19; *Ex parte Brown*, 37 S. C. 187, 15 S. E. 926; *Bank of Columbia v. Gibbs*, 54 S. C. 579, 32 S. E. 690; *Ex parte Miley*, 73 S. C. 329, 56 S. E. 535.

For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

[4. *Eminent Domain* ⇨61.]

The constitution does not authorize the legislature to take property away from one man and vest it in another—not even in his wife and children.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 51, 52, 54, 57; Dec. Dig. ⇨61.]

[5. *Homestead* ⇨110.]

A debtor has the right to sell or mortgage his homestead after it has been assigned to him, and the legislature has no power to deprive him of such right.

[Ed. Note.—Cited in *Cantrell v. Fowler*, 24 S. C. 429; *Ketchin v. McCarley*, 26 S. C. 14, 11 S. E. 1099, 4 Am. St. Rep. 674; *Watson v. Neal*, 38 S. C. 102, 16 S. E. 833.

For other cases, see *Homestead*, Cent. Dig. § 176; Dec. Dig. ⇨110.]

[6. *Homestead* ⇨109.]

A debtor's land was sold under execution, and \$1,000 of the purchase-money was reserved as a homestead exemption under an order of court requiring the sheriff to apply such money to the "purchase of a homestead for defendant, under his direction, and that he have leave to take title for the same in the name of his wife and in trust for his children." Subsequently the sheriff, by defendant's direction, paid the money to the purchaser of this land (who was the execution plaintiff), who made deed to such defendant as trustee for his wife and children, and at the same time took mortgage for a credit portion of the purchase-money. *Held*, that there was no trust created prior to the execution of this deed and contemporary mortgage; that the transaction was unobjectionable, and that the mortgage was entitled to payment before any application of the proceeds of sale to the purposes of the trust.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 174; Dec. Dig. ⇨109.]

Mr. Justice McGowan dissenting.

Before Witherspoon, J., Fairfield, September, 1882.

The opinion states the case.

Mr. A. S. Douglass, for appellants, cited the several homestead acts and also the following authorities: *Thomp. Homest.*, §§ 43, 465, 453, 502; *Cooley Const. Lim.* 442-449, 352; 3 *Blacks. Com.* 418; *Pott. Dwar.* 185, 203, 209, 213; 7 S. C. 19; 1 *Jones Mort.*, §§ 731, 466; 2 *Id.* 1632; 8 S. C. 49; 11 *Id.* 30.



Mr. A. M. Mackey, contra, also cited the homestead statutes and Tiff. & B. Trusts 354; Smythe Homest., §§ 254, 262; Thomp. Homest., §§ 470-473; 1 Perry Trusts 452, 460; Lew. Trusts 138, 802; 2 S. C. 227, 244; 7 Id. 1, 149; Herm. Exec. 120; 36 Am. Rep. 730, note; Freem. Exec. 239; Freem. Co-ten. & P., §§ 50, 51.

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\*April 19th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. On May 9th, 1877, R. J. McCarley obtained judgment against the defendant, John C. Mackorell, for the sum of \$1,136.26, and, under the execution issued to enforce this judgment, the tract of land which is the subject-matter of the present action was levied on by the sheriff. Appraisers were appointed to set off the homestead of the judgment debtor, who certified that they valued the premises levied upon at the sum of \$2,275, and that, in their judgment, the premises could not be divided so as to set off the homestead without injury to the remainder. The judgment debtor, John C. Mackorell, waived the sixty days' time allowed him by the act to pay the difference between the appraised value and the amount of the homestead exemption, and, accordingly, the premises were sold by the sheriff on September 3d, 1877, for the sum of \$2,232.04 to R. J. McCarley, who complied with his bid by paying to the sheriff \$1,000 and the costs, in cash, and receipting on his execution for the balance of his bid, whereupon the sheriff made titles to him in the usual form.

On October 25th, 1877, upon the application of John C. Mackorell, the court ordered "that the said sum of one thousand dollars be applied by the said sheriff to the purchase of a homestead for the said defendant, under the direction of the defendant, and that the defendant have leave to take title for the same in the name of his wife and in trust for the children of the said defendant." On December 17th, 1877, R. J. McCarley sold and conveyed to John C. Mackorell the premises in question for \$2,200, receiving from the sheriff \$1,000 in cash, and receipting to him for said sum, as the "amount of defendant's homestead invested by order of the court"; and, to secure the balance of the purchase-money, Mackorell gave to McCarley his bond as trustee for his wife and children, secured by a mortgage of the premises—the title having been made to Mackorell as trustee for his wife and children—the deed, bond and mortgage having been executed simultaneously.

This action is now brought by the plaintiff, who had been appointed receiver of the estate of R. J. McCarley, to foreclose said mortgage, and John C. Mackorell and his

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wife and children \*are made parties defend-

ant to the action. The Circuit judge held that the sum of \$1,000, held by the sheriff, was a trust fund, and that it was a breach of trust to invest such fund in land which was to be encumbered by a mortgage to secure the credit portion of the purchase-money; that McCarley had notice of such breach of trust, and that the plaintiff, as receiver, was bound to the same extent that McCarley would be; and therefore, that the plaintiff is not entitled to receive any portion of the proceeds of the sale of the mortgaged premises until the said trust fund is replaced. He, therefore, rendered judgment for foreclosure, but provided in the order that the mortgaged premises should be withdrawn from sale unless they brought more than \$1,000 and costs; and, if they brought more than that amount, then that the sum of \$1,000 should be retained by the clerk, subject to the further order of the court, and that the plaintiff should only be entitled to so much of the excess over said sum of \$1,000 and costs as might be necessary to pay the amount due him.

From this judgment the plaintiff appeals upon various grounds which, under the view we take of the case, need not be set out here. The substantial question made by the appeal, and the one upon which the case must turn, is as to the character of the fund of \$1,000 in the hands of the sheriff, representing the homestead of the judgment debtor, John C. Mackorell. If that fund had been impressed with a trust before the purchase of the land from McCarley by Mackorell on December 17th, 1877, when the deed and bond and mortgage were contemporaneously executed, then upon the authority of Mathews v. Heyward, 2 S. C. 239, it was a breach of trust to invest the same in land to be encumbered with a mortgage to secure the payment of a portion of the purchase-money, and the mortgagee, McCarley, who must be regarded as having notice, took his mortgage subject to such trust, and cannot enforce it until provision is made for replacing such fund, and the plaintiff who stands in his shoes has no higher right than he has.

But if, on the other hand, such fund was not impressed with any trust until it was created by the deed contemporaneous with the mortgage, then the lien of the mortgage

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is not impaired by \*the trust, and the plaintiff is entitled to his judgment of foreclosure in the usual form. Barrett v. Cochran, 8 S. C. 49; same case in 11 S. C. 35. For in that event, as is said in Barrett v. Cochran, where first reported, "The trust must be considered as created by the deed to Barrett [Mackorell], which must be construed together with the mortgage as contemporary acts. The burden on the trust estate was, under this view, created by the very act calling the trust into existence, and its imposition must

be deemed consistent with the purposes of the trust."

The practical question, therefore, in this case is, whether the fund of \$1,000 had been impressed with any trust before the execution of the deed from McCarley to Mackorell. To determine this question it is necessary to ascertain what is the nature of the homestead right as created by the constitution and the laws passed in pursuance thereof. It is derived from section 20, article I., and section 32, article II. of the constitution, and is regulated by such acts of the general assembly as have been passed in conformity to these constitutional provisions. Looking to these sections we find nothing indicating a purpose to create or provide for any new kind of estate, as an estate of homestead, but the manifest purpose and declared object is simply to protect a certain amount of property from levy and sale, under mesne or final process; the language of the one section being: "A reasonable amount of property as a homestead, shall be exempted from seizure or sale for the payment of any debts or liabilities except for the payment of such obligations as are provided for in the constitution," while that of the other section, which goes more into detail as to the amount and character of the property to be exempted, and to the class of debts constituting the exceptions, is, that the property mentioned "Shall be exempt from attachment, levy or sale on any mesne or final process issued from any court."

The purpose then was not to create any new estate, or to invest estates already existing with any new qualities, or to subject them to any restrictions, but to secure a right of exemption by forbidding the use of the process of the court to sell certain property for the payment of debts. It is true that it has not been uncommon to find, even

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in acts of the legislature and \*judicial opinions, the right of homestead spoken of as an estate, but such a characterization of the right of homestead is not warranted by anything contained in the fundamental law. Indeed it would be altogether beyond the competency of the legislature to divest one man of his estate and vest it in another, even though such other might be his wife or child; nor would it be competent for the legislature to change the character of the estate which the citizen has in his property without his consent, by declaring that in a certain event he shall hold such property in trust for his wife or child. As is said in Cooley on Const. Lim. 357, "There is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or special enactment." And again, at page 530, "It is conceded on all hands, that the legislature

has no power in any case to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit." It is clear, therefore, that the right of homestead is not an estate, but a mere right of exemption by which the estate of a person recognized as already existing is protected from seizure and sale for the payment of debt. If, therefore, the legislature had undertaken to declare in express terms that the homestead should be held by the head of the family in trust for his wife and children, such legislation would have been clearly unconstitutional and void, and the head of the family would continue to hold the property constituting the homestead by the same right as before, and would have the power to use and dispose of it in the same way as he could of any other property which belongs to him absolutely, either by sale or mortgage. *Homestead Association v. Enslow*, 7 S. C. 1; *Rosenberg v. Lewi*, 7 S. C. 344.

It is true that in these cases the mortgages, the lien of which was held to be superior to the right of exemption claimed under the homestead laws, were executed before the homestead had been assigned or set off to the debtor, but it is difficult to conceive what difference that could make. The right would be the same after as well as before the assignment, the only effect of which would be to designate specifically what

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was before \*unascertained—the metes and bounds of the land exempted. The laying off of the homestead could not possibly affect, or in any way change the nature of the estate which the debtor held in the property exempted; and even if the legislature had undertaken to declare, in the most explicit terms—as they have not—that after the homestead has been laid off, the debtor shall not have the power to sell or mortgage the property so laid off, or that he shall thereafter hold it in trust for his wife and children, or in any other way undertake to interfere with the owner's right of dominion, they would not have had the power so to do, as it would be an attempt to interfere with vested rights which, as Judge Cooley says, cannot be done under any rule or principle known to our system of law.

The legislature undoubtedly has the power, by virtue of its control over the remedies provided for the collection of debts, to prescribe the mode and manner in which the process of the courts may be used, and place limitations upon such use, provided they keep within the limits of the constitutional provision which forbids them passing a law impairing the obligation of a contract, but should they undertake to divest vested rights and declare that one man's property shall be transferred to another, or shall be held in trust for another, it would become a very different matter, and it would be impossible



to see how such an exercise of legislative power could be vindicated. So, too, the legislature, by virtue of their power to prescribe the laws of descent and inheritance, may declare what disposition shall be made of a person's estate after his death, and, in so doing, may declare that the property exempted under the homestead laws shall vest in his wife for life, or his wife and minor children, or make any other provision they see fit as to the disposition to be made of such property, but that is a very different thing from requiring a person while living to make any particular disposition of his property, or any part thereof, without his consent.

When, therefore, the fund of \$1,000, which had been exempted from liability for the debts of John C. Mackorell, by virtue of the homestead provisions, went into the hands of the sheriff, it went there as Mackorell's property, to which he had the same right as he had before the sheriff's sale. He had the

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\*right, therefore, to use and dispose of it as he pleased. He might, by a declaration of trust in writing, impress upon it any trust that he might see fit to create, or he might invest it in land and take the conveyance to himself, or to another upon such trusts as he chose to impress upon it, but, until he did so, the fund remained his own absolutely, to do with as he pleased.

The inquiry then presents itself: Did John C. Mackorell impress any trust whatever upon this fund before he invested it in the land and took the title in which the trust was created contemporaneously with the lien of the mortgage. There is certainly no evidence that he executed any declaration of trust in writing, signed by him, which is required by chapter XCIII., § 5, p. 466, Gen. Stat. of 1872, which was the law in force at the time these transactions occurred, by which the rights of the parties were fixed, and is yet the law, (Gen. Stat. of 1882, § 1961,) if this fund is to be regarded in equity as land, as was contended for with much force by respondent's counsel. But even if a writing is not necessary, where is the evidence that Mackorell, in any way, imparted a trust character to this fund before investing it in the land covered by the mortgage sought to be foreclosed by these proceedings.

The order of the court, which, indeed, was wholly unnecessary, is not such a dedication of the fund as would impart to it a trust character, for, even if the court had undertaken, in express terms, to impress a trust upon the fund, it would have had no power to do so without the consent of Mackorell. But the court did not even attempt to do anything of the kind. The very terms of the order, which has hereinbefore been set out, show that the court recognized the right of Mackorell (referred to in the order as "the defendant") to the fund, for the sheriff was directed to apply the money to the purchase

of a homestead "for the defendant and under his directions," and that the defendant should "have leave to take title"—not that he should take title—"in the name of his wife and in trust for his children." It is plain that the order of the court not only could not impress any trust upon the fund, but that it did not even purport so to do.

Even if the application for this order by

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Mackorell should be regarded as an indication of his intention to impress a trust upon the fund, that would not be sufficient, for entertaining and even expressing an intention to do a thing and actually doing it are two very distinct and different matters, attended by wholly different consequences. Indeed, as matter of fact, the intention of Mackorell, as indicated by the order, was never carried into effect, for the leave given was to take title "in the name of his wife and in trust for the children of the said defendant," while the act done by Mackorell was to take title in his own name in trust for his wife and children; and this illustrates the difference between a mere intention and an act.

Again, if a trust was created on the day the order was passed, what were the terms of such trust? Would it be possible for any one to say? Was the property to be held in trust for the sole and separate use of the wife during her life, and after her death for the children? Or was it to be held in trust for the wife and children jointly? Or what were the terms of the trust? It must be manifest that no trust was then created. Nor can it be said that the trusts declared by the deed must be connected with the direction given in the order, so as to make the latter the mere formal execution of the purpose declared in the order for, as we have seen, the title was not taken as contemplated by the order.

But, suppose it is regarded as being a substantial compliance with the terms of the order, then how can it be said that the investment of trust funds, under the order of the court, was a breach of trust? We are unable to see how the fund of \$1,000, in the hands of the sheriff, can be regarded as having been impressed with any trust until such trust was created by the deed from McCarley to Mackorell, which must be construed with the mortgage as contemporaneous acts. The encumbrance, having been created by the same act which brought the trust into existence, it must be deemed consistent with the purposes of the trust, (*Barrett v. Cochran*, supra,) and hence the plaintiff is entitled to have his mortgage debt paid before any portion of the proceeds of the sale of the mortgaged premises can be reserved to meet the purposes of the trust.

The judgment of this court is that the

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judgment of the \*Circuit Court be reversed, and that the case be remanded to that court

for such further proceedings as may be necessary to carry into effect the views herein announced.

Mr. Chief Justice SIMPSON concurred and Mr. Justice MCGOWAN dissented.

19 S. C. 247  
TRIMMIER v. THOMSON.  
(November Term, 1882.)

[1. *Executors and Administrators* ⚡453.]

Executors sued upon the debt of their testator plead, *inter alia*, *plene administravit*, and verdict was rendered for the plaintiff generally. Judgment and execution were entered against the executors for the amount so found, "to be levied of the goods, &c., of testator in the hands of defendants to be administered, or which may hereafter come into their hands to be administered." After second action brought to recover this debt from the executors, individually, they made a motion to set aside the former judgment, or to make the same conform to the verdict and the facts proven, alleging by affidavit that no evidence was taken on the plea of *plene administravit*, and that the case was heard solely on the question of testator's indebtedness. *Held*, that the judgment was responsive to the issues involved and to the verdict, and could not be disturbed except as to the words, "or which may hereafter come, &c." which were unauthorized and mere surplusage.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1903; Dec. Dig. ⚡453.]

[2. *Judgment* ⚡287.]

A judgment record, which is responsive to the issues necessarily involved, cannot be contradicted by proof of what was or was not tried.

[Ed. Note.—Cited in *McNair v. Ingraham*, 21 S. C. 74; *Cheatham v. Morrison*, 37 S. C. 191, 15 S. E. 924; *Willis v. Tozer*, 44 S. C. 17, 21 S. E. 617; *Anderson v. Cave*, 49 S. C. 512, 27 S. E. 478; *Greenwood Drug Co. v. Bromonia Co.*, 81 S. C. 519, 62 S. E. 840, 128 Am. St. Rep. 929.

For other cases, see *Judgment*, Cent. Dig. § 567; Dec. Dig. ⚡287.]

[3. *Executors and Administrators* ⚡453.]

A judgment generally against executors who do not plead *plene administravit*, is conclusive evidence of assets then in hand, in a second action of debt suggesting a *devastavit*; *a fortiori*, where such plea has been interposed and not found by the verdict.

[Ed. Note.—Cited in *Abercrombie v. Abercrombie*, 25 S. C. 50; *Gowan v. Gentry*, 32 S. C. 375, 11 S. E. 82; *Willis v. Tozer*, 44 S. C. 22, 21 S. E. 617; *Parker v. Latimer*, 59 S. C. 335, 37 S. E. 918.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1884-1908; Dec. Dig. ⚡453.]

[4. *Executors and Administrators* ⚡437.]

An action against defendants to recover a debt established by a former judgment against them as executors, and alleging a *devastavit*, instituted within a year after the termination of the former action, is not barred by the statute of limitations.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1760; Dec. Dig. ⚡437.]

Before Fraser, J., Spartanburg, July, 1881. This was an action by F. M. Trimmer, ad-

ministrator cum testamento annexo of Peyton Simmons, against H. H. Thomson and J. S. R. Thomson, and also a motion by defendants in a former action of the same plaintiff

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against the same defendants, \*as executors of H. H. Thomson, deceased. The opinion sufficiently states the case.

Messrs. Duncan & Cleveland, for appellants.

Messrs. Bobo & Carlisle, contra.

April 18th, 1883. The opinion of the court was delivered by

Mr. Justice MCGOWAN. It will simplify the many points made in these cases to make a short statement of facts. The first case named in the title was brought on a judgment previously obtained against the defendants as the surviving executors of H. H. Thomson, deceased, suggesting a *devastavit* by the executors. It appeared that in 1858 H. H. Thomson, Sr., died, leaving a handsome estate, which he disposed of by will, of which Mildred E. Thomson, Joseph W. Thomson, H. H. Thomson, Jr., and J. S. R. Thomson were named as executors; the two latter were minors at the time, and did not qualify until afterwards. At the beginning only the first two qualified, and, in administering the estate, paid the debts (except the one in controversy here), assented to legacies, and, to a large extent, settled the estate. They published no notice for creditors to present their demands, but had actual notice of the annuity debt to Simmons (of which, more hereafter), and had paid annually the amounts falling due on it—certainly until 1863—when the present defendants qualified.

In 1867, Peyton Simmons, to whom the debt above mentioned was payable, sued all the executors, including the present defendants. This debt of the testator had, as stated, been recognized certainly by the executors who first qualified, but no provision had been made for it, and they resisted the action, pleading that the bond had been given for slaves, who were emancipated, but not pleading *plene administravit*. In this suit payments were claimed to have been made on the Simmons debt, after the present defendants qualified. This suit abated by the death of Simmons in 1871, who left the claim to his wife by his will.

In 1873, F. M. Trimmer bought the bond, took out letters of administration, with the

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will annexed, on the estate of Simmons, and brought another action against the present defendants as surviving executors (those first qualified having died in 1868). In this action the defendant executors admitted the cause of action against their testator, and set up as defenses failure of consideration and counter-claim, and pleaded *plene administravit*. The case was stoutly resisted and submitted



to a jury, which found a general verdict for the amount of the debt (\$3,000) against the defendants. Upon this verdict judgment and execution were regularly entered by order, "to be levied and collected of the goods and chattles, rights and credits, lands and tenements of said H. H. Thomson, deceased, in the hands of said defendants to be administered, or which may hereafter come into their hands to be administered," together with costs, &c. An appeal from this judgment was taken, in which no objection was made to its form, and the Supreme Court affirmed it. 10 S. C. 164.

In 1879, the execution having been returned nulla bona, the plaintiff commenced this action against the executors, suggesting a devastavit. The executors answered, denying that they had assets of the testator in their hands at the time of the rendition of the former judgment, or since, or had committed any devastavit, pleading the statute of limitations, and setting up as a bar to recovery the long possession of the legatees and devisees under the will.

Pending this action, (October, 1880,) the defendants made a motion for an order setting aside the former judgment on which the action was brought, "or making the same conform to the verdict and the facts proved," &c. Along with this motion were filed affidavits of the defendants, and their lawyers in the former case, stating that no evidence was offered "on the plea of plene administravit, and the case was heard solely on the question as to whether defendants' testator owed the debt; that conforming to what was considered the usage of the bar and the understanding in the matter, no issue was made on the question as to indebtedness of defendants to the estate of their testator." Counter statement was made "that before the trial of the case, at the suggestion of J. S. R. Thomson (one of the counsel for defendants), plaintiff consented that defendants

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need not file \*copies of the inventory returns, &c., as required by the rule, but that the original might be used, instead of said copies. That this was the only agreement made by deponent, or to his knowledge," &c. This constitutes the case second above stated.

The whole matter was referred to John E. Bomar, Esq., as referee, to take the testimony and state the same with his conclusions of fact. He did take the testimony, and made a very long and carefully prepared report, stating the complicated condition of the property in the hands of the legatees and devisees, and closing his report with the following conclusion of fact: "That neither of the defendants had assets in their hands at the rendition of judgment in favor of plaintiff, or have had since that time, except the sum of \$350, received by the defendant, H. H. Thomson, Jr., on account of rent of the residuary real estate, and paid to his sisters, Mrs. Scaife and Mrs. Nowell, in 1878, and a

bond of Jesse Cooper, given to their testator to indemnify him against the aforesaid claim of Peyton Simmons, which was put in suit promptly upon the dismissal of the appeal."

The cases were submitted to Judge Fraser, on written arguments, who refused to set aside or materially modify the judgment on the motion, and held that it was too late for the defendants now to show that, at the time the former judgment was rendered, they had no assets of their testator; and if it was not too late to make such question, that they had failed to show that they were not liable for the judgment debt of plaintiff, and therefore gave judgment for the plaintiff to the amount of his debt, interest and costs, with leave to issue execution for the same. The defendants appeal to this court upon various grounds, contained in twenty-eight exceptions, but, from the view which this court takes, it is unnecessary to state them at length here. They are in the "Case."

First. As to the motion to set aside the former judgment, or make it conform to the facts proved. For several reasons this can not be considered as an application, under section 195 of the code, to set aside the judgment taken against the defendants through their "mistake, inadvertence, surprise or excusable neglect." It is, in terms, a motion to make the judgment conform to the facts proved, which cannot be done. It is not

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clearly \*perceived what change is desired. No particular form of judgment is proposed, and we cannot conceive what form could be given to it so as precisely to meet the view suggested. It could not be made a judgment against the testator alone, for he is dead, and his executors are before the court. It could not be made a judgment against the executors individually, for that is the very thing that is denied. It could not be a judgment for the plaintiff on the question of debt, and for the defendants as to assets, or, as it is called, quando acciderint, for the claim is that that question was not considered. It could hardly be proposed that the judgment should be for the plaintiff on the question of debt, with a statement that the question of assets was left undecided. Such seems to be the object of the motion.

But uncertainty is not the main difficulty. The judgment, as entered, was substantially right, because in conformity with the verdict. Under the rules of pleading applicable to cases where executors are sued, only one of three verdicts is possible: either for the defendant generally, for the plaintiff quando acciderint, or for the plaintiff generally. The latter was rendered here, and the only judgment that could have been entered was the one which was entered de bonis testatoris, &c. A judgment must be entered in conformity to the verdict, speaking from the record and the issues in the case, and it is not admissible to contradict the record and

make a new verdict by showing what was or what was not actually proved. A verdict is the result of a trial, and if regular and free from impropriety, cannot in turn be subjected to trial, except by appeal. In considering the form of a judgment to be entered on it, we cannot hear what was or what was not proved, but what should have been proved—what, under the issues in the case, must be taken to have been proved, whether, as matter of fact, it was so proved or not. If the court could, at any subsequent time, change a judgment so as to make it conform to what might appear to have been proved or omitted at the trial, without regard to the verdict rendered, there never would be an end of litigation, but each successive struggle would be directed to the point that the judgment immediately preceding had not been entered according to the actual proof made.

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\*There is no doubt that the court has the power in a proper case, as in *Carroll v. Tompkins*, 14 S. C. 223, to correct a mistake or clerical error in its own process in order to make it conform to the record; but that does not authorize an alteration which would contradict the record and change the whole scope and effect of the judgment. The judgment here was in conformity to the verdict. It was regularly entered by order in 1877. It was appealed from, but no exception taken as to its form, and it was expressly affirmed by this court. We agree with the Circuit judge that the motion to change its form could not be granted; but we may say that in considering the effect of the judgment, it will be taken to be in form, such as should have been entered on the verdict, that is to say, a judgment *de bonis testatoris vel si non de bonis propriis* as to costs. The verdict which alone must govern, did not authorize the additional words "or which may hereafter come into their hands to be administered," and they will be disregarded as surplusage. Such phrase could only be inserted properly on a verdict *quando acciderint*, which was not rendered by the jury, and it is not competent to show that it was the understanding of the parties that such should be considered the import of the verdict.

"When the defendant in the previous recovery had neglected to plead *plene administravit*, a motion to open the judgment and for leave to file the plea, on an affidavit of instructions to the attorney in the former suit, was refused on the trial of the action of *devastavit* on the judgment." *Caldwell v. Micheau*, 1 Speers 276. In delivering the judgment of the court, Judge Wardlaw said: "This court is satisfied that the motion to set aside or open the former judgment was properly refused. There could be no end to litigation, if the judgment in such circumstances should be liable to disturbance."

Second. As to the force and effect that should be given to the first judgment against the executors upon the question of assets.

We think it must be regarded as settled in this State, that a general judgment against an executor who does not plead *plene administravit* or *praeter*, is conclusive evidence of assets in a second action of debt suggesting a *devastavit*; the only qualification being that a matter arising subsequent to the for-

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mer action, \*showing a destruction of the assets or removal of them from the hands of the executor without his fault, may be set up. *Ford v. Rouse*, Rice 220; *Young v. Kennedy*, 2 McMull. 81; *Caldwell v. Micheau*, 1 Speers 276; *Lowndes v. Pinckney*, 2 Strobb. Eq. 44; *Ewing's Ex. v. Peters*, 3 T. R. 685; 2 Wms. Ex. 1201, 1225; *Stark. Evid.* 562.

As we understand it, this proceeds on the ground that the action being against the executor for a debt of the testator, has embraced in it two distinct allegations, both of which are necessary to his recovery: first, that the testator owed the debt; and second, that the executor has assets to pay it, whether this latter is or is not expressly alleged in the complaint. The executor has the right to resist both allegations. He may plead *plene administravit*, indeed must do so, at the peril of having it concluded against him by default or confession that he has assets.

This conclusion rests upon the doctrine of that kind of estoppel known as *res adjudicata*; that a party having the opportunity in an action to make a defense and does not do so, is precluded from doing so afterwards. *Maxwell v. Connor*, 1 Hill Eq. 22. It seems to us that the doctrine of *res adjudicata* should apply with increased force, when the plea of *plene administravit* is put in, and there is notwithstanding a general verdict for the plaintiff. In such case it would seem to be the irresistible conclusion that the defense was made and failed.

But to this view it is earnestly replied, that nothing can be properly held to be adjudged which was never considered, and that in the former action, as a matter of fact, no evidence was offered or considered upon the question of assets, but by the agreement and stipulations of counsel it was intentionally omitted. The statements do not agree as to the alleged stipulations, but if they did we cannot listen to affidavits as to what was or was not agreed to be tried. The case furnishes a good illustration of the rule which forbids the court to consider stipulations not in writing. Besides we can only look to the record, which shows that *plene administravit* was put in, and that there was a general verdict for the plaintiff. The issue was an entirety and indivisible by agreement. *Wells Res Adjud.* §§ 228, 248. We need not inquire

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whether the onus of proof was on the \*plaintiff or defendants on the question of assets. We incline to think that the plea was a mere matter of defense, but in either case, whether new matter to be proved or mere matter of defense, the result would be the same; that



having an opportunity to make the defense, indeed being bound to make it at their peril, they put in the proper pleas, and there was a general verdict against them, either from failure to offer proof or from insufficient proof.

This court has lately, in the case of *Hart v. Bates*, 17 S. C. 42, attempted to define the doctrine of *res adjudicata* as follows:

"It seems to be now settled that, though the proceeding is in another jurisdiction, the judgment will be conclusive provided the court had jurisdiction and the judgment was directly on the point. \* \* \* It is claimed, however, as a sequence of this rule, that the defense of *res adjudicata* extends to every question which could have been made, whether it was considered or not. There are cases which seem to go to that extent, but we think the decided preponderance of authority sustains the more reasonable doctrine. 'That a judgment is not, technically, conclusive of any matter, if the matter is not such that it had, of necessity, to be determined before the judgment could have been given; that it was not merely collateral nor to be inferred by argument from the judgment.' 6 Wait Ac. & Def. 785, citing *Hunter v. Davis*, 19 Geo. 413, and other cases. Or, in the language of Mr. Justice Miller, of the Supreme Court of the United States: 'The rule is, that when a former judgment is relied on it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided.'"

Let us apply this rule here. Does it appear from the record that the point in controversy was necessarily decided in the former suit? If so, then parol proof upon the subject is inadmissible to contradict the record. It is very true that there are cases in which parol proof was admitted to show that the point was actually considered or not considered, but never when the record shows that the point was necessarily involved. Otherwise records would stand for nothing, and everything would be set afloat. The point here is, as to whether there were assets

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in \*the hands of the executors at the time the first judgment was rendered. Was that precise point (disregarding alleged stipulations) necessarily involved and decided in the former suit? The plaintiff sued the executors for a debt of their testator. The executors denied that the testator owed the debt, or, if so, that they had assets to pay it. Upon this record appears a general verdict for the plaintiff, upon which judgment and execution were issued. We cannot resist the conclusion that both points made were directly involved, and that the verdict necessarily decided both.

It is admitted that such would have been the import of the verdict if the plea of *plene administravit* had not been filed at all, and how can its import be less when the verdict

was rendered notwithstanding the plea? The defendants had an opportunity to make the defense, and either made it and failed, or, what is the same thing, omitted to make it. If no assets had been shown the verdict would have been clean for the defendants, unless the plaintiff had chosen to take a verdict *quando acciderint*. If the executors at that time could have made the proof that they had in hand no assets of their testator, and that the estate had been distributed before the executors or some of them had notice of the claim on the Simmons bond, it was a fatal mistake not to have made that proof at that time, when they had an opportunity to do so.

According to this view, the former judgment was conclusive evidence of assets in the hands of the executors at that time, and this, with the return of *nulla bona* on the execution, makes it unnecessary to consider the many other minor questions made in the case. We do not see how the statute of limitations can apply. The debt, having gone into judgment against the estate of the testator, must be paid. It may be matter of regret that it cannot fall equally upon all those who are enjoying the property of the testator, in common with those who happen to be executors; but the fault was in undertaking to assent to legacies and devise and distribute the estate before the debts were paid or even ascertained. Creditors are required by law to look for payment to executors, whose first duty is to ascertain and

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provide for their payment, and, therefore, the burden of this debt must, at least in the first instance, fall upon the executors.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

A petition was filed in this case for a rehearing of so much of the foregoing opinion, or rather of the judgment of the court, as affirmed the judgment of the Circuit Court, entered by the clerk, under Judge Fraser's decree, in which Circuit judgment costs of the first case—*Trimmier v. Thomson's Executors*—were taxed against the executors individually. The matter here complained of was the ground of one of the exceptions upon which the appeal was taken.

May 20th, 1883. The following order was passed:

PER CURIAM. We have carefully considered this petition for a rehearing of the case, so far as regards the costs of the first case against the executors of H. H. Thomson, deceased, viz.: \$156.50, which, it seems, the clerk of the court, in taxing the costs of the second case against the same parties for a *dévastavit*, added to the proper costs of that case—making the judgment against the defendants, individually, amount to the sum of \$4,000 and \$304.35 costs. (This lat-

ter item including the tax costs of the first case—\$156.50.)

As to the costs of the first case, no complaint is made against the decision of Judge Fraser, who ordered that "The plaintiff should have judgment against the defendants for the sum of \$3,000, with interest from April 6th, 1877; and for costs, with leave to issue execution for the same." The judgment of this court was intended simply to affirm the judgment of Judge Fraser, which, as we understand, only adjudged that the defendants should pay the costs proper in the second case for a devastavit, in which he was then announcing judgment. No other matter was properly before us on appeal. This being the case, we do not see that it is necessary or proper that the point as to the costs in the first case should be re-argued in this court, which has made no order upon the subject. We see no authority, either in the decision of Judge Fraser or the judg-

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ment of this court, \*for adding into the last judgment against the defendants, individually, the tax costs in the first case. These costs are not properly taxable in the last case for devastavit, and they must stand as they were left at the termination of the first case, which was appealed to this court and affirmed. By whom they are to be paid, and in what character—whether individually or out of the assets of the estate—must be ruled by some proper authority before this court can have a right to consider the subject.

The motion for a rehearing is refused.

# 19 S. C. 257

## PLYLER v. ELLIOTT.

(November Term, 1882.)

### [1. *Alteration of Instruments* 23.]

A sealed note was altered by the payee after its execution by adding thereto the words, "bearing interest at 15 per cent.," but the additional words were erased by him before action brought. *Held*, that he could not recover on the note, which was rendered void by this material alteration.

[Ed. Note.—Cited in *Sloan v. Latimer*, 41 S. C. 219, 19 S. E. 491, 691; *Powell v. Pearlstone*, 43 S. C. 409, 21 S. E. 328; *Central National Bank of Kansas City v. Ebird*, 91 S. C. 138, 74 S. E. 136.

For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 24, 192; Dec. Dig. 23.]

### [2. *Alteration of Instruments* 23.]

Nor could the payee disregard the note so avoided and recover on the indebtedness for which the note was given.

[Ed. Note.—Cited in *Wagener & Co. v. Kirven*, 52 S. C. 34, 29 S. E. 390.

For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 192-207; Dec. Dig. 23.]

### [3. *Alteration of Instruments* 23.]

But a contemporaneous mortgage having been executed by the principal debtor to the payee of the note, and the debt sufficiently ap-

pearing from the terms of the mortgage alone, which was not altered, the creditor is entitled to a judgment of foreclosure. (*Gillett v. Powell*, Speers Eq. 143, recognized and followed. Mr. Justice McIver dissenting.

[Ed. Note.—Cited in *Dearman v. Trimmer*, 26 S. C. 515, 2 S. E. 501; *Smith v. Smith*, 27 S. C. 166, 168, 169, 170, 3 S. E. 78, 13 Am. St. Rep. 633; *Wallace v. Craig*, 27 S. C. 523, 4 S. E. 74; *Heath v. Blake*, 28 S. C. 416, 5 S. E. 842; *Ballou v. Young*, 42 S. C. 177, 20 S. E. 84; *Williamson v. Eastern B. & L. Ass'n*, 54 S. C. 597, 32 S. E. 765, 71 Am. St. Rep. 822; *Swaney v. Parrish*, 62 S. C. 245, 40 S. E. 554; *Ewbank v. Ewbank*, 64 S. C. 437, 42 S. E. 194; *American Mortgage Co. v. Woodward*, 83 S. C. 529, 65 S. E. 739.

For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 192-207; Dec. Dig. 23.]

Before Pressley, J., Lancaster, September, 1881.

The opinion states the case.

Mr. R. E. Allison, for appellant, cited 2 Jones Mort., §§ 889, 924, 1203-7; Speers Eq. 143; 1 Hilliard Mort. 476, § 3; 2 Pars. Cont. 716, 722; 12 Allen 92; 2 Washb. Real Prop. 173; 1 Greenl. Evid. 565; 35 N. J. 227; 3 C. E. Gr. 461; 2 Pars. Bills & N. 571; 63 Pa. St. 187; 112 Mass. 271; Am. L. Rep. (Jan. 1876), p. 372; 4 Allen 440; 4 Pick. 352; 6 Allen 139; 19 Pick. 535; 2 Cox 123; 11 Mass. 378; 13 Iowa 322; 38 Id. 181; 43 Id. 373; 51 Miss. 371.

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\*Mr. Ernest Moore, contra, cited 12 S. C. 612; 5 S. C. 67; 4 T. R. 320; 2 Bailey 359; 18 Cal. 482; 63 N. Y. 613; Jones Mort., § 741; 34 Ill. 106; 4 Allen 562; 2 Washb. Real Prop. 174, 606; 1 McCord Ch. 397; 2 Id. 11; 4 McCord 336; 10 Rich. Eq. 487, 582; 6 S. C. 209.

April 20th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for the double purpose of recovering the balance due upon a note of both the defendants and to foreclose a mortgage upon a tract of land, executed by R. Elliott, the principal in the note, to secure the same debt. The note was in the following terms:

"\$703.80.—Twelve months after date we or either of us promise to pay P. M. Plyler, or bearer, Seven Hundred and Three Dollars and eighty cents, for value received of him. Witness our hands and seals, this December 23d, 1874.

Bearing interest at 15 per cent.†

R. Elliott, [L. S.]

C. A. Plyler, [L. S.]"

The mortgage was executed by Elliott at the same time. Two hundred dollars had

†These words, "Bearing interest at 15 per cent.," were added by the payee after the execution of the note, and when the note was produced at the trial had been erased. The erasure was made, the plaintiff testified, "with a knife a short time before the suit was commenced."—REPORTER.



been paid on the note January 24th, 1878, and \$30 on January 25th, 1879, leaving due the balance of \$583.41, for which the plaintiff prayed judgment and foreclosure of the mortgage. The defendants answered, alleging that after the making and issue of said note, upon which said mortgage as security is based, and before this action, the said note was materially altered by the said plaintiff without the consent of the defendants, by adding the words, "bearing interest at 15 per cent.," wherefore they demand judgment. On June 16th, 1881, Judge Aldrich ordered an issue upon the following points:

1. "Were the words, 'bearing interest at 15 per cent.,' added to the note described in the complaint, by the plaintiff, or with his knowledge and consent, as alleged in the answer?"

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\*2. "If yea, was the same done with a view to alter the terms of the note and with intent to defraud the defendants?"

3. "Have the defendants, or either of them, made any payments on the said note after notice of such alleged change? and have they, or either of them, ratified such change by word or deed?"

4. "What rate of interest was agreed to be paid on the money secured by the note, at the time the note was given? and what interest, if any, have the defendants at any time agreed to pay?"

At the October Term of the court for 1881, Judge Pressley made an order, giving the plaintiff leave to amend his complaint by adding the common counts for money loaned, &c., and mortgage given, which was done. On October 5th, 1881, the defendants answered the amended complaint, alleging that any indebtedness which may have existed on the day the note was given "was extinguished by the acceptance of the sealed note, which, since its execution, had been materially altered without the consent of the defendants, by inserting therein and adding thereto the words, 'bearing interest at 15 per cent.,'" &c. To this answer the plaintiff demurred upon the grounds: 1. That it did not state that the alleged alteration was made with fraudulent intent or added to the liability of the defendants. 2. That it did not state that the alleged alteration was made by the plaintiff, or with his knowledge and consent, &c. 3. That it did not charge that the alleged alteration rendered the sealed note void. The judge overruled the demurrer upon the ground that all supposed defects in the answer were cured by the order directing the issues aforesaid, which had been heard and decided before the demurrer was filed.

The jury found against the plaintiff on all the issues, and Judge Pressley decided as follows: "The question of the alleged alteration of the note by adding thereto, after its execution, the words, 'bearing interest at 15 per cent.,' was referred to a jury by Judge Aldrich, and on trial before me the verdict

was that said note had been so changed. On subsequent hearing before me I sustain the verdict and adjudge that the said alteration materially changed the said note, with intent to make defendants liable for more interest than was borne by the original note.

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That addition was \*erased by plaintiff before the commencement of this suit, and he claimed herein only the balance of principal and interest, which would have been his right if the note had never been changed. My decision is, that the change of said note was such as entirely to destroy its validity, which could not be restored by the subsequent erasure.

"I also regard it as settled that the taking of a sealed note, with or without security, for a debt due only on account or simple contract, merges the debt into the note; and if that be rendered invalid by act of the holder, he cannot maintain suit on the previous debt or consideration of the note.

"The difficult question is, whether the mortgage executed on the same day with the note can be so separated from it as to stand valid of itself and prevent the merger of the original consideration into the note. In *Gillett v. Powell*, Speers Eq. 142, a mortgage and bond were executed for the same debt, but did not refer to each other as forming together one security. The bond was rendered invalid by alteration by the holder, and it was decided that the mortgage was a separate security for the debt, and would keep it alive as a valid claim, though the bond was made invalid by alteration. The difference in this case is, that the mortgage in its condition expressly refers to the note; also, the consideration stated in the mortgage is the exact amount of the note, and is not the amount of the debt as it stood before the note was made. That was only \$612, which was increased to \$703.80 by adding the interest for twelve months at 15 per cent. But, under the law then existing, that rate of interest could only be maintained by contract in writing, and in this case the note was the only such contract. It is, therefore, plain that the sum of \$703.80, stated as the consideration in the mortgage, had reference to that amount provided for by the note. It is, therefore, adjudged that the plaintiff cannot maintain his action, either upon the said note or mortgage, and his complaint is dismissed with costs."

The plaintiff appealed, both from the order overruling the demurrer (but the exceptions on this subject need not be set out), and from the decree, on the following grounds:

1. "That the Circuit judge erred in hold-

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ing that the writing \*at the bottom of the note, these words, viz.: 'Bearing interest at 15 per cent.,' was a material alteration of the note.

2. "That he erred in not finding, as a mat-

ter of fact, from the position of these words, their beginning with a capital letter, the absence of any specific amount and of any point of time from which to run, from all the testimony in the case, and, especially, from the explanation of plaintiff himself, that the plaintiff had simply added these words to remind him at what rate of interest he had loaned his money, and what rate of interest the interest-bearing demand in the note was bearing the first year.

3. "That he erred in finding that plaintiff, by adding the said words at the bottom of the note, intended to make defendants liable for more interest than the note originally bore, when there was no evidence to show such intention, and the added words themselves do not bear such interpretation.

4. "That he erred after the issues of fact had been referred to a jury, in charging the jury on the facts of the case, and suggesting further, that there was fraud in the transaction because the words were written below on a crease of the paper where it was difficult to write.

5. "That he erred in failing to find that the defendants, after the words were so added, had promised to pay the debt, thus ratifying the same and waiving the supposed irregularity.

6. "That he erred therein in assuming that the sealed note, referred to in the answer as being altered, was the debt itself; whereas, the same was only one evidence of the debt, and the mortgage might, in the light of equity and good conscience, be considered another distinct evidence of the same debt as well as a lien for the payment of the same.

7. "That he erred therein in concluding that the mortgage could not be so separated from the said sealed note, as signed by both defendants, as to stand valid of itself and to prevent the merger of the original consideration into the said note.

8. "In that he therein failed to recognize that the said sealed note was one security for the payment of the debt, or original consideration, and that the mortgage was another security for the same purpose, and, being of a higher grade, might stand without said sealed note.

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\*9. "That he erred in concluding that the consideration of the debt had merged into that particular sealed note, and that the alleged alteration in said note had entirely destroyed the mortgage as well as the said note.

10. "That he erred in failing to recognize the fact that the said sealed note was a separate contract between the plaintiff and both the defendants, whilst the mortgage was another separate and distinct contract entered into between the plaintiff and the defendant Elliott, alone, and not affecting the defendant Plyler.

11. "That he erred in overlooking the fact that the mortgage does not refer to any note at all for its consideration; and that it refers in its condition clause to Elliott's promissory note of same date, and not to the sealed note in question at all.

12. "Because the money due by Elliott to plaintiff on account, for loaned money, to wit: Six hundred and twelve dollars, before sealed note was given, was a sufficient consideration for the mortgage.

13. "Because the promissory note of defendant Elliott, referred to in the condition clause of the mortgage, was a sufficient consideration without the sealed note of both defendants for the mortgage; no objection being made to the proof of the mortgage without the production of the promissory note therein referred to on the trial, and the judge erred in not enforcing the lien of the mortgage."

There is no doubt that in the beginning the debt to the plaintiff was upon a valuable consideration, money due before and then borrowed, with interest for a year included, making the amount of \$703.80; and both the note and mortgage, with seals and of equal dignity, were legal and binding and remained so for two or three years—certainly down to the time when the alteration was made in the note. Although the note when sued had been restored to its original form and no actual injury had resulted to the defendants by the alleged alteration, we must consider it as established by the verdict of the jury, and the approval of the Circuit judge, that at one time before action brought there was an addition to or memorandum on the note of the words about interest, which were afterwards erased. Assuming the correctness of

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this finding, we agree with the Circuit \*judge, that it is well settled that "any material alteration of a written security in a material part renders it void." *Vaughan v. Fowler*, 14 S. C. 356 [37 Am. Rep. 731]. In the language of Mr. Greenleaf, (volume I., section 565,) "written instruments which are altered, in the legal sense of that term, are thereby made void."

The note and the mortgage—both securities under seal—one or both—absorbed the simple obligation for the money due, and thereby destroyed the right to sue upon an *indebitatus assumpsit*. The plaintiff is not at liberty to say, "I have made two contracts, and if one of them is made void for fraud, I will set up the other." *Mills v. Starr*, 2 Bail. 360; *McCorkle v. Doby*, 1 Strobb. 399 [47 Am. Dec. 560]. So that the judge was right in dismissing the complaint as to C. A. Plyler, who seems not to have received any of the consideration or to have had any connection with the transaction, except as a surety for Elliott, the principal debtor on the note.

But considering the note as not recoverable



either against the principal debtor or his surety on it, the more difficult question still remains, whether the plaintiff can enforce the mortgage, which was not altered, against the principal debtor for the balance of his debt as a separate security unaffected by the alleged alteration of the note. This court has recently held in the case of *Nichols v. Briggs*, 18 S. C. 484, that when a note and mortgage are both given to secure the same debt, the mortgage may be enforced although the note was barred by the statute of limitations. That case went on the ground that the debt itself is something different from either the note or mortgage, which are both mere securities for and evidences of the debt, and as a consequence the loss of the right to enforce one does not necessarily take away the right to enforce the other. The courts say: "It must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds, personal, real, pledge, mortgage, &c. The note given is only evidence of the debt and one of the means of collecting it, and if there is a mortgage, that is only another security for the same debt. \* \* \* The bond undoubtedly is the most common assurance, and for this reason possibly it may be regarded as the primary security and a mort-

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gage as cumulative, \*but in no proper sense can the mortgage be regarded as a security merely for the bond, which, being only the evidence of the debt, may be displaced by substitutes or lost or destroyed, leaving the mortgage as a subsisting security for the debt in a new form. *Gibbes v. R. R. Company*, 13 S. C. 253, and authorities. 'A mortgage being given as a security for a debt, the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt.' 1 Hill. Mort., § 3."

This decision and the principle announced must dispose of this case, unless, in respect to its effect upon the debt itself, there is an essential difference between the case of a note barred by the statute and that of one made void by alteration. In the case of the statutory bar we know that only the remedy is taken away. The inquiry then is, what is the effect of avoiding, by the act of the plaintiff himself, a note given as one of the securities for a debt to him? Does it simply take from him all remedy upon that security, or does it in its effects reach further and touch and taint the debt itself? If the latter, then all the securities of course fall with the debt, as it is well established that payment or anything else that reaches to the debt itself and discharges it, ipso facto discharges all the securities of every kind. We have not been able to find any case upon the

precise point except that of *Gillett v. Powell*, Speers Eq. 144, cited and commented on in the Circuit decree. That case is referred to by Mr. Herman in his work on Mortgages (section 293) in the following words: "A mortgage being a mere security, is an evidence of debt, being an instrument the purpose of which is to secure a debt. No other written evidence of the debt than that furnished by the instrument itself is necessary to sustain a mortgage. Thus where a bond secured by mortgage containing no allusion to the bond, was fraudulently altered and rendered void, the mortgage was held valid, and that it was evidence of the debt. *Gillett v. Powell*, Speers Eq. 142."

We are unable to discover any principle upon which we can distinguish this case from that of *Gillett v. Powell*. In that case, one James Higginbottom purchased proper-

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ty at an administrator's sale to the amount of \$2,337.75, and gave his bond for the same, and on the same day executed a mortgage of the property purchased to the same person to whom he gave the bond, and for identically the same amount. The mortgage made no reference in express terms to the bond, but there cannot possibly be a doubt that it was given to secure the same debt for which the bond was given. When the bond was produced in court it was discovered that it had been altered. The court held that, although the alteration in the bond rendered it void, yet that did not affect the mortgage, which must be taken to be the evidence of the debt, and recoverable. In delivering the judgment of the court, Chancellor Harper said: "But I am of opinion that the alteration of the bond does not affect the mortgage, and that it must be taken as the evidence of the debt. If the mortgage alone had been taken, there can be no doubt but that it would have constituted a specialty debt. \* \* \* If he had taken a single bill and a bond with a penalty, or a bond with and one without security, though there might have been an equity to restrain the enforcement of both, I do not see how the alteration of one could vitiate the other."

It is stated that the mortgage, in *Gillett v. Powell*, made no allusion to the bond, and it is insisted that in this case the mortgage does mention the note, and that makes the difference. It will be observed that the mortgage in the case before us does not, in the conveying part, make the least reference to any note, but directly to the debt itself, as follows: "That the said Richard Elliott, in consideration of the sum of seven hundred and three dollars and eighty cents, lawful money of the United States, to him in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, conveyed," &c., &c. This was a distinct and independent acknowledgment of the debt under seal,

and a deed of land to secure this amount of money.

We do not take the view that this amount of money, including the fifteen per cent. interest for one year, had to be first fixed by the note—"provided for by the note"—and then transferred to the mortgage. Neither the note nor the mortgage, as they stood originally, mentioned the fifteen per cent. in-

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terest for a \*year, and the consolidated amount, including the interest for one year, could be as well "provided for" in writing by the mortgage as by the note, and, as matter of fact, was so "provided for." The note was "not the only contract" in writing covering and making legal the fifteen per cent. It was embraced in the mortgage as well as in the note. The mortgage was a security at least as high and original in its character as the sealed note, and as capable of containing the original agreement, which it did. The mortgage would have been good and recoverable for the amount of money distinctly stated in it, if the note had never been given at all. *McCaughrin & Co. v. Williams*, 15 S. C. 505.

It is true that in the defeasance of the mortgage it is stated as follows: "Provided always and these presents are upon this condition: that if the said Richard Elliott shall well and truly pay his certain promissory note, having even date herewith, given to the said P. M. Plyler, then these presents shall become void," &c. The note altered was not in fact the promissory note of Elliott, but a sealed note of Elliott and C. A. Plyler, and it is therefore claimed that the note referred to is not the sealed note that was altered; and the whole doctrine being merely technical, it is insisted that the greatest certainty should be required. We, however, suppose that reference was intended to be made to the sealed note, that day given by Elliott and C. A. Plyler, for the sum of \$703.80, and think that the reference thus made was precisely equivalent to and only another form of saying "well and truly pay the amount hereinbefore stated," to wit, the sum of \$703.80 (the precise amount of the note referred to).

Even disregarding the mistake in the description of the note, it does not seem to us that such an erroneous reference in the defeasance of the mortgage should be allowed to have the great effect claimed for it; that is to say, in contradiction to the first and most important part of the mortgage, to change the whole structure and effect of the instrument, and, from being an original security for the debt expressly named in it, to make it merely a collateral security for the note itself, a security of no higher grade than the mortgage.

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\*Besides, Elliott, who got and retains the money of plaintiff, and executed the mort-

gage to secure it, has never claimed that he should be exonerated from the debt. On the contrary, there is evidence tending to show that after he had notice of the alteration of the note, he declared to Walter, Conner and Duffie that, while he intended to prosecute the alleged forgery, he owed plaintiff the debt; that it was a just debt, and he expected to pay the principal and interest, but not pay any more. See *McCorkle v. Doby*, 1 Strobb. 396 [47 Am. Dec. 560].

The judgment of this court is that the judgment of the Circuit Court be modified: that it be affirmed in so far as it dismissed the complaint against C. A. Plyler, as surety, and that in so far as it refused an order to foreclose the mortgage against Richard Elliott, it be reversed and the cause remanded to the Circuit Court for such orders as may be necessary to carry out the conclusion herein indicated.

Mr. Chief Justice SIMPSON, concurred.

Mr. Justice McIVER, dissenting. It appears to me that the question as to what effect the alteration of a note, secured by a mortgage, has upon the right to foreclose a mortgage, depends altogether upon whether such alteration was fraudulently made by the plaintiff. If it was, then the plaintiff not only loses his right of action on the note, but also his right to the aid of the court in enforcing the collection of his debt in any form. This is the penalty which he incurs for his fraud. The court withholds the use of its process to enforce the collection of a debt which may be due to a person who has, for the purpose of committing a fraud upon his debtor, made an alteration in any one of the evidences of such debt. If, however, the alteration is not shown to have been done fraudulently by the plaintiff, then the only effect is to deprive the plaintiff of the right of action upon the note or other evidence of debt which has been altered, but does not affect his right of action for the debt, if he can establish it by any other evidence. He cannot sue upon the altered note, because that is not the contract into which the defendant entered, but he still may sue for the

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debt and will be permitted \*to establish such debt by any other evidence than that afforded by the altered note, which it may be in his power to produce. These views, it seems to me, are fully supported by the authorities. *Masters v. Miller*, 4 T. R. 320; *Mills v. Starr*, 2 Bailey 359; *McCorkle v. Doby*, 1 Strobb. 396 [47 Am. Dec. 560].

As is said by Lord Kenyon, in *Masters v. Miller*, supra, "No man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected," so in *Mills v. Starr*, supra, *Johnson, J.*, in delivering the opinion of the court, after laying down the rule that



the alteration of a note by the party claiming under it, for the purpose of fraud, renders it void, uses this language: "To prevent fraud was the obvious policy of the rule which avoids a written contract on account of a fraudulent alteration in a material part, and a forfeiture of the benefit to be derived from it is the means used to enforce it. It is apparent that if the party guilty of the fraud may found a claim upon the original consideration, the rule itself would be defeated, and that he cannot is demonstrable from various considerations. \* \* \* The forfeiture of the benefit to be derived from the contract is a just retribution for the fraudulent intent." And in *McCorkle v. Doby*, supra, it is said: "A person is not at liberty to say, 'I have made two contracts, and if one of them is avoided for fraud I will set up the other.' Selway v. Fogg, 5 Mees. & W. 83; 9 Car. & P. 59; 1 Adolph. & E. 40."

It seems to me that any other rule would destroy the distinction between a fraudulent and an innocent alteration of a note. The latter destroys the right of action on the note, but does not impair the right of action on the original consideration for which such note was given (*Hunt v. Gray*, 35 N. J. 227; S. C., 10 Am. Rep. 232), and if the former did no more it would be placing the guilty in no worse position than the innocent. Upon the same principle, it seems to me that where a note secured by a mortgage has been fraudulently altered by the plaintiff, he not only loses his right of action on the note, but also on the mortgage. To apply the principle announced in *McCorkle v. Doby*, quoted above, he is not at liberty to say: "I have made two contracts to secure my debt; one evi-

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denced by \*a note and the other by a mortgage, and, although the contract evidenced by the note has been avoided by my own fraud, yet I will set up the other."

It seems to be supposed that this case is concluded by the decision in *Gillett v. Powell*, Speers Eq. 155, but I do not so understand that case. There are at least three distinctions between that case and the one now under consideration: First. There the mortgage was of personal property, and it is well settled that in such case the mortgagee becomes the legal owner of the mortgage property after condition broken, while here the mortgage is of real estate where that rule does not obtain. Second. In that case the mortgage did not in any way refer to the bond which had been altered, and, although I must confess that I have never been able to appreciate the force of this circumstance, as I suppose there can be no doubt that the bond and mortgage were given to secure the payment of the same debt, yet, as this seems to be one of the circumstances relied upon by the distinguished chancellor who delivered the

Circuit decree, it may be proper to mention it. Third. But the material distinction is that in *Gillett v. Powell* there was no evidence tending to show that the alteration was made with any fraudulent intent, while here the jury have found, and their finding is approved and concurred in by the Circuit judge, that the alteration was fraudulently made by the plaintiff.

Again, in *Gillett v. Powell*, the case of *Mills v. Starr*, upon which I, in large measure, base my conclusion, is distinctly recognized, and the court disavows any disposition to call it in question. This case, therefore, in my judgment, stands upon an entirely different footing from *Gillett v. Powell*, for, as we have seen, the fact that the alteration was fraudulently made by the plaintiff, is the fact upon which the principle I am contending for rests; and, as that fact did not appear in *Gillett v. Powell*, the decision in that case is in no way inconsistent with the view which I take of the case now under consideration.

So, too, the recent decision in *Nichols v. Briggs* rests upon a totally different foundation. In that case no element of fraud entered. It simply decided, and properly decided, that a plaintiff did not lose his right of

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action to foreclose a mortgage by \*reason of the fact that his right of action on the note given for the same debt was barred by the statute of limitations. It is well settled that the statute affects the remedy only, and does not extinguish the debt. That still remains, and if a creditor is so fortunate as to have his debt secured by a mortgage as well as by note, I can conceive of no reason why he should be deprived of his right of action upon the mortgage simply because his right of action on the note is barred. If a creditor holds two securities for the same debt, he may sue upon the one or the other as he pleases. If he sues upon the one on which his right of action is barred by the statute, of course the action cannot be maintained; but if he sued upon the other before the expiration of the statutory period which applies to it, he meets with no such obstacle and therefore may recover. But this matter has been so fully and satisfactorily discussed by Mr. Justice McGowan in *Nichols v. Briggs*, that it is needless for me to pursue the subject.

I am, therefore, unable to concur in so much of the opinion of the majority of this court as holds that the action may proceed for the foreclosure of the mortgage notwithstanding the fraudulent alteration by the plaintiff of the note given for the same debt which the mortgage was given to secure, and, on the contrary, think that the judgment of the Circuit Court should be affirmed.

Judgment modified.

## 19 S. C. 279

## LAIN v. SIMON.

(November Term, 1882.)

[1. *Action* ⇨2.]

Where a mortgagee assigned his chattel mortgage to a stranger after giving consent to a purchase of the chattel by another party, and a guaranty that the mortgage should never be used against the purchaser, who was afterwards compelled to pay a second time for such property, the purchaser has a just claim against the mortgagee for the damages to which he (the purchaser) has been subjected by reason of the assignment of the mortgage.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 10; Dec. Dig. ⇨2.]

[2. *Chattel Mortgages* ⇨208.]

Even if the purchaser could by legal proceedings have prevented a sale of the chattel under the mortgage, he nevertheless would be entitled to recover for the damages caused him by the fraudulent act of the mortgagee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 462; Dec. Dig. ⇨208.]

[3. *Chattel Mortgages* ⇨208.]

Under the plaintiff's action for damages for fraud, he might recover damages for the breach of defendant's guaranty, especially so, as the breach was caused by defendant's fraudulent transfer of his mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 462; Dec. Dig. ⇨208.]

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\*Before Hudson, J., Barnwell, March, 1882. The opinion fully states the case.

Mr. L. B. O'Bryan, for appellant.

Mr. J. J. Brown, contra.

April 20th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant, Nathan Simon, held a mortgage on a horse given to secure a note for \$75, payable October 1st, 1879. The mortgagor desiring to trade the horse to O. A. Lain, the plaintiff, for a mule, obtained authority from Simon to do so. The terms having been agreed upon, Lain went to Simon to obtain his consent, and Simon told him "that the mortgage should never be used against him." On October 29th, 1879, Simon, for valuable consideration, "assigned all his right, title and interest in the within mortgage to Mantoue & Co.", who, in December, 1879, seized the horse while in the possession of a third party, to whom it had been sold by Lain, and sold it under the mortgage, the plaintiff, Lain, knowing of the sale. Lain then "had to return the purchase-money" to the person to whom he had sold the horse, and from whom it had been taken under the mortgage, and on January 8th, 1880, commenced this action against Simon for damages for fraud."

The case was submitted to the Circuit judge for trial, without a jury, who, after finding the facts substantially as above stated, held that Simon was estopped from any use of the mortgage, and that the transfer to Man-

toue & Co., and subsequent sale of the horse by them under the mortgage, was a palpable fraud on the rights of the plaintiff, on the part of Simon, for which he is responsible. He, therefore, rendered judgment for the plaintiff for \$100, the value of the horse, and for the costs of the action.

From this judgment the defendant appeals upon the following grounds: "1. Because the action by the assignees, Mantoue & Co., could not have prejudiced any set-off or other defense of the plaintiff existing at the time of the assignment. 2. Because the plaintiff not having been prejudiced in any defense he had at the time of the assignment, has not

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been damaged or deprived of his \*rights by the said assignment to Mantoue & Co. 3. Because Simon having released his claim over the horse, the subsequent assignment to Mantoue & Co. carried only Simon's interest, which was nothing, and could not damage plaintiff. 4. Because plaintiff had a good and valid title to the horse, and not having objected to the sale of him under the said mortgage, he cannot now bring his action against the assignor, who is only responsible to the assignee for consideration of assignment. 5. Because the debt was unpaid, and there being no consent to discharge the same, the mortgagor had a right to assign the mortgage, and was not responsible for the action of Mantoue & Co., who only held the interest of assignor."

We do not see how there can be a doubt that Simon perpetrated a fraud in assigning the mortgage after giving plaintiff a guaranty that it should not be used against him, and thereby inducing the plaintiff to part with his property. And there is as little doubt that one of the results of that fraud was to cause a loss to the plaintiff of the value of the horse sold under the mortgage, which was thus fraudulently assigned; and it would seem to follow necessarily that the party injured had a just claim for damages against the party whose fraud caused the injury. The defense seems to be based upon the idea that, inasmuch as the plaintiff had it in his power to prevent the sale of the horse under the mortgage, and thereby avoid the injury thus done him, and having failed to exercise it, he cannot now complain of a result which he had the means of preventing. This is an attempt to apply the doctrine of contributory negligence to a case in which we do not think it applicable. That doctrine applies where the action is based upon the negligence of the defendant, and not where it is based upon his fraud.

There are many cases in which a person who has sustained an injury from the fraud or other misconduct of another, where he might have taken measures to prevent such injury, and yet his failure to do so would not deprive him of the right to recover damages



from the party whose fraud or other misconduct has caused the injury. It would scarcely do to say that a party who has been beaten lost his right to recover damages for such a trespass upon his person because it was

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made to appear that by a \*proper use of his physical powers, or by taking advantage of an opportunity to escape from his assailant, he might have entirely protected himself from such injury. So, too, if a person should be induced to buy property by the false representations of another as to its quality or title, it would hardly be a defense to an action for damages sustained by reason of such fraudulent misrepresentations to show that the party injured might, if he had used proper diligence, instead of relying upon such representations, have been able to ascertain that they were false and fraudulent, and thus have escaped the injury of which he complains. A party injured oftentimes has a choice of remedies—a right to make his own selection of the manner in which he shall seek redress for a wrong done to him, and when he does so the wrong-doer cannot say to him, "You have failed to make use of the most effective remedy which the law afforded you, and therefore you cannot avail yourself of the one which you have selected."

In this case, Mantoue & Co., by the assignment of the mortgage, acquired no higher right than Simon, their assignor, had; they may be regarded as standing in his shoes, and, in selling the horse under the mortgage, exerted only the power which Simon had conferred upon them. They were, so to speak, his agents, and their act was his. Now, if Simon had himself seized and sold the horse under the mortgage, in violation of his express assurance to Lain, "that the mortgage should never be used against him," there can be no doubt but that he would have been liable to Lain for any damages which he might thereby have sustained, even though Lain may have had the right to prevent the sale by instituting proper proceedings for that purpose. Lain would have had a choice of remedies, and it might be that to institute proper proceedings to enjoin the sale would involve more trouble and expense than he was willing to encounter, and that he preferred to fall back upon his action for damages, as he undoubtedly would have the right to do. If this be so, then, as Mantoue & Co. stood in the shoes of Simon and could only exercise such power as he had conferred upon them, their act was practically his act,

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and the same principle \*would apply as if the seizure and sale had been made directly by Simon.

There is another view of this case, which must be conclusive. Simon gave to Lain an express guaranty, not merely that he would not use the mortgage against him, but

"that the mortgage should never be used against him," and, upon the faith of such guaranty, Lain parted with his mule, and took in exchange therefor the horse, covered by the mortgage. At the time this guaranty was made, Simon had the means of making it good, as he then had the control of the mortgage, and, of course, no one could use it without his consent. But the mortgage was used by a third party, who was empowered to do so by the fraudulent act of Simon, and the use thus wrongfully made of the mortgage, in violation of Simon's express guaranty to Lain, has resulted in damage to Lain, and we are unable to see any reason why he cannot recover the amount of such damages. For, although the action is for damages for fraud, and is not based upon the breach of the guaranty, yet, under the liberal principles of the code, the plaintiff may, if necessary, fall back upon the violation of the guaranty, especially when such violation was caused by, and accompanied with, the fraudulent act of the defendant in transferring a mortgage which he knew at the time he had no right to transfer.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 19 S. C. 274

## SCRUGGS v. FOOT.

(November Term, 1882.)

[1. *Executors and Administrators* ⚡328.]

The Court of Probate has jurisdiction, on the petition of a creditor, as well as on the petition of the administrator, to order a sale of land in aid of assets.

[Ed. Note.—Cited in *Shaw v. Barksdale*, 25 S. C. 211; *Dyson v. Jones*, 65 S. C. 318, 43 S. E. 667; *Hand v. Kelly*, 86 S. E. 384.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1346; Dec. Dig. ⚡328.]

[2. *Executors and Administrators* ⚡335.]

An infant heir having conveyed to his mother his interest in the descended lands, and his deed being voidable at his election after attaining his majority, but not absolutely void, he was not a necessary party to a proceeding for the sale of such land in aid of assets.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1379–1384; Dec. Dig. ⚡335.]

[3. *Homestead* ⚡210.]

An original proceeding by a widow for homestead in the lands of her deceased husband, cannot be initiated in the Court of Common Pleas. *Ex parte Lewie*, 17 S. C. 153, affirmed.

[Ed. Note.—Cited in *Bridgers v. Howell*, 27 S. C. 431, 3 S. E. 790; *People's Bank v. Brice*, 47 S. C. 137, 24 S. E. 1038.

For other cases, see *Homestead*, Cent. Dig. § 391; Dec. Dig. ⚡210.]

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\*Before Pressley, J., Newberry, February, 1882.

Action by Jane Scruggs, and Richard M. Scruggs, by his guardian ad litem, against Michael Foot. The opinion states the case.

Mr. F. Werber, Jr., for appellant.

Messrs. W. H. Wallace, J. K. P. Goggans, contra.

April 21st, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Robert Scruggs, late of Newberry county, died in 1873, intestate, leaving as his heirs-at-law his widow, Jane Scruggs, and Elizabeth F. Fallow, Columbus C. Scruggs, Mary J. Summers, Sallie Scruggs and Richard Scruggs, his children, all of whom were of age, except Richard. In addition to a small personalty, he died seized and possessed of a small lot of land situate in the town of Helena, near Newberry C. H. William A. Fallow administered on his estate. The children, a short time after the death of their father, conveyed their interest in the aforesaid lot to their mother, so that she became the owner of the entire tract, including the interest of Richard, until his deed is avoided on account of infancy.

In 1878, one Nellie Jones, holding a debt against the estate, commenced action in the Probate Court in her own behalf, and in behalf of other creditors of Robert Scruggs, deceased, against Fallow, the administrator, and the heirs-at-law, alleging the insufficiency of personal assets, and praying that the land be sold in aid thereof to pay debts. The defendants were all served with summons, but it seems that no guardian ad litem was appointed for Richard, the minor. This fact is admitted as one of the facts of the case. No answer having been put in, and it appearing that the personal assets were insufficient, the Probate judge ordered the land to be sold, the proceeds to be applied to the payment of the claim of Nellie Jones, the sole creditor, to wit: \$138.70, and to the costs, amounting to \$110.05, the balance to await the further order of the court. At the sale the defendant became the purchaser. This

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sale was in December, 1878, and the defendant, appellant, has been in possession ever since.

The present action was commenced in January, 1881, by Jane Scruggs, and Richard, through his guardian ad litem, James K. P. Goggans, Esq., alleging the above facts and praying judgment that a homestead be assigned to plaintiffs; that the proceedings in the Probate Court be set aside, and the sale thereunder annulled; that the defendant be adjudged to account for rents and profits, and for costs and disbursements, &c. The case was referred to the master, Silas Johnstone, Esq., who reported the testimony. Upon the hearing of this report in February, 1882, Judge Pressley adjudged and decreed that the deed of conveyance to the defendant (appellant), under the Probate Court sale, be set aside, on the ground that said court

was without jurisdiction, and further, that the plaintiffs have homestead, and that commissioners be appointed and directed to set apart such homestead to said plaintiffs. From this decree the defendant has appealed.

There are two questions presented in the appeal: First. Did the Probate Court have jurisdiction in the proceeding ordered by Judge Pressley to be vacated? Second. If not, can the decree below ordering homestead be sustained?

In *McNamee v. Waterbury*, 4 S. C. 156, this court sustained a judgment of the Probate Court ordering real estate to be sold to aid personalty in the payment of debts, obtained upon the application of the administrator of the intestate. This settles the abstract question as to the jurisdiction of the Probate Court to order the sale of realty to aid personalty in payment of debts, but it does not determine in terms whether this jurisdiction can be invoked by creditors as well as the administrator. In that case, as has been stated, the administrator of the debtor instituted the proceeding, and it was upheld. If the administrator in this case had been the actor, then the two cases would have been precisely parallel, and *McNamee v. Waterbury* being exactly in point both as to its facts and the legal principle involved, nothing more would be necessary except simply to cite that case.

In the present case, however, a creditor, not the administrator, instituted the proceeding. Can this make any difference as to

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\*the jurisdiction of the Probate Court over the subject-matter? Does that jurisdiction depend upon the mode in which this subject is brought before the court, or does it depend upon the subject itself? In the opinion in *McNamee v. Waterbury*, the court based the jurisdiction upon that clause of the constitution which confers jurisdiction upon the Probate Court in "matters of administration," (article IV., section 20,) and it held under 2 Stat. 570, if the exigency of the estate required it, the lands of a decedent might be regarded as assets for the payment of his debts, in cases of insufficiency of personal property, to be enforced through sale by order of the Probate Court; the fact upon which the jurisdiction depends being the insufficiency of the personal assets and the necessity of using the realty in the administration arising from such insufficiency.

Now it is well understood that lands in the hands of the heir may be reached by creditors of the ancestor by action directly against the heir; or rather judgment may be obtained against the heir to the extent of lands descended or devised, and in this way the lands of a decedent may be substantially made liable for his debts without any direct action on the part of the administrator. If



this can be done by a creditor in the Circuit Court without the co-operation of the administrator, where can be the objection in permitting him to do the same thing in the Probate Court, when it is admitted that the constitution has invested that court with jurisdiction necessary to meet just such an exigency, when it is invoked by the administrator upon facts established by him, to wit: the insufficiency of the personal estate, and the necessity for the application of the realty. Of course in such a proceeding both the heir and the administrator should be made parties, and the heir should have all the right of defense which he would have in an ordinary action against him to subject lands descended to the payment of the debts of an ancestor, including the right to require that the debt shall be established by such tribunal as its character may demand.

To hold that, under the section of the constitution referred to, the Probate Court only has jurisdiction in such cases when the administrator chooses to invoke it, would, it seems to us, be a very narrow construction. It would be placing a provision of the con-

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stitution, intended for the benefit of creditors, quite beyond their reach, making them entirely dependent upon the administrator, (who, perhaps, might be hostile to their interests), whether or not they could ever avail themselves of it. The other construction would be more liberal, would prevent circuity of action, and would more certainly meet the end and purpose of the constitution in conferring such jurisdiction upon the Probate Court "in matters of administration," and, when accompanied with the right of the heir to be made a party, privileged to make all the defenses which he could, if sued directly on account of lands descended or devised, would in no way be hurtful to him.

We think the principle of *McNamee v. Waterbury* goes to the extent of sustaining the judgment of the Probate Court herein as to the parties legally before that court. Now, who was before the court? It is admitted that all the heirs were legally summoned, but it is also admitted that Richard was a minor, and that no guardian ad litem was appointed for him. As to the adults, even if they were necessary parties, having been summoned and failing to appear and answer, they would be bound by the judgment; but, under our view of the case, they were not necessary parties. It appears that before the commencement of the proceeding by Nellie Jones, they had conveyed their interest in the land to their mother, and at that time they had no legal interest whatever in the litigation. This applies, too, to Richard. True, his deed to his mother was executed while he was a minor, but this fact did not render the deed absolutely void; it only made it voidable, and, until avoided,

the title of his mother was good. So that neither the adults nor Richard were necessary parties to the proceeding before the Probate Court. The objection, then, to the want of parties, cannot avail. Mrs. Scruggs, being the sole owner of the land, was the only party legally interested, and, she having been made a party, the court had complete jurisdiction.

Our conclusion, therefore, is, that the judgment of the Probate Court should have been conclusive on the plaintiff. It was certainly so as to her interest as an heir-at-law of her deceased husband, which was one-third. In regard to the interest derived from her children, had the question as to the

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liability of so much of the \*land as had been bona fide aliened before suit brought been made before the Probate Court, upon proof of conveyance by the heirs-at-law to Mrs. Scruggs before action by Nellie Jones, doubtless a different judgment would have been rendered in that court as to the land thus conveyed by the heirs-at-law. But Mrs. Scruggs failed to answer, and the fact of such alienation, with its legal consequences, was not made or claimed before the Probate Court, and, no appeal having been taken from its judgment, it is *res adjudicata* as to all defenses made, or which could have been made thereto.

As to the homestead: This court held in *Ex parte Lewie*, 17 S. C. 153, that the Circuit Court had no original jurisdiction in the matter of homestead. At the time the petition was filed in that case the power to set off homestead to widows and children belonged, under the acts upon that subject, to the Probate Court, and Mrs. Lewie, having filed her petition in the Circuit Court, under the principle laid down in *Howze v. Howze*, 2 S. C. 232, to wit: "That where rights are created by statute, to be obtained and protected in a special manner, specified in the act and by a special tribunal, no other court can assume jurisdiction," this court, in effect, dismissed the petition.

Since the petition in *Ex parte Lewie* a subsequent act has been passed, substituting the masters, and in such counties where no masters have been appointed, the clerk of the court in the place of the Probate Court, in such matters. Gen. Stat. 1882, § 2002. But there is no provision in this act authorizing the initiation of an original proceeding for homestead in the Circuit Court.

The question of the right of the plaintiff to the homestead claimed, notwithstanding the sale of the land under the decree of the Probate Court, is not before us, and, therefore, no opinion is expressed in reference thereto. We desire to be understood as holding, simply, that the mode adopted here to have the homestead set off was not the legal mode, as prescribed by the statute, leaving

the parties to pursue such course hereafter as they may be advised.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

# 19 S. C. \*280

## \*STATE v. MINTON.

(November Term, 1882.)

[Bail  $\hookrightarrow$  75.]

The defendant having failed to appear and plead to an indictment for misdemeanor, his recognizance may then be estreated, before trial, sentence and issue of bench warrant. Mr. Justice McIver dissenting.

[Ed. Note.—Cited in *State v. Rabens*, 79 S. C. 546, 60 S. E. 442, 1110; *State v. Williams*, 84 S. C. 28, 65 S. E. 982; *State v. Edens*, 88 S. C. 307, 70 S. E. 609; *Ex parte Massee*, 95 S. C. 328, 79 S. E. 97, 46 L. R. A. (N. S.) 781.

For other cases, see *Bail*, Cent. Dig. § 320; Dec. Dig.  $\hookrightarrow$  75.]

Before Fraser, J., Charleston, February, 1882.

The report of the presiding judge was as follows:

This case was heard by me at the term of the Court of Sessions for Charleston county in February, 1882, and by consent of counsel the decision was reserved, to be rendered after the adjournment of the court. Ben Tomkins was arrested on a warrant duly issued, charged with larceny of live stock, under the value of \$20, and conceded by the State to be a charge of misdemeanor and not felony. He was released on the usual recognizance, and Warren Minton, the respondent, was surety for his appearance to answer. It was admitted that Ben Tomkins was duly called and failed to answer when the case was called for trial. The rule in this case was issued and duly served on Warren Minton, requiring him to show cause why the recognizance should not be estreated and adjudged forfeited, and execution issued for the penalty of the same—the sum of \$200. The respondent shows, for cause, that there has been no bench warrant issued for the arrest of Ben Tomkins, for sentence, and no return of non est inventus on the same by the sheriff or other proper officer.

The only question in the case submitted to me is, whether the liability of the surety on the recognizance has been fixed by the failure to appear and answer when called, or whether it is necessary to issue a bench warrant and have a return of non est inventus before the surety becomes liable. In cases of felony there is no doubt that the liability is fixed by the failure to appear and answer when called, because there can be no trial without the presence of the accused, at least in those cases where an arraignment is necessary. In cases of misdemeanor I think

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that the rule is the same, \*with this modification: "If the accused once appears and pleads, it is not necessary to be present de die in diem until the case is disposed of, but he may absent himself, and his surety will be discharged if he should be arrested on a bench warrant or is delivered up by his surety to receive sentence." This view, I think, is in accord with the doctrine as laid down by Hawkins; the book not being accessible I cannot give the page. In *State v. Rowe*, 8 Rich. 21, we find the following language: "In misdemeanors the defendant's obligation compels his appearance on the first day of the term and de die in diem until he has been discharged or has pleaded." It is also here said "that after he has pleaded that it is sufficient if he is present to receive sentence."

The absence of defendants and witnesses, when called in the Court of Sessions, has become a very great evil, and some means must be found to check it. If I had any doubt on a subject like this, it is my duty to put it in a position to be passed on by a tribunal which alone can settle the law in this State. It is therefore ordered and adjudged that the rule in this case be made absolute, and that the said recognizance be estreated, and is hereby adjudged forfeited, and that judgment be entered and execution be issued for the sum of \$200, the penalty thereof, and costs, against Warren Minton, the respondent.

In the brief appears the statement, agreed to by counsel, "that the name of the appellant's attorney, S. J. Lee, appears as counsel for the defendant, Ben Tomkins, on the judge's docket."

Respondent appealed upon the following ground:

"Because the defendant, Ben Tomkins, being under recognizance to answer to an indictment for a misdemeanor, there was no legal impediment to his being tried, and his recognizance cannot be forfeited until he has been tried, convicted, and fails to appear for sentence of the court; and his Honor erred in not so holding."

Mr. S. J. Lee, for appellant.

Mr. Solicitor Jervey, contra.

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\*April 21st, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. [Omitting the statement.] It is conceded that in misdemeanors, unlike felonies, the defendant may be tried in some cases in his absence, and as the object of the recognizance is to secure his presence so as to receive sentence, it has been unusual, if not unknown in this State before this case, for the bond to be adjudged forfeited till after conviction and failure to



appear for sentence evidenced by bench warrant and a return of non est inventus. The question, however, is not what has been the custom and practice, but what is the law on the subject. We have been unable to find any case in our own reports bearing directly on this point. In the case of *State v. Rowe*, 8 Rich. 21, Judge Glover, in delivering the opinion of the court, said: "In misdemeanors, the defendant's obligation compels appearance on the first day of the term, and de die in diem until he has been discharged or until he has pleaded. After he has pleaded he appears by his attorney, and his recognizance will not be estreated, although he should fail to appear at each succeeding term, provided, that after conviction he be present to receive the sentence."

But that question was not directly involved in the case then before the court, as that was a case of felony. These remarks, therefore, though falling from the lips of a learned judge, can not be recognized as controlling authority, as they were merely obiter. Nor have we been able to find any decisions in our sister States, except in the State of Kentucky. In that State, in a recent case referred to in 2 Crim. L. Mag. 411, the case of *Walker v. Commonwealth*, 2 Ken. Law Rep., March, 1881, p. 197, the precise question was made and adjudged, the court holding that trial and conviction was not necessary in order to forfeit bail in a misdemeanor, and that the liability of the surety was fixed when the defendant failed to appear. As the volume of the Kentucky Reports in which this case is found is not in the library, we have not had opportunity of reading it in full, and of ascertaining the grounds upon which the decision rests; whether upon statute regulations, the terms of the recognizance or otherwise; but as reported in the maga-

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zine referred to, it is \*full and direct to the point, and in accordance with the remarks of Judge Glover above.

The condition of the recognizance is stated to be the same in misdemeanor as in felony, it being that the accused "shall personally appear \* \* \* to answer to a bill of indictment to be preferred against him, and to do and receive what shall be enjoined by the court, and not to depart without leave." This according to its literal terms, would seem to require personal appearance both to answer (that is, to plead,) and to receive what shall be enjoined by the court, the sentence. We think that it is a sufficient indulgence to a defendant in misdemeanor that he should not be required to remain in court de die in diem after appearing and pleading, but his recognizance demands that he shall do that much in the first instance, and we can see no good reason why the court should relax his obligation and make a new contract for him. Besides, the weight of authority is against such ruling.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN. I concur. A copy of the recognizance is not before us, but it is taken as a matter of course that its tenor was in express terms that the accused would "personally appear" and answer the offense charged at the next ensuing term of the Court of General Sessions. That was his express obligation, which was broken by his non-appearance. In regard to misdemeanors which may be tried without the presence of the accused, it may, as a rule, be unnecessary to enforce the appearance of the accused until after conviction. Upon this view probably has grown up the practice said to exist, not to ask that the recognizance should be declared forfeited until after conviction. I do not see that any particular harm can come from such practice, which may be generally the most convenient, especially as the party accused may not be convicted. But when the Circuit judge, for reason satisfactory to himself, has thought it proper to estreat the recognizance for default before trial, I am unable to affirm that such order is error of law.

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\*Mr. Justice McIVER dissenting. [Omitting the statement.] I am unable to perceive any sufficient reason for departing from what I have always understood to be the universal practice in this State, in regard to estreating recognizances of defendants charged with misdemeanors only. According to that practice the recognizance was never estreated until the defendant had been convicted and had failed to appear to receive sentence, for the reason that until that time there was no occasion for his personal appearance. When the court had once obtained jurisdiction of the person of the defendant by his arrest, the trial could proceed in his absence, and there was no reason why his personal presence should be required. If he chose to absent himself at the trial, that was his own affair; and if he sustained any injury by such absence, he alone was responsible for it. It was not even necessary that he should appear in person and plead to the indictment, for in misdemeanors the defendant could appear and plead by attorney. As is said in 1 Chit. Crim. Law 411: "Although we have seen that no one can be convicted of a felony in his absence, and at the assizes and sessions the defendant must appear in person before plea, it is otherwise in the King's Bench in the case of misdemeanors, for the defendant may in that court, when the crime is inferior to felony, appear by attorney." To same effect see 1 Bac. Abr., tit. Attorney, B., and 1 Com. Dig., tit. Attorney, B. 5, p. 623.

In this case it appears from the agreed statement of facts, that Tomkins had appeared by attorney, for it is admitted that the name of appellant's attorney appears on the docket as counsel for said Tomkins. It

seems to me, therefore, that there was no sufficient ground for estreating the recognizance in this case, and that the Circuit judge erred in ruling otherwise, and that he should have held that the recognizance was not liable to be estreated until Tomkins had been tried and convicted and failed to appear when called for sentence.

The argument drawn from the phraseology of the condition of the recognizance seems to me to be without support. There is nothing in the "Case," as presented here, which shows what was the language used in the condition of the recognizance, and I am not aware of any statute prescribing the form of such

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\*instruments, from which it could be inferred that any particular form was used in this case. If we are to take the form of the instrument from usage, then it seems to me that we should adhere to the construction which usage has given to such form, as exhibited in the universal practice hereinbefore alluded to. But, even supposing that it be conceded, as stated in the argument of the solicitor, that the form of the recognizance in misdemeanors is the same as in felony, requiring that the accused "personally appear \* \* \* to answer to a bill of indictment to be preferred against him, and to do and receive what shall be enjoined by the court, and not depart without leave," I do not see how that helps the argument. It is conceded that, though the form of the recognizance is the same in felony and in misdemeanor, yet the rule is different as to the obligations imposed in the two classes of cases, and this is sufficient to show that the form is not controlling.

The argument is that, according to what is claimed to be the form of this recognizance, the defendant is not only required "to do and receive what shall be enjoined by the court," but that he is also required to "personally appear \* \* \* to answer to a bill of indictment;" and, therefore, a failure to do either one of these two things operates a forfeiture of the recognizance. It will be observed, however, that there is a third requirement in the language used, to wit: "and not depart without leave;" and yet no one has ever contended that a failure to observe this third requirement would operate as a forfeiture of the recognizance. Indeed, it seems to me plain that the language relied upon affords only one of the numerous instances of that verbosity and tautology so frequently found in old acts of parliament and statutes and legal instruments, as to furnish no little foundation for the reproaches, not to say ridicule of laymen; and all that it really means is that the accused shall not put himself beyond the reach of the court when he is needed. At all events, this is the construction which has always been given, and I am quite satisfied to adhere to it.

I have not been able to obtain access to the case from Kentucky, relied upon by the solicitor, and, therefore, do not know whether it is in point or whether it rests upon

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some statutory \*provision or practice adopted in that State. But, even if it is directly in point, though entitled to great respect, it is not authority here; at least not sufficient to warrant the reversal of a practice which has long, if not always, been followed in this State, and which, so far as my experience and observation goes, has worked very well.

For these reasons I cannot concur in the conclusions reached by a majority of the court.

Judgment affirmed.

19 S. C. 286

DeWALT v. KINARD.

(November Term, 1882.)

[1. *Jury* ⇨25.]

Action was brought for recovery of real property and for injunction, and the answer denied the plaintiff's title. Motion was then made by plaintiff, on the pleadings alone, for the payment of rent into court, the leasing of the land pending litigation, and for a reference to the master to take the testimony, and the motion was granted. *Held*, that the issue of title was a legal demand, triable by jury, and defendant's failure to demand such a trial was not a waiver of this right.

[*Ed. Note.*—Cited in *Capell v. Moses*, 36 S. C. 561, 15 S. E. 711; *Heyward v. Farmers' Min. Co.*, 42 S. C. 145, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; *McCreery Land & Investment Co. v. Myers*, 70 S. C. 285, 49 S. E. 848.

For other cases, see *Jury*, Cent. Dig. § 155; Dec. Dig. ⇨25.]

[2. *Receivers* ⇨36.]

A claim of title in the complaint, together with an allegation of defendant's insolvency and of danger of loss of rents—all of which are denied in the answer—do not make a case warranting the appointment of a receiver.

[*Ed. Note.*—For other cases, see *Receivers*, Cent. Dig. § 61; Dec. Dig. ⇨36.]

Mr. Justice McGowan dissenting.

[3. *Appeal and Error* ⇨1010.]

A conclusion of fact, drawn by the Circuit judge from the allegations of the complaint and answer, reversed, because without any evidence to support it, or, at least, opposed to its manifest weight.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. § 3979; Dec. Dig. ⇨1010.]

[4. *Receivers* ⇨42, 51.]

It is not necessary that a plaintiff should give bond to entitle him to the appointment of a receiver for the collection of rents pending litigation; and the master of the court being appointed such receiver, no special bond need be required of him.

[*Ed. Note.*—For other cases, see *Receivers*, Cent. Dig. §§ 68, 87; Dec. Dig. ⇨42, 51.]



[5. *Motions* ⇨53.]

On a motion preliminary to the hearing on the merits, it is error to grant relief beyond the terms of the notice.

[Ed. Note.—Cited in *Bollman v. Wamer*, 38 S. C. 469, 17 S. E. 223; *Goodlett v. Goodlett*, 88 S. C. 462, 70 S. E. 439.

For other cases, see *Motions*, Cent. Dig. § 52; Dec. Dig. ⇨53.]

[6. *Receivers* ⇨7.]

Upon the equitable issues raised in the case, testimony could be taken by the master, even without the consent of the other side; but the legal issues cannot be referred without consent of all parties.

[Ed. Note.—Cited in *St. Philip's Church v. Zion Presbyterian Church*, 23 S. C. 297, 313; *Boulard v. Carpin*, 27 S. C. 238, 3 S. E. 219; *Wilson v. Township of York*, 43 S. C. 302, 21 S. E. 82.

For other cases, see *Receivers*, Cent. Dig. § 13; Dec. Dig. ⇨7.]

[7. *Appeal and Error* ⇨274.]

Any errors apparent in the Circuit order may be made the grounds of appeal. This case distinguished from *Kaminer v. Hope*, 18 S. C. 561.

[Ed. Note.—Cited in *Pelzer, Rodgers & Co. v. Hughes*, 27 S. C. 416, 3 S. E. 781.

For other cases, see *Appeal and Error*, Cent. Dig. § 1639; Dec. Dig. ⇨274.]

[8. *Deeds* ⇨31.]

[Cited in *Ramage v. Ramage*, 27 S. C. 42, 2 S. E. 834; *Johnson v. Johnson*, 27 S. C. 316, 3 S. E. 606, 13 Am. St. Rep. 636; *Dendy v. Waite*, 36 S. C. 574, 15 S. E. 712; *Sullivan v. Susong*, 40 S. C. 163, 18 S. E. 268; *Givins v. Carroll*, 40 S. C. 416, 18 S. E. 1030, 42 Am. St. Rep. 889; *Williams v. Washington*, 40 S. C. 461, 19 S. E. 1, to the point that, a deed not made in the name of the owner will not operate as a conveyance.]

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 60-63; Dec. Dig. ⇨31.]

[9. *Deeds* ⇨31.]

[Cited in *Peiper v. Shahid*, 85 S. E. 905, to the point that in making a deed under power of attorney it must be made in the name of the principal, and not in the name of the attorney.]

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 60-63; Dec. Dig. ⇨31.]

[This case is also cited in *Connor v. Edwards*, 36 S. C. 567, 15 S. E. 706, without specific application.]

Before Kershaw, J., Newberry, November, 1880.

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\*Action by George DeWalt, commenced in September, 1880. The opinion states the case.

Messrs. Suber & Caldwell, for appellant.

Messrs. Moorman & Simkins, J. Y. Culbreath, contra.

April 21st, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff in his complaint alleges that the defendant Andrew Kinard executed a note to him for \$650, which note was secured by a mortgage of a tract of land, described in the complaint, bearing date March 8th, 1876, containing a power of sale; that default being made in

the payment of the note, the defendant Andrew Kinard went out of possession of the land, and that thereby the title became vested in the plaintiff; that under the said power of sale the plaintiff, on January 5th, 1880, exposed the land for sale at public outcry, with the knowledge and consent of Andrew Kinard, and the same was bid off by O. B. Mayer, Jr.; that a deed was accordingly made to said Mayer, who, on the same day, executed a deed for said land to the plaintiff; that the defendant George A. Kinard, and the defendants Cannon and Ruff, who claim to be his tenants, are in unlawful possession of said land, and have refused upon demand to surrender possession to the plaintiff; that the defendant Cannon has agreed to pay defendant George A. Kinard three bales of cotton as rent for the land for the year 1880; that both George A. Kinard and Cannon are insolvent, and that there is danger that the rents will be lost unless some provision is made to prevent such a result. Wherefore, the plaintiff demands judgment: 1st. For the recovery of possession of said land. 2d. Declaring the rents to be the property of plaintiff, and restraining defendant Cannon from paying same to defendant George A. Kinard. 3d. For costs and disbursements. 4th. For other and further relief.

Before any answer was filed, an order was obtained by the plaintiff restraining and enjoining defendant Cannon from paying the rent to George A. Kinard, and restraining said George A. Kinard from receiving or in any wise interfering with the rents until the further order of the court.

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\*After this order was granted, the defendant George A. Kinard filed his answer, in which he admits the execution of the note and mortgage, referred to in the complaint, by Andrew Kinard, but alleges that the real intention of Andrew Kinard was to mortgage only his interest in the land, which was one undivided half; that at the time the mortgage was executed, Andrew Kinard held the legal title to said land; that default was made in the payment of said note, but he denies that subsequent to such default the said Andrew Kinard went out of possession of said land, and, on the contrary, avers that he remained in possession by himself or by his tenants; that the land was offered for sale by plaintiff, under the power contained in the mortgage, and bid off by O. B. Mayer, Jr.; that Andrew Kinard had consented to said sale; that plaintiff executed a deed for the land to said Mayer, but he denies that Mayer was a bona fide purchaser of said land, and, on the contrary, avers that he bid it off at the instance and for the benefit of plaintiff; that said Mayer did on the same day execute a deed to plaintiff for said land, but he denies that the title passed

thereby; that Cannon and Ruff are his tenants in possession of said land; that he refused to surrender possession, upon the demand of plaintiff, of more than one-half of said land; that Cannon has agreed to pay him three bales of cotton, as rent for the year 1880, and that he denies that he is insolvent. As an affirmative defense, he alleges that he was entitled to a one-half interest in said land, under an instrument in writing executed by Andrew Kinard on December 28th, 1865, long before the execution of the mortgage, a copy of which instrument was filed as an exhibit to the answer, and set out in the "Case"; that plaintiff was aware that defendant George A. Kinard had this interest before he took the mortgage from Andrew Kinard; that to carry out the purpose of this instrument, the said Andrew Kinard, on December 18th, 1877, executed a deed to defendant George A. Kinard, for one undivided half of said land; that after plaintiff had obtained his mortgage from Andrew Kinard, he undertook, as the attorney of defendant George A. Kinard, to procure from Andrew Kinard payment for the interest of the said George A. Kinard in the land, and in violation of his

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instructions, and \*imposing upon the said George A. Kinard while under the influence of liquor, he took from Andrew Kinard a mortgage junior to his own, well knowing at the time that the same would be worthless, as the said Andrew Kinard was hopelessly insolvent; and that upon discovering these facts, defendant George A. Kinard procured from said Andrew Kinard the deed of December 18th, 1877, for one undivided half of the land; that plaintiff, by the betrayal of the confidence of defendant George A. Kinard, has seriously damaged said defendant. Wherefore, he demands judgment: 1st. For a partition of said land; 2d. That he is entitled to the rent, the payment of which has been enjoined; 3d. For damages; 4th. For costs and disbursements.

To this answer the plaintiff replied, "reiterating many of the allegations of his complaint, and denying all the charges of the answer." The defendant Andrew Kinard did not answer, and the answer of defendants Cannon and Ruff state nothing material to this appeal.

The case was docketed by the plaintiff on calendar No. 2, and, before it came on for trial, he served notice on the defendants that he would move for an order, 1st. Requiring the rent for the year 1880 to be paid into court to await its order; 2d. Requiring the land to be leased by the master for the year 1881 to the highest bidder, and this rent, when due, to be paid into court, subject to its further orders; 3d. That it be referred to the master to take the testimony in the case and report the same to the court. This motion was heard by the Circuit judge

upon the pleadings alone, no affidavits or oral evidence having been submitted, and he held that the admissions of the answer were "sufficient to establish plaintiff's title prima facie and only qualify their effect by allegations of fraud without proof," and that the allegation of the insolvency of George A. Kinard, though denied by him, is shown to be prima facie true by the terms of the paper set up as an exhibit to the answer of George A. Kinard, and that, therefore, irreparable injury would ensue unless some order is made to preserve the rents during the pendency of the suit. Accordingly, he ordered: 1st. That the rent, from January 1st, 1880,

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be paid to the master; 2d. That \*the master let the premises from year to year, until the final determination of this action or the further order of the court; 3d. That all obligations held by the defendant, George A. Kinard, or his agents, for the rent of said premises for the year 1880, be delivered up to the master; 4th. That the master hold all money and securities which may come into his hands under this order, subject to the further order of the court; 5th. That it be referred to the master to take testimony upon the issues of fact made by the pleadings herein, and report the same to the court.

From this order defendant George A. Kinard appeals upon the following grounds, to wit: "1st. Because there was not before his Honor evidence sufficient to show that the said George A. Kinard is not entitled to retain the use and control of the lands involved in this action: 2d. Because there was not before his Honor any affidavits or oral testimony to show the necessity of the intervention of the court pending the action to secure the rights of the plaintiff: 3d. Because the issues in the case, it being an action for the recovery of specific real property, are properly triable before a jury, which trial has not been waived, and, therefore, the testimony could not be compelled to be taken before a referee; 4th. Because this is not a case in which the court is authorized to appoint a receiver of any character; 5th. Because his Honor's order does not require of George G. DeWalt any bond or other indemnification of the appellant for expenses or losses that may befall him in consequence of the order; 6th. Because his Honor, in ordering the land to be rented out by the master for the year 1882 and thereafter, ordered what the plaintiff never applied for or gave notice of."

For a proper understanding of the questions raised by this appeal, it will be necessary to determine the nature and objects of the action and the nature of the defenses pleaded thereto. It was undoubtedly an action of a two-fold character, legal and equitable, and the defenses were of the same character. The main purpose was to recover possession of real property upon the



allegation that plaintiff had title thereto, and unless this allegation was admitted an issue was presented which the defendant had the right to have tried by a jury, unless he waived that right, and there is no evidence

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of any such waiver. There was \*no necessity for the defendant to make a formal demand for that mode of trial, for, if the issue was triable in that way, he had the right to assume that the court would, without such demand, accord to him a right expressly guaranteed to him by statute. Lynch's Code, § 276. But even if a formal demand was necessary, inasmuch as the case had never been called for trial, the time for making such demand had not arrived. So that we see no force in the argument urged by respondent that the appellant, by failing to demand a trial by jury, had waived his right to such a mode of trial.

The Circuit judge seems to have assumed that the defendant admitted the plaintiff's title, but we do not so understand the pleadings, and it must be remembered that the motion was heard upon the pleadings alone, no evidence whatever having been submitted. Hence no facts should have been assumed except such as were alleged in the complaint and admitted in the answer. Now the plaintiff alleged that he had title to the premises in question and went on to state particularly how he derived his title; but the defendant in his answer, while admitting certain facts set out in the complaint, distinctly denied that plaintiff had title, and thus an issue was presented properly triable by a jury. The plaintiff seems to have rested his claim of title upon two grounds: First. Upon the allegation that his mortgagor having gone out of possession of the mortgaged premises, the title thereby vested in him as mortgagee under the proviso to the second section of the act of 1791; but the essential fact upon which such a claim must rest, to wit, that the mortgagor had gone out of possession, was distinctly denied in the answer, and therefore it is quite clear that it could not be said that the plaintiff had established even *prima facie* that source of title. Second. The plaintiff rested his claim of title upon the ~~sae~~ same under the power contained in the mortgage.

Now while it is true that the defendant admitted the allegations that the land was offered for sale under that power and bid off by Mayer; that plaintiff executed a deed to Mayer, and that on the same day Mayer executed a deed to plaintiff, he distinctly denied that plaintiff thereby acquired title, because he says that the sale to Mayer was merely

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sham and pretensive, and \*thus an issue was presented as to whether the plaintiff had established his title through the second source from which he claimed to derive title, which issue was properly triable by a jury. For it

is well settled that even though a defendant might admit the execution of a deed relied upon by the plaintiff as one of the links in his chain of title, such admission did not preclude him from showing in a court of law, when the jurisdictions were distinct and separate and exercised by different tribunals, that title did not pass thereby because of fraud or some other sufficient reason; courts of law having had concurrent jurisdiction with courts of equity in some cases of fraud.

Again, it will be observed that, after stating that the land was offered for sale under the power contained in the mortgage and bid off by Mayer, the plaintiff alleges that "he executed and delivered to the said O. B. Mayer, Jr., his deed in fee-simple of said land, a copy of which deed is herewith exhibited," and this allegation is admitted in the answer in this form, that the "said George G. DeWalt executed his deed to said land to the said O. B. Mayer, Jr., and that said deed is correctly exhibited with the complaint." Now if this allegation be taken as strictly true in the form in which it is made, it is very clear that no title passed to Mayer; and, if so, none from Mayer to the plaintiff; for it is well settled that in making a deed under a power of attorney, it must be in the name of the principal and not in the name of the attorney, (*Webster v. Brown and Hammett*, 2 S. C. 428,) and, therefore, in order to pass the title of the mortgagor, Andrew Kinard, it must be done by his deed through his attorney, and not by the deed of George G. DeWalt. If the plaintiff made "his deed," as he alleges, and not the deed of Andrew Kinard by George G. DeWalt as his attorney in fact, no title passed thereby to Mayer, and of course Mayer could convey none to the plaintiff. We are not, however, disposed to rest the case upon this point, as there is no copy of the deed before us, for although exhibited with the complaint it is not embraced in the "Case," and it may be that if we had the deed before us, we would find that the language used in the pleadings was a loose and inaccurate statement of the form of the deed.

It seems to us, therefore, that whether the

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plaintiff relied \*upon the one source of title or the other, an issue was presented which the defendant had a right to have tried by a jury.

It is true that the complaint, besides demanding judgment for the recovery of the possession of the land, which was strictly legal relief, also demanded relief of an equitable character, by injunction, but there was no prayer for the appointment of a receiver, which was in effect done by requiring the rents then due to be paid to the master, and directing that officer to take possession of the land and lease it from year to year during the pendency of the litigation; and, of course, any issues arising on this branch of

the case could be either tried by the court or referred to the master. The absence of any prayer for the appointment of a receiver would not prevent the court from granting that mode of relief, provided the case made properly warranted the granting of such relief. But we do not think that such a case was made by the pleadings, and the motion was heard only on the pleadings. The case made was that of a plaintiff, under claim of title, seeking to recover real property alleged to be in the possession of another, by himself and by his tenants, with an allegation that defendant was insolvent, and "that there is danger that the said rental will be lost to the plaintiff unless the same is protected by this honorable court until the judgment herein be rendered," while the defendant denies that title is in the plaintiff, denies that he is insolvent, and denies that there is any danger of loss of the rents. This certainly does not make a case warranting the appointment of a receiver, depriving the defendant of the possession of the land and impounding the rents.

A person in possession of real property is presumed to have title until the contrary appears, and we do not see by what authority he can be deprived of such possession until the question of title has been tried, even though it should be made to appear, *prima facie*, that he was insolvent. But we cannot agree that the pleadings made any such *prima facie* showing. As we have said, the allegation of insolvency was distinctly denied, and the inference drawn by the Circuit judge from the contents of paper filed as Exhibit A. to the answer of George A. Kinard, that said Kinard was insolvent at the date of that paper—fifteen years before—was not sufficient, in our judgment, to

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rebut the \*positive denial of the answer, especially when the inference drawn from the paper, that George A. Kinard was insolvent because he was then burdened with obligations which rendered it unsafe for him to hold property in his own name, was met by the fact that on December 18th, 1877, he did take title in his own name for an undivided half of this land. For, although George A. Kinard may have been insolvent in 1865, just at the close of a disastrous war, it by no means followed that he was in the same condition fifteen years afterwards, especially when he swears he was not insolvent, and when it appears that the fact upon which the inference of insolvency in 1865 was based, to wit: his inability to hold property in his own name, had ceased to exist nearly three years before this action was commenced. We think, therefore, that the conclusion of the Circuit judge, that the insolvency of George A. Kinard was made to appear *prima facie*, if not without any evidence to sustain it, was certainly against the manifest weight of the evidence.

The fifth ground of appeal cannot be sustained. While it is undoubtedly proper that when a receiver is appointed he should be required to give bond, we are not aware of any statute or rule of law which requires that a bond should be exacted from a plaintiff before granting an order for the appointment of a receiver. Inasmuch as the master, a bonded officer of this court, was in the case made practically, though not nominally, receiver, we see no necessity for requiring a special bond from him.

We think, however, that the sixth ground of appeal is well taken, for, while it is true that when a case has been heard upon the merits, the judge before whom it is heard may grant such relief as in his judgment the plaintiff has shown himself legally or equitably entitled to demand, whether such relief is formally demanded or not, yet when a motion is made preliminary to the hearing of a case upon the merits, it seems to us that there is error in going beyond what the party is notified will be asked for, as it may be that he would not desire to oppose the granting of that, but would be disposed to contest the granting of anything more unless it appeared, as it does not in this case, that the party was present at the

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hearing and decision of the motion \*and had an opportunity of being heard upon the question of granting such further relief.

From what we have said, it follows that there was error in referring the whole case to the master to take the testimony and report the same to the court, for on all the legal issues the defendant has a right to have the witnesses examined before a jury, except such witnesses as under statutory provisions may be examined by commission; for, even when testimony is taken by the clerk, under the act of 1872 (15 Stat. 41), the statute secures to either party the right to require the personal attendance and *viva voce* examination at the trial of the witnesses so examined.

It is true that the affirmative defense set up by the defendant George A. Kinard, that his equitable title arising out of the terms of the paper filed with his answer as Exhibit A., connected with his legal title arising out of the deed of December 18th, 1877, was superior to the lien of the mortgage through which the plaintiff claimed, as one of his sources of title, was a defense of an equitable character, and any testimony for or against that defense could properly be taken by the master even without the consent of the defendant.

The plaintiff, at the conclusion of his argument, takes the position that "this appeal cannot be sustained because none of the points involved were presented to or considered by the court below." If this position could be established, then it would for-



low that a party who, from any cause, was prevented from being heard in the Circuit Court and presenting his views before that court, could not be heard here, no matter what might be the errors in the judgment which he desired to appeal from. In this case the appellant has taken his exceptions to the judgment below in the manner prescribed by law, and upon such exceptions he has a right to be heard here even though the points made by such exceptions were not made before the Circuit Court. What we are called upon to do is to review the judgment or order appealed from, and if the appellant, by exceptions properly taken, is able to show any error therein, he is entitled to have such error corrected.

This case differs from the case of *Kaminer*

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*v. Hope*, 18 S. C. \*561, in this respect: There the exceptions pointed only to errors of omission on the part of the Circuit judge, while here the exceptions relate solely to errors of commission. They do not complain, as in *Kaminer v. Hope*, that the Circuit judge overlooked or omitted any point which should have been considered, but they allege errors in deciding the points presented by the pleadings, and are, in fact, exceptions to the rulings of the Circuit judge, taken in proper time and in proper form.

The judgment of this court is that the order appealed from be reversed, and that the case be remanded to the Circuit Court for such further proceedings, in conformity to the views herein announced, as may be necessary.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McGOWAN. I concur in this judgment in so far as it gives to the defendant George A. Kinard the right of trial by jury. But I am unable to concur in so much of it as sets aside the order of the Circuit judge, requiring the master to let the premises from year to year, and hold the money and securities arising therefrom until the final determination of the action. That order was in the nature of one appointing a receiver for the purpose of preserving the rents and profits during the litigation. Such orders are generally salutary in their operation. The judge who was present on the Circuit and heard the case decided that the prima facie showing made for such an order was sufficient, and it seems to me that it should not be reversed as error of law, as it could only have the salutary effect of preserving the issues of the property pending litigation, then to be delivered to that party who may finally be decided to be entitled to the same.

Judgment reversed.

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\*CANEDY v. JONES.

SAME v. RIDDLE.

(November Term, 1882.)

[1. *Wills* ⇨614.]

The unpunctuated will of a testator was as follows: "Being desirous of disposing of all such worldly estate as it hath pleased God to bless me with do make and ordain this may last will in manner following I desire that all my just debts and funeral expenses be paid then I give to my daughter Nancy all my real and personal estate of every description and all the money due to me to use and dispose of as she may think proper during her natural life provided she maintains and supports her mother decently during her life." *Held*, that Nancy took an absolute estate.

[*Ed. Note.*—Cited in *Howze v. Barber & Drennan*, 29 S. C. 472, 7 S. E. 817; *Blount v. Walker*, 31 S. C. 22, 9 S. E. 804; *Haynesworth v. Goodwin*, 35 S. C. 59, 14 S. E. 491.

For other cases, see *Wills*, Cent. Dig. § 1395; Dec. Dig. ⇨614.]

[2. *Wills* ⇨616.]

Even if a life-estate in Nancy, the power was given to her of disposing during her lifetime of the property absolutely, and she having conveyed a tract of land acquired under this will, her alienees took a fee-simple title.

[*Ed. Note.*—For other cases, see *Wills*, Cent. Dig. §§ 1418-1430; Dec. Dig. ⇨616.]

[3. *Wills* ⇨440.]

[Cited in *Vaughan v. Bridges*, 61 S. C. 161, 39 S. E. 347, to the point that, in the construction of a will, the cardinal rule is to look for the intention of the testator as expressed in the words of the will.]

[*Ed. Note.*—For other cases, see *Wills*, Cent. Dig. § 956; Dec. Dig. ⇨440.]

Before Pressley, J., Laurens, February, 1882.

The opinion states the case. The order of the Circuit judge was as follows:

In this case defendant Charles Jones demurs, and assigns for grounds that the complaint does not set forth a cause of action, and that if plaintiffs have a cause of action, the proceedings should be in partition. The cause of action rests on the will of William Canedy, wherein he gave to Nancy Canedy all his real and personal estate of every description, and all the money due him, to use and dispose of as she may think proper during her natural life. She sold to Charles Jones eighty acres of the land so bequeathed to her, and having since died, her estate in said land is supposed to be ended, and plaintiffs, as heirs-at-law of William Canedy, seek in this action to recover it.

On the first question raised by the demurrer, my judgment is: That Nancy Canedy took only a life-estate in the said land. The words of the will do not make a general gift with power of disposition or appointment. The clause, "during her natural life," qualifies the whole sentence, and the words, "to use and dispose of as she may think proper," were only intended to prevent all interference with her management and use of the prop-

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erty whilst \*her estate lasted. I see nothing in said will which indicated that the words "during her natural life" were intended to limit only the "money due." In *Moon v. Moon*, 2 Strobh. Eq. 327, a limitation somewhat like this was held to apply only to the negroes, not the land. But in that will the negroes were bequeathed to others after the life-estate, and no such disposition was made of the land, either by particular devise or residuary clause. The court held that this difference between the disposition of the land and the negroes indicated an intent to sever the land, from the words "during life." No such intent being indicated in this case, I regard said words as attached to the whole gift.

On the second question my judgment is: That Nancy Canedy, as one of the heirs-at-law of William Canedy, had a share in remainder in said land after the ending of her life-estate, and that her conveyance to Charles Jones gave him title to all she could then claim, or to which she might become entitled in case any of the other heirs of William Canedy should die before her, leaving no issue. This view of the case entitles Charles Jones to have the case proceed in equity, so that out of the eighty acres sold to him by Nancy Canedy her share or shares in the whole tract may be set apart to him. The case is therefore referred to the master to take the testimony, and report who are the heirs-at-law of William Canedy; whether any of them died in the life-time of Nancy Canedy without issue; what are the shares of each in the said land, and any special matter necessary to the final partition of the whole tract of land bequeathed by William Canedy, or the proceeds of the same if it cannot be fairly divided.

Messrs. Holmes & Simpson, for appellants, cited 3 Jarm. Wills 31, and note; 13 Johns. 537; 12 Serg. & R. 54; 19 Pa. St. 87, 515; 26 Iowa 272; 3 Desaus. 249; 13 Ves. 445; 2 Johns. 393; 52 Pa. St. 219; 15 S. C. 277; 21 Pick. 412; 3 Jarm. Wills 35; 4 Kent Com. 319; 5 Hill (N. Y.) 410; 2 Strobh. Eq. 134, 327; 9 Rich. Eq. 360; 16 Johns. 537.

Mr. J. W. Ferguson, contra, cited 6 Pet. 75; Bailey Eq. 526; Sugd. Pow. 459; 3 Jarm.

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Wills 40; 15 S. C. 440; 1 Redf. Wills \*425; 18 How. 391; 6 Hare 145; 18 Ves. 40; 11 Rich. 514; 4 Eng. Rep. 110; 2 Strobh. Eq. 327; 93 U. S. 327; 36 Ill. 355.

March 30th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, resting upon the same facts and involving the same legal principles, were heard together on Circuit, and were heard and will be considered together here.

The plaintiffs, as heirs-at-law of William

Canedy, deceased, seek to recover two tracts of land—one in the possession of defendant Jones, and the other in the possession of the defendant Riddle—which had been conveyed to them by Nancy Canedy upon the theory that she had only a life-estate therein, and that upon her death (which occurred prior to the commencement of these actions), the tracts of land in question reverted to the heirs-at-law of said William Canedy. It was conceded that the land belonged to William Canedy at the time of his death, and that he died leaving a will, of which the following is a copy: "In the name of God Amen I William Canedy \* \* \* being desirous to dispose of all such wordly estate as it hath pleased God to bless me with do make and ordain this my last will in manner following I desire that all my just debts and funeral expenses be paid then I give to my daughter Nancy Canedy all my real and personal estate of every description and all the money due me to use and dispose of as she may think proper during her natural life provided she maintains and supports her mother Elizabeth Canedy decently during her life and lastly I do constitute and appoint my daughter Nancy Canedy executrix of this my last will and testament hereby revoking all other and former wills and testaments by me heretofore made."

The questions made turn upon the proper construction of this will. The Circuit judge held that the will conferred only a life-estate upon Nancy, and that upon her death the estate reverted to the heirs of the testator; but that Nancy, being one of the heirs, her share became vested in her alienees, the defendants, Jones and Riddle; and, therefore,

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that it was a proper case for \*partition. He therefore granted orders for the purpose of carrying into effect that view.

The defendants, Jones and Riddle, make three points by this appeal: 1. That by a proper construction of the will of William Canedy, his daughter Nancy took an estate in fee and not a life-estate merely. 2. That if she took only a life-estate, yet she took such estate with power to dispose of the property absolutely; and that having exercised the power by conveying to Jones and Riddle the land in question, they took absolute estates therein. 3. That the plaintiffs having failed to make out the case as stated in their complaints, which were not framed with a view to partition, the complaints should have been dismissed, and it was error to order partition.

First, then, as to the nature of the estate which Nancy Canedy took under a proper construction of the will. The cardinal rule in construing a will is to look for the intention of the testator as expressed in the words of the will. With this view, let us examine carefully the terms used by the testator in this case. In the first place, it must be ob-



vious, even to the casual reader, that the will is not artistically drawn, but is the work of one not familiar with the drawing of such papers. It is embraced in a single sentence, and counsel on both sides state in their argument that it is without punctuation marks of any kind, though the copy set out in the "Case" does exhibit such marks. We may naturally expect, therefore, to find that the testator has expressed his intention in loose and inaccurate language; and, what is most likely in such cases, that the testator would, in the effort to express his meaning, employ more words than were necessary, and, by needless repetition, raise doubts as to what was his real intention.

The next thing that must strike every one upon reading this will is, that it was the intention of the testator to dispose of his entire estate; and that he did not intend to die intestate as to any portion of it. This is clear from the language used in the introductory part of the will, "being desirous to dispose of all such worldly estate as it has pleased God to bless me with." This being so, in order to avoid an intestacy which the testator did not intend, and to make the will operate

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as a disposition of his entire estate which he did intend, it would be necessary to construe the devise to Nancy as creating an estate in fee instead of a life-estate only. But this is not all; the declared purpose of the testator being to dispose of all his estate, that purpose would be entirely defeated by construing the devise to Nancy as a life-estate, for there is no remainder and no residuary clause in the will, and the result would be that instead of disposing of all his estate, a large portion, perhaps the most valuable portion, of it would be left entirely undisposed of.

Again, the use of the word "estate" implies a fee, for, as is said in 2 Jarm. Wills 132: "It has been long established that a devise of a testator's estate includes not only the corpus of the property but the whole of his interest therein;" and this doctrine has been recognized in at least two of our own cases, *Fraser v. Hamilton*, 2 Desaus. 573, and *Cruger v. Heyward*, Id. 422. It being conceded that the testator owned the lands in fee-simple, when he gave all his estate to his daughter, he must be considered upon the authorities above cited to have given the fee to her.

Again, the fact that the estate which he gave to Nancy was charged with the support of her mother, is a strong indication that he intended Nancy to take an absolute estate and not an estate for life merely; for such an estate might not have proved to be of sufficient value to provide for what seemed to be the primary object of the testator—the comfortable support of his widow. Indeed if the widow survived Nancy, which was not by any means impossible, then, if the latter

took only a life-estate, the scheme which the testator had provided to effect what is conceded to have been his primary object, would have been defeated. True, in such a case, the widow would have been entitled to one-third of the estate; but that was not the provision which he manifestly intended for her; and it was for him to judge; and he had seen fit to provide that his entire estate should be charged with her support. We are satisfied, therefore, that, looking at the will as a whole, the testator intended, by the words he used, to give to his daughter Nancy an estate in fee-simple and not a life-estate merely.

Is there anything in the will which imperatively demands that we should place a

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different construction upon the terms of \*this will, and thereby defeat what seems to us, from the circumstances above mentioned, to have been in the mind of the testator when he penned his will? It is not sufficient for this purpose that we should find expressions in the will which would render the construction demanded by the general scope of the will doubtful; for, as was said by DeSausure, chancellor, in *Waring v. Middleton*, 3 Desaus. 251: "It is common, in cases of wills in which there is a clause in the beginning of the will declaring an intention to dispose of the whole of the estate—to infer from thence that, as the testator, avowedly, did not mean to die intestate of any part of the estate, the devise, even of a doubtful nature, should be construed favorably to extend the estate and give a fee-simple to the devisees, because a contrary construction would tend (where there was no residuary clause) to produce an intestacy as to some part of the estate against the express declaration of intent by the testator."

It will be observed that the estate is not given to Nancy for and during the term of her natural life in express terms, as would strike any one, even the most ignorant and inexperienced, as the most natural way of expressing an intention to create a life-estate, but the language used is: "I give to my daughter, Nancy Canedy all my real and personal estate of every description and all the money due me to use and dispose of as she may think proper during her natural life provided she maintains and supports her mother Elizabeth Canedy decently during her life." So that the question is whether the words, "during her natural life," relied upon to cut down Nancy's estate to one for life only, in the connection in which they are found, imperatively demand that we should override what we have seen to be the intent of the testator from the circumstances above referred to?

The words relied upon do not follow the words of gift to Nancy, as it would seem natural that they should do if the intention in using them was to qualify what would, without those words, unquestionably be a gift of the absolute estate, but they follow the

words empowering her to use and dispose of the property, and, therefore, there is at least a doubt as to which member of the sentence

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they were intended to qualify. It may \*be true, as a general rule, that such qualifying words will apply to all the different members of the sentence to which they are annexed, and are not to be limited to that member of the sentence immediately preceding such words, but where, as in this case, there are other terms in the will which demand a different construction from that which would result from applying the qualifying words to the entire sentence, then they must be confined to that member of the sentence which immediately precedes the qualifying words; and this results from the well-settled rule that a will must be so construed as a whole, as to give effect to every part, if possible.

It is argued that if the will had not contained the words "during her natural life," there would have been no doubt that Nancy would have taken an estate in fee, and that these words must have been inserted for some purpose, and that the only purpose of inserting them was to limit the estate which the previous words would have created. There would be very great force in this view if it were not possible to conceive of any other purpose in inserting the words in question. But, is that so? Bearing in mind, as we must do throughout this discussion, that we are undertaking to construe the language of one who was manifestly not capable of expressing his intentions in apt and proper words, and that, as we have seen, there are the strongest indications in the other parts of the will that the testator intended to give to his daughter an estate in fee, let us inquire whether the words in question could not have been used for some other purpose than that of cutting down the estate to a mere life-estate. Might not the testator have supposed that, inasmuch as the estate he intended for his daughter was to be burdened with the charge of supporting her mother, she would not have the right to use and dispose of the same as she might think proper during her life, without special power so to do, and, therefore, these words were inserted for the purpose of giving her that power, provided she maintained and supported her mother? Or, might not the testator have supposed that some such provision was necessary to prevent his daughter from wasting the estate and thereby defeating his primary object—the support of his widow; and hence,

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the power of disposition was \*given to her during her life only, on the condition that she carried out the testator's main object by providing for the support of the old lady? The location of the words in the sentence seem to point to some such conclusion, and, if so, then the insertion of the words in question cannot have the effect of cutting down the estate of Nancy to a life-estate.

It is very true that if the testator intended to give his daughter an estate in fee, there was no necessity to give her the power to use and dispose of it as she might think proper, as that would follow as a necessary incident to the estate created; but it very frequently happens that we find in a will drawn by one unskilled in the preparation of such documents, terms used which are wholly unnecessary to effect the object which the testator had in view. A striking instance of this is found in the will now under consideration, where the testator provides for the support of his widow "during her life," and when such unnecessary terms are found in a will they ought not to be allowed to defeat the manifest intent of the testator, as ascertained from an examination of the will as a whole, where it is possible to put such a construction upon those terms as will not conflict with such manifest intent, even though such construction may not be the one which such terms naturally and usually require.

We are, therefore, of opinion that under a proper construction of the will of William Canedy, his daughter, Nancy Canedy, took an estate in fee, and not a life-estate merely.

But, if it be assumed that Nancy Canedy took an estate for her life only, the next inquiry is whether she took such estate with power to dispose of the same absolutely, or only the power to dispose of it for the term of her natural life. As is said in Sugd. Pow. 459, cited with approval in *Fronty v. Fronty*, Bailey Eq. 518: "In considering the extent of a power, the intention of the parties must be the guide." The question, then, is, What was the intention of the testator in conferring the power here in question upon his daughter? Was it simply to authorize her to sell the life-estate, or was it for the purpose of enabling her to make an absolute disposition of the property, if she thought proper to do so? In determining this question, it must be remembered that the property did

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not consist of land only, but \*it was all the real and personal property, of every description whatsoever, which the testator owned; and hence, if the power should be limited to the disposition of the life-estate only, then the devisee and legatee could not sell or dispose of any portion of the property absolutely. It can scarcely be supposed that the testator, in giving his entire estate to his daughter with the power to use and dispose of it as she might think proper, with the purpose, primarily, of providing a support for her mother, intended so to hamper it as to prevent his daughter from selling any greater interest than a life-estate in any portion of it, and thus materially decrease the means of accomplishing his primary object.

Again, if the estate given to the daughter was an estate for her life, there would have been no necessity whatever to invest her with power to dispose of such estate, for that she would have, as owner, without the



empowering words; and it is difficult, if not impossible, to conceive of any other reason for creating the power than that of enabling the life-tenant to make an absolute disposition of such portions of the estate as she might think proper to dispose of. As is said in Sugd. Pow. 458: "A general power to a tenant for life to grant a term or estate, without specifying the duration of it, will enable him to grant a term beyond his own life, although it defeat the remainders over, for otherwise the power would be merely idle and void, as every tenant for life may alien the estate during his own life." Here the case is much stronger, as there is no remainder over to be defeated. We think it clear that, if the estate of Nancy should be construed to be a life-estate merely, then the effect of the power was to enable the life-tenant to dispose of the estate absolutely and not for her life only, provided she make such disposition "during her natural life."

The cases of *Smith v. Bell*, 6 Pet. 74 [8 L. Ed. 322]; *Brant v. Virginia Coal and Iron Company*, 93 U. S. 326 [23 L. Ed. 927], and *Boyd v. Strahan*, 36 Ill. 355, relied upon by the respondents to support a contrary view as to the extent of the power here in question, are not, in our judgment, sufficient for that purpose. In the first place we must remember that while a decided case may aid

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us in ascer\*taining the rules of construction, unless it is in every respect like the one under consideration, which rarely happens, it cannot be allowed to have a controlling effect, inasmuch as the object should be in every case to ascertain the intention of the testator from the words which he had used, and unless the language to be construed is identical in both cases, the authority cited, though it may aid us in reaching a proper conclusion, cannot be regarded as absolutely controlling.

In *Smith v. Bell*, the only question made was as to the nature of the estate created—whether a fee or a life-estate merely—and there was no question raised as to the extent of the power. Therefore all that is said upon that subject was obiter dicta, and, though entitled to great consideration, is not authoritative. In that case, too, there was a remainder over, a very material matter, and was the principal ground upon which the decision was rested. But here there is no remainder over, nor is there a residuary clause.

In *Brant v. Virginia Coal and Iron Company*, the words of the will were: "I give \* \* \* to my wife, Nancy Sinclair, all my estate, \* \* \* to have and to hold during her life, and to do with as she sees proper before her death"—very different from the words used in Canedy's will. The words used were the apt and technical words by which a life-estate is created, and there

could be no doubt as to the nature of the estate which the wife took. So, too, the empowering words were different from those used in the case now in hand. The wife was given a life-estate in express terms, and it was that which she was authorized "to do with as she sees proper before her death," and therefore she could only dispose of the life-estate. But here the estate is given to Nancy Canedy in terms which would carry the fee, and then follow the empowering words.

In *Boyd v. Strahan* there were two clauses in the will, in one of which the testator gave to his wife certain property absolutely, and in the other he gave her certain other property "to be at her own disposal, and for her own proper use and benefit during her natural life." The decision seems to have turned upon the fact that there were two clauses in which the testator used different language, thereby showing an intent to draw

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a distinction, and \*that by the latter he only intended his wife to take a life-estate with only the incidents of such estate.

If, then, the estate given to Nancy be regarded as a life-estate, with power during her life to dispose of the same absolutely, the exercise of such power in conveying the land in question to the appellants, Jones and Riddle, conferred upon them the fee. *Pulham v. Byrd*, 2 Strobb. Eq. 142; *Scott v. Burt*, 9 Rich. Eq. 360, and the authorities cited in those cases. And such being the case, it is clear that the actions in these cases cannot be sustained, and the complaints should have been dismissed.

The judgment of this court is that the judgments of the Circuit Court in both of the cases above stated be reversed, and that the complaints be dismissed.

## 19 S. C. 307

## STROMAN v. VARN.

(November Term, 1882.)

[1. *Partnership* ⇨138.]

One partner may bind his copartners by deed if the others are present and authorize it, or if authority to do so is fairly inferable from the evidence of their conduct and course of business.

[Ed. Note.—Cited in *Sibley & Co. v. Young & Napier*, 26 S. C. 419, 2 S. E. 314; *Salinas v. Bennett*, 33 S. C. 289, 292, 11 S. E. 968.

For other cases, see *Partnership*, Dec. Dig. ⇨138.]

[2. *Partnership* ⇨157, 160.]

There were four partners in a saw-mill, two of whom owned the land. One of the others mortgaged the land in the name of the four and signed the firm name. *Held*, that the mortgage was a valid lien on the land, the two owners having received the consideration and in many ways acknowledged and ratified the mortgage.

[Ed. Note.—Cited in *Wallace v. Craig*, 27 S. C. 520, 4 S. E. 74.

For other cases, see *Partnership*, Cent. Dig. § 284; Dec. Dig. ⇨157, 160.]

[3. Partnership  $\hookrightarrow$  157.]

A purchaser of the interest of one of the owners, in both land and partnership, after record of the mortgage, held bound by its lien.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 282-291; Dec. Dig.  $\hookrightarrow$  157.]

Before Kershaw, J., Hampton, October, 1881.

The opinion states the case. The Circuit decree, omitting its statement, was as follows:

From these circumstances I find, as matter of fact, that the execution of the mortgage in question was authorized by James G. Varn, Gabriel Varn, and that the same is a good, valid and satisfactory mortgage of the land and other property described therein; that Malcolm V. Wood acquired his interest therein affected by notice and subject to the

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encumbrance of said \*mortgage. When it is considered that the mortgage was so long acted upon by all the parties concerned, and so solemnly and repeatedly recognized and affirmed as a good and valid transaction; that the steam mill, which constituted the principal effective agent of the business, was included with the land upon which it was located in the same mortgage, which was duly recorded; and that the land was then dealt with by the owners as if it were partnership property of the firm, I cannot hesitate as to these findings of fact.

When Wood purchased his interest in the mill he was affected with notice of the mortgage thereof, which was duly recorded—the recording being constructive notice. It was notice of all that the deed contained, and, therefore, notice of the mortgage of the land as the property of the firm. If made with the authority of the legal owners of the land, as presumably it was (and as it is now known to have been), it is in law a good and valid mortgage, because the owners, in that case, would be estopped to deny it. Story Eq. Jur., § 385. It purported to be a valid mortgage. It was capable of being shown to be a valid mortgage, and, therefore, Wood having taken with notice of such a mortgage, he takes subject to its encumbrances where it is shown to be a valid mortgage.

Again, the possession of the land and its use for the purposes of the partnership was notice that it was being dealt with as partnership property, for possession is notice. Massey v. McIlwain, 2 Hill Eq. 427. Prima facie, it was partnership property, and, but for the admission that it was not actually so, it would have been so held, in accordance with the case of Winslow v. Chiffelle, Harp. Eq. 25, where the circumstances were similar.

The general rule is, that one copartner has no power to bind his copartners by deed, but there are many exceptions. Chancellor Kent says (volume III., page 48): "An absent partner may be bound by a deed executed on be-

half of the firm by his copartner, provided there be either a previous parol authority or a subsequent parol adoption of the act. Such authority need not be under seal, nor in writing, nor specially communicated for the purpose, but may be inferred from the partnership itself and from the subsequent con-

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duct of the copartners implying \*an assent to the act." *Graime v. Seton*, 1 Hall 262, cited in note 7. This doctrine has been affirmed by the New York Court of Appeals. *Smith v. Kerr*, 3 Comst. 144. Judge Story lays down the same doctrine in his work on Partnership, section 120.

Counsel at bar cited also the case of *Lawrence v. Taylor*, 5 Hill (N. Y.) 107, to the effect that a contract to convey lands belonging to two partners, executed in the name of the firm by one of them, is binding on the firm if done under a previous authority, or if the act be subsequently ratified by the other. In the case of *Saunders v. Hughes* (not reported), cited by Judge O'Neill in *Fleming v. Dunbar*, 2 Hill 532, and affirmed in *Fant v. West*, 10 Rich. 149, and the *Bivingsville Man. Co. v. Bobo*, 11 Id. 386, the law of the State is declared, that a deed executed by several copartners, by the authority of the others, is valid, and authority may be gathered from any circumstances which create the belief that the absent partners knew of the deed and intended to be bound by it. The law is differently stated elsewhere, but these cases show that here the principle is settled, that such a mortgage as this binds the land to the same extent as if it were the property of the firm.

It follows from this that a subsequent purchaser takes subject to the mortgage, when it has been, as here, duly recorded.

It is ordered and adjudged that it be referred to the clerk of the court to ascertain and report to the court the amount remaining due upon the note secured by the said mortgage; that the plaintiffs have judgment for the sale of said mortgaged premises in satisfaction of the amount which may be found due them, and the costs of this action and for any deficiency that may be left after applying thereto the proceeds of such sale; and that the defendants, and all persons claiming under them, be forever barred and foreclosed of any equity of redemption in the said mortgaged premises, and that plaintiffs have leave to apply at the foot of this judgment at chambers for the confirmation of the report herein directed, and for the sale of said premises, and for such other and further orders as may be necessary to carry the same into effect; that the judgment for any deficiency go only against the defendants, James G. Varn, Gabriel Varn

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and \*Josiah Preacher, surviving partners of the late firm of Varns & Preacher.



Messrs. Howell & Murphy, for appellants.  
Mr. C. J. C. Hutson, contra.

April 5th, 1883. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action to foreclose a mortgage on a tract of land in Hampton county, known as the "Ellis land," containing 1,157 acres. It seems that L. B. Varn, James G. Varn, Gabriel Varn and Josiah G. Preacher formed a partnership in the lumber business, under the name and style of "Varns & Preacher;" that they wanted money to build a steam mill, and for that purpose contracted to borrow \$2,500 from John D. Stroman, the testator of plaintiffs, and on December 8th, 1870, L. B. Varn, the active member of the concern, executed and delivered to the said Stroman a note, of which the following is a copy:

"\$2,500.—By the first day of January, 1872, we promise to pay John D. Stroman the sum of two thousand five hundred dollars, for value received, with interest from date, twelve per cent. per annum. Witness our hand and seal this 8th day of December, 1870.

(Signed,) "Varns & Preacher. [Seal.]"

And, in order to secure said note, the said L. B. Varn, on the same day and in the same manner, signed a mortgage of the aforesaid tract of land. At that time the title to the land was in James G. Varn and Gabriel Varn, who had given no written authority to the said L. B. Varn to execute the mortgage; but there is reason to believe that it was done with their knowledge and consent, the mortgage stating that "we, L. B. Varn, James G. Varn, Gabriel Varn and Josiah G. Preacher (under the name and style of Varns & Preacher), do grant," &c., and including other property, in these words: "together with a steam mill that we are about erecting on said land," &c. The mill was built, and the business of the firm there conducted. Preacher afterwards sold his interest in the business to one Malcolm V.

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\*Wood, who took his place in the firm, and on January 4th, 1872, the two partners who had legal title to the land, conveyed by deed, for valuable consideration, one-fourth interest in the same to the said Wood, and another one-fourth interest to L. B. Varn, making the four partners equal in the land, as they were in the business. In 1874 Wood died intestate, leaving as his heirs-at-law his widow, Rebecca A. Wood, and two children, James L. and Mary M. Wood, who are parties defendant, and in 1878 L. B. Varn died intestate, leaving a widow, Mary Varn, and six children, all of whom are also parties, but did not answer the complaint.

Credits appear upon the note, \$500 on January 1st, 1872, and \$1,600 March 2d, 1875, leaving a balance still due and unpaid. James G. Varn wrote letters to John

D. Stroman in his lifetime, and after his death to his widow executrix, fully recognizing the mortgage as a valid instrument; and L. B. Varn, after Wood came into the firm, wrote many letters in the name of the new firm, Varns & Wood, asking indulgence, and otherwise recognizing the validity of the mortgage. On March 1st, 1876, L. B. Varn, James G. Varn, Gabriel Varn and Rebecca Wood joined in making a deed to plaintiff's testator, conveying to him absolutely the mortgaged premises, in consideration of \$1,771.04, with the understanding that he was to sell the property and pay the balance due on the mortgage, and turn over the remainder to the said parties; but it does not appear that these papers were ever delivered or acted upon.

John D. Stroman died in 1877, leaving a will, of which the plaintiffs are executors, who brought this action to foreclose the mortgage on the afore-mentioned tract of land, for the payment of the balance due upon the note. James G. Varn and Gabriel Varn answered, claiming that the tract of land was their individual property, and not that of the firm of Varns & Preacher, when the mortgage was signed by L. B. Varn, and also denying that the act of L. B. Varn in signing the sealed note and mortgage in the name of "Varns & Preacher" was the act of the four partners, including themselves. And Rebecca A. Wood answered, denying that her husband, Malcolm V. Wood, in purchasing the share of Preacher, acquired any

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interest in said land, \*but that he purchased one-fourth interest from James G. and Gabriel Varn after the alleged mortgage was executed, and that he was purchaser for valuable consideration without notice of any encumbrance thereon.

The cause came on to be heard by Judge Kershaw, who gave judgment of foreclosure against all the parties, and they appeal to this court upon the following grounds: "1. For that his Honor erred in holding that the mortgage mentioned and described in the plaintiff's complaint was valid and a lien upon the interest of these defendants in the premises. 2. For that his Honor erred in holding that the recording of the mortgage was constructive notice to M. V. Wood, the intestate of defendants; Rebecca A. Wood, James L. Wood and Henry M. Wood. 3. For that his Honor erred in his finding of fact in this, that he decides that the saw-mill was erected upon the mortgaged premises, there being no proof before the court to that effect, and, as a matter of fact, the mill was not so located. 4. For that his Honor's decree was otherwise contrary to the law and unsupported by the evidence."

We concur with the Circuit judge for the reasons given in his decree. We understand that the mill was built on the Ellis land, which, to that extent, at least, was used for

partnership purposes, and that would seem to indicate that it was considered to be partnership property, although the legal title was at that time in two of the four partners. This view is strengthened by the fact that afterwards one-fourth of it was conveyed to L. B. Varn and the like interest to M. V. Wood. But as the third exception denies that the mill was located on the mortgaged premises, we will assume that when the note and mortgage were given, the land was the individual property of James G. and Gabriel Varn. They were, nevertheless, partners, and the land passed under the mortgage, and is bound by that instrument, if the execution of the note and mortgage by L. B. Varn alone, was, as the mortgage itself recites, the act and deed of all the partners, including the said James G. and Gabriel.

It is true that the general rule is that one partner cannot bind his copartners by a writing under seal, for the reason that such writing, importing a consideration, is consid-

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ered beyond the \*scope of partnership dealings, which are ordinarily carried on with negotiable paper; but there are well recognized exceptions. As we understand it, the object of the rule is to protect partners against the consequences of unauthorized acts on the part of their associates, and, if so, it would not promote, but tend to defeat that object, to apply the rule indiscriminately in all cases, whether the other partners authorized the act or not. We think it settled, in this State, that one partner may bind his copartners by deed, if the other partners are present and expressly authorize the act, or the evidence of their conduct and course of business is such as to justify the inference that such authority was given. *Fleming v. Dunbar*, 2 Hill 532; [*Lucas v. Sanders*] 1 McMull. 312; *Fant v. West*, 10 Rich. 151. In the case last cited, Judge Wardlaw said: "The single bill was not void, but if executed by one partner with sufficient authority from the other, bound both. The validity then depended upon evidence to be judged by the jury. The evidence may have authorized an inference that such authority had been given, and that was a question for the jury. The consideration of the single bill, beneficial to both parties, and the course of dealing shown by their conduct in reference to other such bills, were circumstances proper for the consideration of the jury," &c.

In the case before us, the Circuit judge held "as matter of fact that the execution of the mortgage in question was authorized by James G. Varn and Gabriel Varn, and that the same is a good, valid and satisfactory mortgage of the land;" and we think the finding was well sustained by the evidence. Both from the declarations and conduct of the partners, we are satisfied that the testator of the plaintiffs loaned the mon-

ey on the credit of all the partners, and the faith that the mortgage, as represented, gave a lien on the land; that the partnership received the benefit of the money, and all the partners not only expressly authorized the execution of the note and mortgage by L. B. Varn, but acknowledged the validity of both at different times and in various ways for a series of years. Both James G. and Gabriel admitted, in their testimony, that they authorized the transaction. It is true that James G., upon his being recalled, stated that he had objected to two hundred acres on

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which \*he lived being included, "but that Mr. Preacher and his brother stated on their return [we suppose from the execution of the papers] that they had forgotten, and included this in the mortgage." He afterwards made no objection, and wrote letters to Stroman, recognizing the mortgage as it stood, and not only signed the absolute deed of the land to Stroman when the compromise was attempted, but his wife relinquished her dower in the same.

It is urged, however, that this principle applies only to partnerships, and that it cannot apply to the mortgage on the land, which was not partnership property, and even an express verbal authority to give the note and mortgage for all the partners could not be legally executed by L. B. Varn in the firm name of "Varns & Preacher." It will be observed that although the mortgage was signed "Varns & Preacher," it purports to convey directly the individual shares of all the principals, as follows: "Know all men by these presents that we L. B. Varn, James G. Varn, Gabriel Varn and Josiah B. Preacher (under the name and style of Varns & Preacher), have granted, bargained, sold and released, \* \* \* to John D. Stroman, all that plantation," &c., &c. The signature, Varns & Preacher, was the manner in which all the parties, individually, chose to convey. *Varnum, Fuller & Co. v. Evans*, 2 McM. 412, and authorities.

In that case it is said: "In *Pryor v. Coulter*, 1 Bail. 517, and *Welsh v. Parish*, 1 Hill 155, there was nothing on the face of the deeds which showed that the act done was 'in the name and in behalf' of the principal. Each purported to be the act of A. B., attorney of C. D., and hence the deeds could not be the deeds of the principals. The difference between those cases and this makes a plain and obvious distinction. This, although signed and sealed by the attorney, is declared to be by the authority and in the name and in behalf of the principals, which was the same as if the attorney had said, 'By the authority of the principals and in their names and stead, I sign, seal and deliver this deed,' &c. In this case the person who signed and sealed the mortgage did more, the parties named conveyed through him, under the name and style of "Varns &



Preacher." Besides, the parties received the consideration, and in many ways ratified the

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mortgage and admitted its validity, and cannot now be heard to deny it. 3 Kent 48; State v. S. & U. R. R. Company, 8 S. C. 130.

But it is further objected that this cannot apply to the fourth of the land conveyed to M. V. Wood in 1872, after the note and mortgage were executed. The obvious answer to this is, as held by the Circuit judge, that the mortgage was recorded and Wood had at least constructive notice of it; and in addition it seems to us that it is fairly inferable from the history of the case that he had actual notice. Wood purchased the interest of Preacher, and came into the concern as his privy. Gabriel Varn, in one of his many letters to Stroman, over the signature of Varns & Wood, (October 28th, 1874,) said: "Dr. M. V. Wood bought Major J. G. Preacher's share of the mill, and we are told by three different lawyers that the mill property cannot be sold by creditors until he has been dead nine months." During the two years from 1872 until he died, in 1874, Wood most probably joined in all of the appeals which were made in the name of the new firm to Mr. Stroman for indulgence, and his widow joined in the execution of an absolute title to the land to Stroman in their effort to make a compromise.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

### 19 S. C. 315

#### BOARD OF HARBOR COMMISSIONERS v. PASHLEY.

(November Term, 1882.)

[Commerce ⇨ 78.]

Under a statute which created a board of harbor commissioners for the port of Charleston, authority was given to this board to levy such fees and harbor or port charges as were necessary to pay its officers and to defray its expenses. The board imposed a scale of charges, according to kind, upon all vessels entering that port, the amount in each case being determined by the "length over all" in feet. Held, that the charge not being for services rendered to a vessel, it was a tonnage duty, which is prohibited by the constitution of the United States.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 57; Dec. Dig. ⇨ 78.]

Before Aldrich, J., Charleston, July, 1882.

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\*This was an action commenced in April, 1882, by the Board of Harbor Commissioners of Charleston against Frank Pashley, master, and the owners of the schooner "Marcus Edwards," for the recovery of \$5.90. The case seems to have been tried by the Circuit judge. He rendered the following judgment:

This is a case brought for the enforcement of certain fees charged under act of Assem-

bly known as the Harbor Commission Act (17 Stat. 604). The allegations of the complaint are all admitted, viz.: That the schooner "Marcus Edwards" did, on the tenth day of March, 1882, arrive at the port of Charleston; that Frank Pashley, master, reported her arrival to the harbor master, and recorded her name, tonnage, length and description of the vessel; that the fee of \$5.90 was demanded of said Pashley by the proper officer of the Board of Harbor Commissioners, and that payment of the same was refused.

The act provides that the Board of Harbor Commissioners "shall be and are hereby invested with full power and authority to levy and collect from all vessels entering into and trading with the port of Charleston such fees and harbor or port charges, not inconsistent with law, as in their discretion may be necessary to pay the said harbor master and port wardens for the services required of them, and to defray the necessary expenses attendant upon the execution of the duties devolved upon the said board under this act." In accordance with which, the said board ordained a scale of charges, in proportion to the length over all of such vessels as should become liable to port charges, the charges for fore-and-aft schooners being five cents per foot. The account sought to be collected is in conformity to this scale, and amounts to \$5.90.

The defendant alleges that the said vessel was, at the time mentioned in the complaint, and now is an American vessel, owned by citizens of States of the United States other than the State of South Carolina, duly licensed for the coasting trade, and engaged in commerce and navigation between the several States of the United States, and that the said clearing tax and fee claimed are expressly prohibited by section 10, article I., constitution of the United States.

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\*Section 10, article I., constitution United States, or so much thereof as may be applicable to this case, is as follows:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

"No State shall, without the consent of Congress, levy any duty on tonnage."

Chief Justice Marshall says this constitutional prohibition is on the taxing power, not on that to regulate commerce. Hence, if the object of this act is to regulate commerce and not to raise a revenue, it does not come within the constitutional inhibition. What then is the object of the act? Clearly to establish a police for the harbor and to assist ships trading with the port of Charleston to discharge and take in freights with dispatch and safety by enforcing a system of harbor regulations. There is no provision for rais-

ing revenue, because the act expressly limits the power of the board to levy and collect "such fees and harbor or port charges \* \* \* as may be necessary to pay the said harbor master and port wardens for the services required of them, and to defray the necessary expenses attendant upon the execution of the duties devolved upon the said board under the act." And the ratio of the charges indicates that it can be intended only to defray the necessary expenses of such a system.

It is objected that this is a charge without reciprocal services. But the services are sufficiently rendered by the board of commissioners holding themselves in readiness and being prepared to facilitate and promote the interests of commerce within the port, and non constat that special services were not rendered to this particular vessel.

It is further objected that the charge is a tax on tonnage. If this were so it would clearly be a violation of the letter of the constitution, and not of its spirit and intent, for we have seen that it was not the object of the act to raise revenue. But the word "tonnage" is not used in the act nor in the scale of charges, as passed by the board, but the charge is made upon the "length over all." In my judgment, length bears no direct relation to tonnage. The terms are not synonymous, so that the letter, as well as the spirit, of the constitutional provision remain intact.

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\*It is, therefore, adjudged and decreed that the plaintiff have judgment against the defendants in the sum of \$5.90, with interest from the 10th day of March, 1882, and the costs of this action.

From this judgment the defendants appealed upon the ground that the tax, fee or charge demanded and sued for in the complaint, and for which judgment was rendered by his Honor, Judge Aldrich, is prohibited by section 10, Article I., constitution of the United States.

Mr. J. P. K. Bryan, for appellant.

Mr. W. St. J. Jervey, contra.

April 19th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover the amount of certain port charges imposed upon the schooner "Marcus Edwards" by the plaintiff, by virtue of authority conferred upon said board by an act of the legislature of this State of December 24th, 1880, (17 Stat. 398,) as amended by act of December 20th, 1881, (17 Stat. 604.) This vessel was admitted to be an American vessel, owned by citizens of States of the United States other than the State of South Carolina, duly licensed for the coasting trade, and engaged in commerce and navigation between the several States of the United States. The fees or charges fixed by the

board were to be "charged upon all vessels arriving at this port," [Charleston, South Carolina,] and the amount of such fees or charges was to be determined by "the length over all" of the vessel, according to a certain classification fixed by the board, the rate in the case under consideration being five cents "per foot of length over all."

It will be observed that the charge was to be exacted from "all vessels arriving at this port," and that there is no intimation that such charge was to be made as a compensation for any services rendered said vessel, but, on the contrary, it appears from the terms of the act that the said board was "invested with full power and authority to levy and collect from all vessels entering into and trading with the port of Charleston, such

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fees \*and harbor or port charges, not inconsistent with law, as, in their discretion, may be necessary to pay the harbor master and port wardens for the services required of them, and to pay the necessary expenses attendant upon the execution of the duties devolved upon the said board under this act."

It is conceded that the "Marcus Edwards" did enter the port of Charleston, and that demand was duly made for the charges as fixed by the resolution of the board, which was not complied with, but there was no evidence that any service was rendered such vessel for which such charges were demanded as compensation. The appellants contend that the charges thus demanded of this vessel are expressly prohibited by certain provisions of the constitution of the United States. The clauses of the constitution relied upon are as follows: "Congress shall have power to regulate commerce with foreign nations and among the several States." Art. I., § 8. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. No State shall, without the consent of Congress, levy any duties on tonnage." Art. I., § 10. So that the question for us to determine is whether such charges as this now under consideration are prohibited by these constitutional provisions.

This being a question arising under the constitution of the United States, it is proper that we should look to and be governed by the decisions of that tribunal which has been invested with final jurisdiction of such questions—the Supreme Court of the United States. That court has had before it, upon numerous occasions, questions similar to the one now under consideration, and we think that the principles upon which the decision of the question depends have been fully settled. In *Steamship Co. v. Port Wardens*, 6 Wall. 31 [18 L. Ed. 749], the constitutionality of a statute of Louisiana, which provided that the master and wardens of the port of New Orleans should be en-



titled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, from every vessel arriving in that port, was brought in question. The court held the statute to be in violation of the constitution

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of the United States, as being not only a regulation of commerce, but, also, an attempt to impose a duty on tonnage.

Chase, C. J., in delivering the opinion of the court, used this language: "We think, also, that the tax imposed by the act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense, it is true, these words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But, it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships, which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

From this view of the constitutional provision, we conclude that the proper construction is that it was designed to forbid the levying of any tax upon a vessel as such, whether the amount of such tax was to be ascertained by reference to the tonnage capacity of the vessel, or by any other mode of measurement. This case has been fully recognized in a number of subsequent cases. See *State Tonnage Tax Cases*, 12 Wall. 218 [20 L. Ed. 370]; *Cannon v. New Orleans*, 20 Wall. 581 [22 L. Ed. 417]; *Inman Steamship Co. v. Tinker*, 94 U. S. 245, [24 L. Ed. 118]; *Packet Co. v. Keokuk*, 95 U. S. 86 [24 L. Ed. 377]. That it is wholly immaterial whether the amount of the tax is to be ascertained by reference to the tonnage of the vessel *eo nomine*, or in some other way, is fully shown by the fact that the Supreme Court of the United States has, in several cases, held that a charge imposed upon a vessel, even though measured by its tonnage *eo nomine*, is not in violation of the constitution of the United States where the charge is made as a compensation for services rendered such vessel; as, for example, a charge for the use of a wharf owned by a municipal corporation, even though the amount of such charge should, in express terms, be measured by the tonnage of the vessel, because that is a matter resting in contract, and is the

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\*exercise of a mere property right, and not an exercise of sovereign authority. See *Can-*

*non v. New Orleans*, supra; *Packet Co. v. Keokuk*, supra; *Packet Co. v. St. Louis*, 100 U. S. 423 [25 L. Ed. 688]; *Vicksburg v. Tobin*, 100 U. S. 430 [25 L. Ed. 690]; *Packet Co. v. Catlettsburg*, 105 U. S. 559 [26 L. Ed. 1, 169].

But where, as in the case of *Inman Steamship Co. v. Tinker*, 94 U. S. 238 [24 L. Ed. 118], the legislature of New York undertook to pass an act requiring all ships or vessels, with certain exceptions, entering the port of New York, or loading or unloading, or making fast to any wharf therein, to pay a certain percentage per ton, the act was held unconstitutional, not because the amount to be paid was to be measured by the tonnage of the vessel, but because the charge was exacted for simply entering the port, and not for any service rendered. As was said in the opinion of the court: "The name is immaterial; it is the substance we are to consider." And again: "The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is that it is exacted where there is nothing to be paid for." In *Peete v. Morgan*, 19 Wall. 581 [22 L. Ed. 201], it was held that a State cannot, in order to defray the expenses of her quarantine regulations, impose a tonnage tax on vessels owned in foreign ports and entering her harbors in pursuit of commerce. In *Alexander v. Railroad Company*, 3 Strobh. 594, recognized and approved in *State v. City Council of Charleston*, 4 Rich. 288, the Court of Errors of this State held that an ordinance of the city council of Charleston, providing that certain vessels arriving in the port of Charleston should pay to the harbor master one cent per ton, once in every three months, was a tonnage duty, and as such prohibited by the constitution of the United States. The court, manifestly, did not base its opinion upon the fact that the amount of the charge was to be measured by the tonnage of the vessel, for O'Neill, J., in delivering the opinion of the court, used this language: "But, it is said, the imposition of tonnage in this case is merely a mode by which the plaintiff is to ascertain his fees; and it is so called in the ordinance; 'the above fees,' is its language. I should think there would be great force in this view if it were so that the har-

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bor master rendered any service for the defendant. \* \* \* For, in such a case, although the letter of the constitution might be violated, yet its true meaning would be untouched." This shows that Judge O'Neill took the same view which was subsequently adopted by the Supreme Court of the United States and acted upon in several cases above cited; that where the charge is for service rendered it is wholly immaterial whether the amount of compensation is to be measured by the tonnage of the vessel *eo nomine*, or by any other mode of measurement, as courts look to the substance and not merely to the

form of words. It is clear that the court in the *Alexander* case did not rest its conclusion upon the fact that the charge was imposed in express terms upon the tonnage of the vessel, but upon the fact that the charge was imposed, not for any service rendered, but simply for entering the port, and that it was a tax or duty and not merely a charge for compensation for services rendered. In the same case Judge O'Neill goes on to say: "The distinction between a tax or duty and fees or charges is, that the former is imposed by the sovereign authority without any regard to a corresponding and equivalent benefit or advantage; the latter proceed upon the quid pro quo, and unless service be rendered nothing is to be paid."

Looking at the case now before the court in the light of these authorities, we do not see how it is possible to resist the conclusion that the charge in question is a violation of the constitution of the United States. It was not a charge for any service rendered, for none was rendered, but, as said by Swayne, J., in *Packet Co. v. Keokuk*, supra: "It was a sovereign exaction, not a charge for compensation." It was imposed by the sovereign authority, acting through the agency delegated for that purpose, without any regard to a corresponding equivalent benefit or advantage, and it was, therefore, a tax or duty and not fees or charges. Every vessel, upon entering the port, was liable to pay such charges whether it received any service or not. Its manifest object was to provide the means of paying the officers of the State and the expenses incident to the performance of their duties, and cannot be regarded as anything more or less than as a tax to raise a revenue for that purpose; and we see no reason why, with just as much reason, the

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State might not \*levy a similar contribution upon every vessel entering the port of Charleston, for the purpose of contributing to the means necessary to pay the police who are charged with the duty of preserving order on the wharves as well as in other parts of the city; and this no one would contend for.

If, as was held in *Peete v. Morgan*, supra, the State cannot impose such a tax for the purpose of defraying the expenses of her quarantine regulation—a matter in which all vessels entering a port are interested—it is not easy to perceive how the authority to impose such a tax for the purpose of defraying the expenses of its harbor commission could be sustained. The fact that the amount of the charge in the case now in hand was not to be ascertained by reference to the tonnage of the vessel, but was to be measured by another mode—"the length over all," which, it seems, is not one of the elements to be considered in calculating the tonnage of a vessel under the rule prescribed by sec-

tion 4153, Revised Statutes of the United States—cannot, as we have seen, affect the question. To give the word of the constitution such a narrow and restricted sense would not fully accomplish its intent. As said by Mr. Chief Justice Chase, in *Steamship Co. v. Port Wardens*, supra: "It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty;" or by any other mode of measurement, we may add, as a necessary consequence of the language quoted.

The judgment of this court is that the judgment of the Circuit Court be reversed.

## 19 S. C. 323

## THOMAS v. POOLE.

(November Term, 1882.)

[1. *Courts* ⇨40.]

A decree for partition, regularly made by the Probate Court before the decision of *Davenport v. Caldwell*, 10 S. C. 331, must be sustained upon the principle of *communis error facit jus*.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 160; Dec. Dig. ⇨40.]

2. The question raised, but not considered: What is the extent of the jurisdiction conferred by the constitution upon Probate Courts "in business appertaining to minors" and "in all matters testamentary?"

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[3. *Courts* ⇨40.]

\*A will being incapable of execution according to its terms, a petition was filed in the Probate Court to have the lands and other property sold, and the estate settled according to the spirit of the will, all the heirs being made parties. *Held*, that it was, substantially, a proceeding for partition.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 160; Dec. Dig. ⇨40.]

[4. *Courts* ⇨198.]

The Court of Probate is a court of record, and, within the limits of its jurisdiction, is not an inferior court.

[Ed. Note.—Cited in *Turner v. Malone*, 24 S. C. 401; *Hendrix v. Holden*, 58 S. C. 527, 36 S. E. 1010; *Clark v. Neves*, 76 S. C. 491, 57 S. E. 614, 12 L. R. A. (N. S.) 298.

For other cases, see *Courts*, Cent. Dig. §§ 469, 471-475, 478; Dec. Dig. ⇨198.]

[5. *Appeal and Error* ⇨266.]

Matters appearing in a referee's report and not excepted to, and no ruling thereupon made by the Circuit judge, cannot be considered here.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1552; Dec. Dig. ⇨266.]

[6. *Partition* ⇨48; *Wills* ⇨34.]

Under a devise to M. for life, and after her death to be equally divided between her children, but should she die leaving no child or children, or lineal descendant, then over, the interest of M.'s children was a contingent remainder, which interest could not be adjudicated during M.'s



life-time, and to a proceeding for partition of this land they were not necessary parties.

[Ed. Note.—Cited in *Moseley v. Hankinson*, 22 S. C. 323, 330; *Rabb v. Flenniken*, 29 S. C. 282, 285, 7 S. E. 597.

For other cases, see *Partition*, Cent. Dig. § 122; Dec. Dig. ¶¶48; *Wills*, Cent. Dig. § 1496; Dec. Dig. ¶¶634.]

[7. *Trusts* ¶169.]

A testator directed that money coming to his daughter M. should be paid to C., as trustee. C. died; and on M.'s petition another trustee was appointed by the Probate Court, to whom, through M.'s agency, her money was paid. *Held*, that the Probate Court was without power to appoint trustees; but that M. was estopped from questioning the validity of payments made to the trustee so appointed.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 222; Dec. Dig. ¶¶169.]

Before Fraser, J., Spartanburg, July, 1881. The opinion states the case.

The Circuit decree, omitting its statement, was as follows:

The questions to be settled now, are—

1. What are the rights of the several parties under this will, under a proper construction of its terms? 2. Did the Probate judge have the right to adjust the equities of the parties and order a sale of this land for this purpose? Both questions are involved in doubt, and I approach them with misgivings.

The inquiry in all these cases is not what the testator intended to put in his will, but what intention is expressed by the will. The first is to make a will, and the second is to interpret or construe it. The testimony of Mr. Bomar, the ordinary, who drew this will, is not competent to show that a technical word in the will was used in other than a technical sense. He, of all others, ought to have known the meaning of such words. The memoranda found after testator's death, in his handwriting, are not admissible to explain the meaning of the words used in this

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\*will, and, if admissible, could give no aid. The words must be held to their true and technical import, unless controlled by the context of the will itself, and the context may show that they have another meaning, and when this is done we find the intention of the testator, which is to govern. Words are to be construed in "their strict and primary acceptation," unless they appear, from the context of the will, to be used "in a different sense," in which case they will be so construed. *Wigr. & O'H. Wills*, Prop. I., p. 15.

I. In the fourth clause of the will, testator wills and bequeaths to Mrs. Thomas for life, &c., one of the parcels of land. In the seventh clause he directs that if the appraisement "heretofore directed, shows any inequality in the value of the legacies to my children, for the purpose of making them all equal the legatee or legatees receiving the larger shares shall pay in money to those receiving the smaller shares" until they are

made equal, and if Mrs. Thomas shall be entitled to any money, the same to be paid to a trustee. Does the words "legatee" include Mrs. Thomas and "legacy" include the land? Now the property directed to be appraised in the will "heretofore," i. e., before the seventh clause, was the land, the slaves given to Calvin Poole, and the railroad and bank stock to Washington Poole. If, under this clause, two legatees are to pay, then to whom, unless it is to a third or fourth who gets land? It seems to me that there is no escape from the conclusion that one to whom land is given is called in this clause a legatee, because only two, Calvin and Washington Poole, get personalty out of that appraised property. This conclusion is strengthened by the proviso in this clause that if Mrs. Thomas is to get money, it must be paid to her trustee. This proviso cannot refer to the money to be received under the ninth clause out of the residue, because that clause contains a similar proviso, that the money shall go into the hands of her trustee.

I see nothing in this clause, or in any subsequent part of the will, to require the word "children" to be construed to mean or to include grandchildren. Testator seems to have been careful to say "children" when he meant it, and "grandchildren" when he was providing for them. The word "children" is used

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with \*a qualification, however, in one clause, as we shall hereafter see. 1 *Jarm. Wills*, § 684-5. It is, therefore, held that in the seventh clause the word "legacy" includes the land given to Mrs. Thomas, and the word "children" includes only Mrs. Thomas, Calvin and Washington Poole, and that by its provision they are to be equalized out of the property given to them and ordered "to be appraised" in the second clause of the will.

II. The ninth clause directs a sale of the residue and the payment of debts, and then the balance to be equally divided among my children, share and share alike, according to the statute of distributions, with a proviso that any money coming to Mrs. Thomas shall be paid to her trustee. In the tenth clause of the will, it is provided that "if the value (of the land given to the two sons of Luther Poole) amounts to more than equal share, they are to pay cash in money to their brother and sisters until all are equal." Whence the doubt on the testator's mind as to the value of the land amounting to more than equal share, unless he had made some provision in the will for this brother and sisters (children of Luther Poole, and, therefore, his grandchildren)? No other clause contains any provision for them, and, it seems to me, that the qualification of children in the ninth clause, by the words "according to the statute of distributions," shows that this is the true construction of the will, and that the three children, Mrs. Thomas, Calvin and Washington Poole, and the grandchildren,

children of Luther Poole, take this residuum "according to the statute" per stirpes, and it is so held. *Ruff v. Rutherford*, Bailey Eq. 11; *Izard v. Izard*, 2 Desaus. 309; 2 Wms. Ex. 802; *Wigr. & O'H. Wills*, Prop. 1, p. 15.

III. If these views are correct, then the proper construction of the tenth clause is that William Thomas Poole and James Buchanan Poole take the land under the third clause of the will, after the death of the widow, subject to a charge to make "their brother and sisters equal" to themselves, taking into the estimate what is received under the ninth clause out of the residuum and the value of the land, and it is so held.

The testator made a specific provision for his widow, most of which was absolute; he

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gave a specific legacy to John Washing\*ton Thomas, a grandson; he gave his own children certain property, out of which, as amongst themselves, they were to be made equal; and he gave certain property to the children of Luther Poole, a deceased son, out of which they were to be made equal as amongst themselves, leaving only the residuum as a common fund. He intended to make them equal, but prescribed the mode in which this equality should be attained, and his will on this subject must govern, even if it fails to produce equality.

If, however, the Probate Court had jurisdiction over these matters, this court can review its judgment only on appeal and not here. The Court of Probate, by article IV., section 20 of constitution, has "jurisdiction in all matters testamentary and of administration." The court never assumed to exercise jurisdiction in partition of real estate under this section, but in pursuance of authority conferred by an act of the legislature. *Davenport v. Caldwell*. This act has been held by the Supreme Court to be unconstitutional. The Supreme Court, however, has held that the Probate Court has jurisdiction to order the sale of real estate in aid of assets for the payment of debts, because, by law, real estate had been made assets for this purpose. *McNamee v. Waterbury* [4 S. C. 156]. Even on this the court was divided. The word "administration" has been always held to apply to the control of the personal estate of a deceased person, and never to realty, and the ruling of our Supreme Court is the only exception, and, perhaps, rendered necessary by the statute making real estate assets for the payment of debts, and existing when the constitution was adopted. 1 *Jarm. Wills*, p. 1; 4 *Blacks. Com.*, chaps. XXIII, XXXII.

There has been the same uniform usage in reference to the word "testamentary" in English and American law. It is true that a last will and testament covers both legacies and devises and disposes of real and personal estates. If the constitution had used the words "wills" or "devises" there would have been no doubt that it would have conferred juris-

isdiction over real as well as personal estates. This will, perhaps, be admitted, but it may be said that when, by the terms of a will, real estates are subjected to the payment of debts

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and legacies, then, by analogy to \*the power to sell real estate for debts, the Probate Court can sell real estate to pay and equalize legacies. By act of the legislature under a different constitution, ordinaries had power in certain cases to sell land for division and partition and for the payment of debts, but never without such authority. The power to subject lands to the payment of debts and legacies, unless it was done in pursuance of some special power, in the will, was always a matter of special equity jurisdiction, and it is so yet. *Sharsw. Bl.*, bk. 3, p. 95, and notes; 1 *Story Eq.*, § 602. It is not consistent with public policy that the estates, and especially real estates of married women, minors and absent defendants, shall be subjected in the almost private way in which these proceedings are taken in the Probate Court, to the judgment of officers who, though of high integrity, have, for many reasons, very little experience in adjusting the very delicate and often very difficult questions which arise in these causes.

In the review taken by the court of this case the parties have fallen into a very common error, and Washington Poole, who has been without fault, ought to be protected as far as he can be consistently with the legal rights of the other parties, but no further.

The Court of Probate has no power to appoint a trustee, the act of the legislature giving this power being void for the same reason that it could not confer jurisdiction in partition. The payment, therefore, to John W. Thomas, as trustee for Mrs. Thomas, is void, and her share will have to be paid to a trustee appointed by this court.

William Thomas Poole and James Buchanan Poole took under the will an interest in fee in the land, subject to the payments ordered in the will "to their brother and sisters." Their interest was not of the same kind. While the two named took real estate under the will, the others took only money, though raised out of the land, and the same is true as to all the children of Calvin Poole. If, therefore, either William Thomas Poole or James Buchanan Poole has received his share of the land after coming of age, the one so receiving is estopped from claiming any further interest in the land or disputing, to that extent, the title of Washington Poole;

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but, if the share of \*either was paid to a guardian, then such payment is void, the guardian having no authority to consent to an unauthorized sale of the minors' land. *Sm. Lead Cas.*, p. 662; 6 *Wait. Ac. & Def.*, p. 687. The interest of the other children of Luther Poole, and of the children of Calvin Poole, which was paid to their guardians, was properly paid and amounts to a payment



pro tanto on their share. The money was paid by the administrator, and, though it was irregularly raised, I do not see how they can object to the mode. They cannot be estopped, however, from claiming an additional sum which the land may bring under a valid sale by order of this court, over and above the amount already paid. Washington Poole is entitled to their share, as of the day of the payment to the guardians.

If this is such an action for the recovery of land as to entitle Washington Poole to make his claim for betterments and improvements, such claim is more properly made after the judgment is rendered in this action, and then the sixth section, General Statutes, 1872, page 560, may affect the question of mesne profits. All these questions should be left open and parties be allowed to take such action as may be suggested to them by counsel, and the report be recommitted to the referee.

It is therefore ordered and adjudged that the said two parcels of land be sold by the sheriff of Spartanburg county. \* \* \*

Messrs. Bobo & Carlisle, Duncan & Cleveland, for Washington Poole, appellant.

Messrs. J. S. R. Thomson, Ralph K. Carson, for the other appellants.

April 19th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Elisha Poole, late of Spartanburg county, died in March, 1865, leaving of force a last will and testament. He also left surviving three children, and the children of a deceased son, Luther Poole. He died possessed of certain real estate, located in said county, and, also, of personal property.

In the second clause of his will he directed his land, three slaves and his stock in the

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South Carolina Railroad and South \*Western Railroad Bank to be appraised, after dividing his land into two tracts.

In the third clause he "bequeathed" to his wife, Harriet Poole, during her life, one of these tracts, the homestead, and, at her death, to his two grandsons, William Thomas Poole and Buchanan Poole, to be divided as nearly equally between them as practicable, both as to quality and quantity. He, also, in this clause, gave to his wife a negro boy, Ben, and, at her death, to his grandson John Washington Thomas. The two first named grandsons were two of the children of his deceased son Luther, and John Washington Thomas was the son of his daughter Martha C. Thomas, one of the plaintiffs.

In the fourth clause he devised the other half of his land to his daughter Martha C. Thomas, during her natural life, and, at her death, to be equally divided between and among her children, share and share alike; but, should his daughter die leaving no child or children or lineal descendant surviving

her, he then directed that said land be sold, and the proceeds divided among his children. \* \* \*

In the fifth clause he bequeathed to his son Calvin Poole, the three negroes he had directed previously to be appraised. In the sixth he bequeathed his railroad stock to his son Washington Poole.

In the seventh he stated "that it was his will and desire that, should the appraisement before directed show any inequality in the value of the 'legacies' to his children, for the purpose of making them all equal the legatee or legatees receiving the larger share or shares, shall pay in money to those receiving the smaller share or shares until all shall be equal, before they shall be entitled to receive these legacies; provided, that should my daughter Martha C. Thomas be entitled to any money, the same shall be paid to John B. Cleveland, whom I hereby appoint her trustee." \* \* \*

In the ninth clause he directed that all the rest and residue of his personal estate \* \* \* should be sold \* \* \* and, after payment of debts, the proceeds to be equally divided between his children, share and share alike, the portion going to his daughter Martha C. Thomas, to be paid to her trustee.

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\*In the tenth he said: "In order to make my grandchildren, the children of my deceased son Luther Poole, equal in the distribution of my estate, I will and devise that the land bequeathed to them in the 3d clause of my will, be taken at valuation, and if the value thereof amounts to more than equal share, that they pay back in money to their brothers and sisters until all are made equal."

No executor was appointed in the will, and Washington Poole, a son of the deceased, administered with the will annexed. The appraisement of the property directed in the will to be appraised was had, and the administrator with the will annexed, finding it utterly impracticable to carry out the provisions of the will according to its terms, (because of the fact that the equalization directed could not be made, the parties being unwilling and unable to take the bequests and devises upon the conditions imposed, and because of the emancipation of the slaves,) with the knowledge and consent of most of the parties of age, if not all, and, as it seems, at the earnest solicitation of Mrs. Thomas, one of the plaintiffs herein, instituted proceedings in the Probate Court, in the nature of an action for partition, the purpose being, as stated in the petition, to have the real estate and railroad stock sold, and the estate settled according to the spirit of the will. The minors were all mentioned, and process prayed to bring all parties in, and guardians ad litem appointed for the minors to superintend and protect their interests, but no process was asked to bring in such of the plaintiffs in this action who are the children

of Mrs. Thomas, it being understood that they had no such interest in the estate as entitled them to be made parties.

The Probate Court entertained jurisdiction, and finally made the following decree, to wit: "The parties in interest in this proceeding having had notice of the same and having appeared, do consent that all the land be sold. It is therefore ordered that the land, together with the railroad stock, all be sold on the first Monday in November next, or on some suitable salesday thereafter, on one and two years' credit, with interest from date, except costs, which must be in cash on day of sale. This 11th day of October, A. D.

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1872." The sale took place under \*this order, and a settlement of the estate was made in the Probate Court in December, 1874, by which the proceeds were divided in equal shares between Washington Poole and Mrs. Thomas, the two living children of the testator, and the heirs of Calvin Poole and the heirs of Luther Poole, the two deceased sons of the testator. In accordance with this settlement, the proceeds have been in part, if not in whole, paid to the parties, or to their guardians; the portion going to Mrs. Thomas having been paid to a trustee, John W. Thomas, her son, who, upon her petition, had been appointed her trustee by the Probate Court, and who had given a sufficient bond with justified surety. The plaintiffs, Mrs. Thomas and her husband, and John W. Thomas, the trustee, it appears, were present at the sale and at the settlement, and not only made no objections, but were active in bringing it about.

The proceeding now before the court is an action brought on June 12th, 1879, by Mrs. Thomas and her husband and their children, to set aside and vacate the Probate Court proceedings, and have a settlement de novo, on the ground that the children of Mrs. Thomas, who, with herself and husband, are the plaintiffs in this action, were not made parties to said proceedings, and, therefore, they are not bound thereby in any event; and, also, on the ground that said proceeding being for partition of real estate, the Probate Court had no jurisdiction.

The case was referred to a referee, with instructions to take the testimony and report his conclusions of fact. Upon this report the case came on for hearing before Judge Fraser, who, in August, 1881, filed a decree, in which, after adjudging the rights of the several parties, and ruling that the Probate Court was without jurisdiction, whether it was regarded as a proceeding in partition or a testamentary matter, and, also, that the Probate Court had no power to appoint a trustee for Mrs. Thomas, he ordered the judgment of the Probate Court and all actions thereunder to be annulled, the lands to be resold, a recommittal of the case to the referee to report as to the shares of the different parties, the amounts which had been paid

them, and some other matters preparatory to a final settlement, including a proper trustee for Mrs. Thomas.

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\*From this decree all parties have appealed. The administrator, Washington Poole, appeals upon the ground mainly that the court erred in holding that the Probate Court was without jurisdiction to order the sale of the lands and to appoint a trustee for Mrs. Thomas, and, also, in holding that the payments made under the settlement to the trustee of Mrs. Thomas and the guardian of William Thomas Poole and James Buchanan Poole were void, and in not holding that the parties to the Probate Court proceeding were estopped.

The plaintiffs herein, to wit: Mrs. Thomas and her children, have appealed on the grounds: 1. Because the Circuit judge erred in construing the word "legacy" in the seventh clause of the will so as to include the land devised to Mrs. Thomas in the fourth clause. 2. In not holding that if in the seventh clause the word "legacy" includes lands devised to Mrs. Thomas, that then Mrs. Thomas should only account for the value of her life-interest therein. 3. In not holding that the children of Mrs. Thomas took a remainder in fee in the land devised to her. 4. In directing a sale of the lands without giving the plaintiffs an opportunity to pay such sum as might be necessary to equalize the defendants' interest and keep the land. 5. In directing the costs to be paid by the proceeds of the sales, instead of charging Washington Poole therewith.

William Thomas Poole and James Buchanan Poole appeal: 1. Because the Circuit judge held that if they received their share of the land after coming of age, they are now estopped from claiming any further interest therein or disputing Washington Poole's title (who was the purchaser at the Probate Court sale). 2. In not holding that the real estate should be appraised of its value immediately after the death of the testator. 3. In directing a sale of the real estate. 4. In directing the costs to be paid out of the proceeds of sale.

Mary E. Bryant and her husband, E. G. V. Bryant; Harriet M. Neighbors and her husband, Julian Neighbors; Raymoth V. Poole, Sarah H. Poole and Luther B. Poole, who are the children of Luther Poole, a deceased son of testator, and brothers and sisters of the two grandsons named in the third clause of the will as remaindermen to the widow

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of the testator, also have \*appealed: 1. Because the judge erred in holding that the interest of any of the children of Luther Poole, which was paid to their guardians, was properly paid, and amounts to a payment pro tanto on their shares. 2. In directing the costs to be paid out of the sale instead of charging Washington Poole therewith.



The fundamental question in the appeal is as to the jurisdiction of the Probate Court, and it seems to be so regarded by the appellants on all sides. We will first consider this question as to the subject-matter involved. It has been discussed, in part, as if it was a case of ordinary partition of real estate. The Circuit judge considered it in that aspect, and, under the case of *Davenport v. Caldwell*, 10 S. C. 331, held that the Probate Court had no power in the premises. He also considered it under section 20, article IV., of the constitution, by which jurisdiction in "all matters testamentary" was conferred upon the Probate Court; and he ruled that this did not apply, while admitting that it covered wills and testaments disposing of personal property, yet, inasmuch as the constitution does not use the word "devise," which is the technical word as to real estate in a will, he held it did not apply to devises.

It is true, since the case of *Davenport v. Caldwell*, and while it stands, this court cannot hold that the act of general assembly on this subject, and which was declared unconstitutional in that case, conferred any jurisdiction upon the Probate Court; and if we were considering this question as governed by that act, we would be compelled to sustain the Circuit judge. But *Caldwell* and *Davenport* did not consider the rights of minors as protected by the Probate Court under that provision of the constitution which confers jurisdiction upon that court "in business appertaining to minors." The parties were all adults in *Davenport v. Caldwell*, and the rights of minors were not adjudged there. This is still an open question, as the precise powers of the Probate Court under those terms have never yet been distinctly and authoritatively adjudged by this court that we are aware of, nor is it absolutely essential to decide it now.

We think the recent cases of *Herndon v. Moore* and *Schumpert v. Smith*, 18 S. C. 339, 358, are in point here, where this court held that whatever might be the true solution of

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the ques\*tion as to the powers of the Probate Court in a strict matter of partition, unencumbered with the other questions of "business appertaining to minors" "or matters testamentary," yet, where that court, in cases arising before *Davenport v. Caldwell*, assumed jurisdiction and acted without appeal, that upon the principle of *communis error facit jus*, the judgment must stand. We think that the doctrine established in these two late cases referred to *supra*, if this case is to be regarded as a partition case, must apply; and upon that doctrine the judgment below must be reversed. After the very able development and vindication of that principle as applicable to the numerous partitions by the Probate Court in every section of the State before *Davenport v. Caldwell*, by Mr. Justice McGowan in the cases cited, it will

not be necessary for me now to do more than to refer to them as settling the question here, at least so far as this case is to be regarded as a partition case.

Was it a case of that kind? The property involved, consisting mostly of realty, belonged to Elisha Poole in his life-time. Had he died intestate this would have descended to his heirs-at-law, all of whom were before the Probate Court; but he died leaving a last will and testament, in which he disposed of this property to certain of those who were his heirs, upon certain conditions. It turned out that these conditions could not be complied with, and being conditions precedent, and not happening, the devises and legacies did not attach. The will became inoperative as to these, and the title to the lands descended as in cases of intestacy, and the proceeding in the Probate Court, though not in form strictly a partition proceeding, yet was so, substantially, and we think should be governed and controlled by the principles which have been established in such cases.

Such being our opinion, if the proper parties were before the court, it will be unnecessary to discuss the questions raised as to the rights of the parties under the different clauses of the will. Neither will it be necessary to discuss the powers of the Probate Court as to the "matters testamentary" provision of the constitution.

Next, Did the Probate Court obtain jurisdiction over the necessary parties? The fol-

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lowing statement is found in the \*judgment of the Probate Court, to wit: "The parties in interest in this proceeding, having had notice of the same, and having appeared, do consent that all the land be sold." &c. The Court of Probate is a court of record, and the record in such courts, as styled by Mr. Bigelow, is a remembrancer of what took place during the progress of the case; it is a memorial of the proceeding, and generally it imports such absolute verity that a party cannot aver as error of fact a matter contrary to the record.

The Probate Court, in its jurisdiction, is not an inferior court, but is so important that the same rule of construction is to be made in favor of its jurisdiction and the effect of its record as is applied to courts of general jurisdiction. *Herm. Estop.*, p. 148, § 140. Besides, there is no allegation in the complaint that there was a defect of parties in the case before the Probate Court, except as to the plaintiffs, other than Mrs. Thomas and her husband. Nor did the referee or Circuit judge find, as a matter of fact, that there was such defect. Under these circumstances, we cannot but assume that all the parties named, except the children of Martha C. Thomas, who are plaintiffs here, were properly before the court.

At this stage of the case we cannot look into the irregularities, if any, of service of

summons, the appointment of guardians ad litem, &c. There was no exception as to these matters to the referee's report, nor any ruling made in reference thereto by the Circuit judge. The judgment of the Probate Court having stated that all parties had notice and had consented, until this is assailed directly in a proper way we are concluded thereby and must act upon it as a fact.

As to the plaintiffs, children of Mrs. Thomas: Their interest in the land devised to their mother in the fourth clause of the will, was a contingent interest—a contingent remainder—contingent upon their survivorship of their mother. It was not necessary, therefore, that they should have been made parties in the Probate Court. Nor have they yet any such interest as can be adjudicated by the courts. It is not at all certain but what Mrs. Thomas may outlive all of her children. It may be that the action of the Court now will not bind them if they should

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\*happen to survive, but of this we give no opinion; we only mean to say that, until they have vested rights, they are premature in asking the assistance of the court by way of protection.

We concur with the Circuit judge that the Probate Court had no power to appoint a trustee for Mrs. Thomas, but this does not affect the main question here. It only affects the question of payment of her interest to this trustee. It seems that the trustee was appointed upon the petition of Mrs. Thomas, and through her agency—her own act—he received these payments; we think she is now estopped from repudiating them, or, which is the same thing, she must account in any future settlement for what he has received.

The payments to the guardians of the minors must be sustained.

It is the opinion of this court that the proceedings in the Probate Court should have been sustained except as to the appointment of a trustee for Mrs. Thomas; and to this end it is the judgment of this court that the judgment of the Circuit Court be reversed.

## 19 S. C. 337

Ex parte MOBLEY.

In re McAFEE v. McAFEE.

(November Term, 1882.)

### [1. Mortgages ⇨436.]

Judgment was obtained in April against a party whose land was covered by two mortgages, and during the same month a levy was made, under which the land was sold in June and purchased by M., who was a surety of the defendant for this debt. In May actions were commenced to foreclose these mortgages, and notices of lis pendens were then filed. The mortgagor answered, alleging the sheriff's sale and disclaiming any further interest. M. there-

upon filed his petition, charging the two mortgages to be fraudulent, and asking to be allowed to intervene as a party defendant. *Held*, that M. was a proper party, and that his petition should have been granted.

[Ed. Note.—Cited in McAfee v. McAfee, 28 S. C. 190, 5 S. E. 480; Baum v. Trantham, 45 S. C. 302, 23 S. E. 54.]

For other cases, see Mortgages, Cent. Dig. § 1289; Dec. Dig. ⇨436.]

### [2. Lis Pendens ⇨25.]

The title of the purchaser at sheriff's sale had relation back to the judgment, or at least to the levy, both of which were prior to the filing of notices of lis pendens.

[Ed. Note.—Cited in Carolina Savings Bank v. McMahon, 37 S. C. 317, 16 S. E. 31.]

For other cases, see Lis Pendens, Cent. Dig. § 51; Dec. Dig. ⇨25.]

[This case is also cited in Baum v. Trantham, 45 S. C. 291, 23 S. E. 54, and distinguished therefrom.]

Mr. Chief Justice Simpson, dissenting.

Before Wallace, J., Chester, June, 1882.

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\*The opinion states the case.

Mr. W. A. Sanders, for appellant.  
Messrs. J. & J. Hemphill, contra.

June 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The two plaintiffs above named, Samuel M. McAfee and Ellen M. McAfee, brought these actions for foreclosure of mortgages of real estate; and this is a petition filed by Samuel W. Mobley, asking to be allowed to intervene, as a party defendant, for the purpose of contesting the validity of said mortgages. For this purpose he filed petitions in each of the cases, setting forth that he has an interest in the mortgaged premises; and that he is informed and believes that the bonds and mortgages are pretensive and fraudulent; and that they were made to hinder, delay and defeat the creditors of the mortgagor, John T. M. McAfee. The petitions were duly verified, and no answers thereto were filed. The defendant, who answered in the actions for foreclosure, says that the mortgaged premises have been sold by the sheriff under an execution against the mortgagor, and he, therefore, has no further interest therein.

The facts upon which the petitioner bases his application to intervene are stated by him, substantially as follows: Subsequent to the execution of said mortgages, some time in April, 1882, a judgment was recovered in the Court of Probate by John W. Wright and others against the said John T. M. McAfee as administrator of Thomas Wright, and, under an execution issued to enforce this judgment, the mortgaged premises were levied on by the sheriff, on April 27th, 1882, and advertised for sale on the first Monday in June following. On May 13th, 1882, the actions for foreclosure were commenced, and on the



same day notice of lis pendens was duly filed in each of said cases. On June 5th, 1882, the mortgaged premises were sold by the sheriff under the execution above mentioned, and bought by the petitioner for the purpose, as is alleged, of protecting himself from liability as surety on the administration bond of the said John T. M. McAfee.

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\*The Circuit judge refused the motions to intervene, and this appeal alleges error on his part in so doing. In rendering his judgment, the Circuit judge has fallen into the error of saying that "pending the suit for foreclosure, and after filing of notice of lis pendens according to law, the mortgaged premises were levied on and sold under the judgment above referred to;" whereas, in fact, the levy was made before the actions for foreclosure were commenced and before the filing of the notice of lis pendens, though the sale was made afterwards.

The decision below is based upon the provisions of section 153 of the code (1882). It will be observed, however, that this section only provides that one who purchases property which is the subject of litigation, subsequent to the filing of the notice of lis pendens, shall be bound by all proceedings thereafter had to the same extent as if he were made a party to the action; but it does not forbid the making of such purchaser a party. If a person in such a situation is to be subjected to all the burdens and disadvantages of being a party, it would seem to be nothing more than right that he should, if he desires it, and can make a proper showing for that purpose, be entitled to the privileges of a party. While, therefore, under this section, a person purchasing property while it is the subject of litigation, subsequent to the filing of the notice of lis pendens, is not a necessary party, and the case may proceed to judgment without his presence, it does not necessarily follow that he may not be a proper party under certain circumstances. It sometimes happens that persons may be proper and yet not necessary parties to an action. For example, in an action for the foreclosure of a mortgage, neither prior nor subsequent encumbrancers are necessary, and yet they are proper parties. *Warren, Wallace & Co. v. Burton*, 9 S. C. 197; *Evans v. McClucas*, 12 S. C. 61, and the authorities cited in those cases.

Now, if, as is said in *Massey v. McIlwain*, 2 Hill Eq. 427, a purchaser, at an execution sale, is not only invested with all the rights of the judgment debtor, but "also clothed with all the rights of his creditor, at whose instance the land was sold," we see no reason why Wright, the execution creditor, and, as a consequence thereof, the petitioner, as

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purchaser at the sale under \*his execution, would not be a proper party, and entitled,

upon a proper showing, to be brought in as a party. When, therefore, a proper showing is made, as has been done in this case, we see no reason why a purchaser, under a judgment, not only recovered but actually levied before any notice of lis pendens has been filed, may not be allowed to come in and litigate his rights, of course at the peril of being mulcted in costs if he fails to establish his allegations.

According to the allegations of the petition, which is verified, and of which there is no denial, the petitioner is likely to suffer great injustice unless he is admitted as a party and permitted to be heard upon the issues in the actions. It appears from these allegations that the mortgages which are sought to be foreclosed in these actions, between son and father in one case, and between wife and husband in the other, are pretensive and fraudulent, and made to hinder, delay and defeat the creditors of the mortgagor; and it is very manifest that no such defenses will be set up, for the defendant in the actions for foreclosure has answered, saying that he has no further interest therein since the purchase of the mortgaged premises by the petitioner at the sheriff's sale. As the petitioner, under the section of the code above cited, will be bound by any judgments that may be rendered in these actions for foreclosure, it is very clear that unless he is made a party, and permitted to raise the question as to the bona fides or validity of these mortgages, it will never be done, and the petitioner may lose the land which he has bought without an opportunity of litigating his right thereto. For, if judgment of foreclosure and sale is rendered, as it will be, in the absence of any defense, he cannot dispute the title of the purchaser at such sale, because, being bound by the judgments of foreclosure and sale to the same extent as if he were a party to the actions, he will be concluded by such judgments.

Unless there be some way by which the petitioner could be protected against such a result, a gross fraud will be practiced upon him through the forms of law, provided the allegations in his petition be true. It is difficult to see what else he could have done to protect himself from liability as the surety of the mortgagor, who declines to make any

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defense to the actions for \*foreclosure, brought by his wife and son, than that which he has done. As soon as the judgment was recovered in the Court of Probate, it was levied before, not after, the actions for foreclosure were commenced, and the land was sold at the earliest possible day thereafter, the levy having been made on April 27th, 1882, and the sale made on the first Monday in June thereafter, while the actions for foreclosure were commenced and the notices of lis pendens were filed on May 13th, 1882. There was, therefore, no laches on the part

of the petitioner, but, on the contrary, he acted as promptly as it was possible for him to have done.

Again, in *Freem. Exec.*, § 333, in speaking of sales under execution, the writer says: "While the title of the defendant is not, in a vast majority of the States, divested until the execution of a conveyance to the purchaser, this conveyance, when made, must, for some purposes, be given effect as though executed at some period antecedent to its date. The relation of deeds, made in pursuance of sales under execution, is very frequently spoken of in the reported cases, and yet about the only thing which we conceive to be well settled in regard to the doctrine of relation, is that such deed must be given such an effect as will preserve and make effectual the lien under which the execution sale was made."

In *Jackson v. Dickenson*, 15 Johns. 309, the land of A. was sold under an execution in favor of B. on the 1st of March, and on the 10th of March a bill was filed to foreclose a mortgage on the same land. On the 19th of March the sheriff executed a deed to the purchaser. Held, that his title had relation back to the day of sale, and, not being a party to the proceeding to foreclose the mortgage, he was not bound thereby, as his title was acquired previous to the lis pendens, although not consummated until afterwards.

In *Jackson v. Ramsay*, 3 Cow. 75, the same doctrine was recognized, and the rule as to the doctrine of relation is thus stated: "Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other act shall have relation." If this be so, then the title of the petitioner may have re-

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lation back to the date of the judgment, or, at least, to the date of the levy, and this being prior to the commencement of the actions for foreclosure, he was entitled to be made a party thereto.

The judgment of this court is that the order of the Circuit Court in each of the cases above stated be reversed, and that the cases be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

Mr. Chief Justice SIMPSON dissenting. On May 13th, 1882, the plaintiffs commenced their separate actions above against the defendant for foreclosure of two mortgages executed in 1880, notice of lis pendens being filed in each case on same day.

Previous to the commencement of these actions a judgment had been obtained in the Probate Court against the defendant, as administrator in a suit for an accounting in behalf of John W. Wright et al., for \$2,165. On April 27th, 1882, a short time before these actions were commenced, the real estate in

controversy was levied upon by the sheriff of Chester by virtue of the judgment above referred to. The sale, however, did not take place until June 5th, some weeks after the beginning of these actions and the notice of lis pendens. At the sale by the sheriff, the petitioner, being the surety on the administration bond of the defendant, to save himself became the purchaser, whereupon he filed the petition herein in re to be made a party to said cases, his object being to contest the mortgages of the plaintiffs on the ground of fraud, having been made, as alleged by him, to "hinder, delay, defeat and defraud creditors." Judge Wallace refused the petition on the ground that petitioner having become the purchaser after suit commenced and the filing of the notice of lis pendens, there was no law which entitled him to be made a party.

The appeal involves the question, whether, under the circumstances, the appellant should have been made a party. It will be at once seen that at the time these actions were commenced the appellant could not have legally been made a party, because at that time he had no connection whatever with the matter in litigation. It is true he was a surety on the administration bond of the defendant, but there was no evidence that he had been

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\*made liable on that account, or that he was a creditor otherwise of the defendant, nor did he have any claim to the land in controversy.

One John W. Wright and others had obtained judgment in the Probate Court against the defendant, but up to the commencement of these actions and the "notice of lis pendens," the petitioner was a stranger to the whole matter, and any other person in the community might have been made a party as well as he. Did the fact that he became a purchaser under the circumstances stated, and before judgment in the foreclosure suits, entitle him to be made a party? It is a general rule, that every person whose presence is necessary for a complete determination of the matter in controversy, may and should be made a party before final judgment, and if such person is not summoned at the beginning of the action he may be brought in afterwards. Code, § 143, Gen. Stat.

Can a complete determination of the controversy here be made in the absence of the petitioner? Section 153 of the code (Gen. Stat.) provides that in foreclosure actions lis pendens must be filed at least twenty days before judgment, and that every purchaser or encumbrancer subsequent to such filing shall be bound by all proceedings taken thereafter to the same extent as if he were made a party. This would imply that in such case a complete determination of the controversy might be made without the presence of the subsequent purchaser or encum-



brancer, otherwise the provision that he should be bound to the same extent as if he had been brought in would be idle. The petitioner bought the land at sheriff's sale after the notice of lis pendens; he then occupied the position of a subsequent purchaser, and if he has no higher rights and interests than would attach to a subsequent purchaser simply, he could not intervene. He is a volunteer, having acquired his interest during the pendency of the action and after legal information that he would be bound by the proceeding already in progress, and he would have no just or legal claim to be permitted to interject his newly and voluntarily acquired interest into the action, raising new questions and difficulties, to the delay and

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expense of the original parties, who, perhaps, but for his interference, might have had their rights promptly adjudicated.

But it seems that the petitioner bought under a judgment which was filed and levied a few days before the foreclosure suit and the filing of notice of lis pendens, though the purchase was made afterwards. Can this fact make any difference as to his rights in the premises? We can see no reason why it should. He is still a volunteer, with all the facts before him, and he must abide the consequences. He knew when he purchased that his rights would be subject to the suits then pending to the same extent as if he were made a party. The lis pendens informed him of this fact, and he cannot now legally complain. There is no principle of law as to parties under the old practice or provision of the code under the new which would warrant the petitioner in demanding that he should be made a party. The other sections of the code, referred to in the argument, have no application.

The petitioner had no interest when the actions were commenced, and to have made him a party then would have been a misjoinder. His acquisition of interest after action could not re-act to the date of the judgment under which he bought. It has been decided that the sheriff's deed has relation back to the sale. *Kingman v. Glover*, 3 Rich. 27 [45 Am. Dec. 756]. But we find no authority which carries the title back to the entry of the execution or the date of the judgment, nor is there foundation for the position that petitioner's purchase created an equity having relation back to the judgment. Both his legal and equitable rights attached at the same time; this was upon his purchase. Up to that moment he had neither, and this was after the notice of lis pendens, which, under the law, made those already in court his representatives.

For the reasons given above I concur with the Circuit judge—Judge Wallace. Let this be filed as a dissenting opinion to that of the majority.

Appeal sustained.

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\*CLARK v. CLARK.

(November Term, 1882.)

[1. *Wills* ⚭555.]

There was a devise "to my brother C., for and during his natural life, and on his death to his children, and then to their children living at his death, share and share alike." When the will was drawn, C. had two children, but one of them, S., died before testator, leaving issue; C. died after testator, his other child surviving him. *Held*, that at C.'s death, one-half of the property passed to the children of S.

[Ed. Note.—Cited in *Shanks v. Mills*, 25 S. C. 362; *Tindal v. Neal*, 59 S. C. 18, 36 S. E. 1004; *Reynolds v. Reynolds*, 65 S. C. 395, 43 S. E. 878.

For other cases, see *Wills*, Cent. Dig. § 1199; Dec. Dig. ⚭555.]

[2. *Partition* ⚭104.]

This property having been sold under a decree in partition proceedings, to which the children of S. were not parties, the bidder was not bound to comply with his bid.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 341-351, 375, 377, 380-395; Dec. Dig. ⚭104.]

[3. *Wills* ⚭439.]

In the construction of a will, the main object should be to ascertain the testator's intention, which must be gathered from the will itself, assisted by the light of the circumstances surrounding the testator when the will was made.

[Ed. Note.—Cited in *Dillard v. Dillard*, 95 S. C. 87, 78 S. E. 1037; *Id.*, 80 S. E. 849.

For other cases, see *Wills*, Cent. Dig. §§ 952, 953, 957; Dec. Dig. ⚭439.]

[4. *Wills* ⚭774.]

The doctrine of lapse has no application to this devise.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1995, 1996, 2001; Dec. Dig. ⚭774.]

[5. *Wills* ⚭462.]

Words supplied in a will, they being absolutely necessary to make the context sensible.

[Ed. Note.—Cited in *Bishop v. Tinsley*, 64 S. C. 186, 41 S. E. 895; *Dillard v. Dillard*, 95 S. C. 87, 78 S. E. 1037.

For other cases, see *Wills*, Cent. Dig. § 981; Dec. Dig. ⚭462.]

Before Aldrich, J., Charleston, June, 1882.

The opinion states the case.

The Circuit decree was as follows:

I am so well satisfied with the opinion given by Judge Fraser, while at the bar, as to the proper construction of this will, that I have adopted it as the judgment of the court.

The will of Henry Clark devises to his brother, William Clark, a lot at the corner of Hasel and Anson streets, Charleston, "for and during his natural life, and on his death to his children, and then to their children living at his death." At the date of the will, William Clark had two children living, one of whom, Mrs. Sherwood, died before the testator, and the other William J. Clark, was living at his death. At the death of William Clark, there were children of Mrs. Sherwood, and also of William J. Clark, living. Now, what is the proper construction of this will?

Before the act of 1824, words of limitation

were necessary to create by will a fee-simple estate; and the devise to the children of

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William Clark in this will would only \*have given them a life-estate; and if there had not been, as in this case, a remainder over in fee, the estate would have returned to the heirs of the testator, or to his residuary devisee.

By the act of 1824, (re-enacted, Gen. Stat., ch. LXXXVI., § 9,) no words of limitation in a will are necessary to create a gift in fee-simple "unless such construction shall be inconsistent with the will of the testator, expressed or implied." If, in this case, the will is held to give a fee-simple to William J. Clark, then his children can take nothing as purchasers under the will, but the whole estate goes in fee-simple to the father, William J. Clark. Now, this is manifestly inconsistent with the will of the testator, and, therefore, the will is to be construed so as to give William J. Clark what a common law construction before the statute could give to him, to wit, a life-estate. After his death, his children would take the fee, because there is no provision of the will inconsistent with it.

If this be the proper construction of the will as to the estate of William J. Clark, then Mrs. Sherwood's estate, if she had been named, was also a life-estate. *Lesly v. Collier*, 3 Rich. Eq. 128. But the remainders to the children of the children of William Clark are, by the terms of the will above quoted, contingent upon their being living at the death of William Clark. The devise, however, is not to Mrs. Sherwood by name, but is to be to the children of William Clark, and only to those who answer the description of children at the death of the testator. When a legacy is given to a class of persons in general terms, and one or more dies in the lifetime of the testator, "those of the described class who survive the testator take the whole estate." 2 Wms. Ex. 877. It thus seems to us that William J. Clark took an estate for life in the lot in Charleston, with remainder in fee to his children living at the death of William Clark.

It is, therefore, ordered, adjudged and decreed, that Rudolph Hopke do accept the title tendered under the proceedings in this case, and do pay the costs so far as this question is concerned.

Messrs. Simons & Cappelmann, for appellant, cited 17 S. C. 45; 23 Pa. Stat. 388; 2 Pow. Dev. 6; 2 Jarm. Wills 181, 472; 1 Metc. (Mass.) 446, 480; 2 Hill Ch. 105; 6

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Monr. T. B. 399; \*3 Rich. Eq. 138; 6 Rep. 17; 6 Rich. Eq. 88; 16 S. C. 220; 2 Vern. 611; 2 P. Wms. 103; 1 Russ. & M. 639; 2 Myl. & K. 69; 4 Desaus. 312; 7 Paige 336; 70 N. Y. 87; 3 Kern. 273; 23 N. Y. 366; 3 Jarm. Wills 632; 6 Sim. 329; 8 Sim. 354; 54 Me. 239; 4 S. C. 84.

Messrs. A. T. Smythe and W. M. Bruns, contra, cited some of the same authorities; and, also, 1 Rich. Eq. 32, 401; 9 Id. 470; 2 Wms. Ex. 1322; 1 Strobb. Eq. 283; 1 Hill Ch. 311, 355; 2 Id. 41, 431; 2 McC. Ch. 444; 1 Jarm. Wills 602; 3 Id. 700; Bailey Eq. 9, 302; Spears Eq. 319.

August 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Henry Clark, of Charleston, in 1869, executed his will, by which, among other things, he devised as follows: "I devise to my brother William Clark, all that lot of land on the corner of Hasel and Anson streets, &c., for and during his natural life: and on his death to his children, and then to their children living at his death, share and share alike," &c. The testator died in October, 1871, and at that time there were living his brother William, the life-tenant, and his child, William J. Clark, who had children as follows: Eliza, wife of Louis Appelt; Samuel J. Clark, L. Inez Clark, William H. Clark, Henry D. Clark and Martha, wife of E. C. Horton, and the latter has since died, leaving an only son, Edward C. Horton. Martha A. Sherwood, another of the children of William, had died after the testator made his will, but before his death, leaving surviving her children, Ella A. Sherwood, Mary L. Sherwood, Cornelia L. Sherwood and Anne L. Sherwood (the latter since dead, without issue).

In January, 1875, William Clark, the life-tenant, died, leaving surviving him an only son, William J. Clark, and his children, and his grandchildren, the Sherwoods, as before stated; and William J. Clark, his only surviving child, instituted the principal case of *W. J. Clark v. W. H. Clark et al.*, for partition and division of the lot between himself and his children, without making the Sherwoods, children of his deceased sister, parties. There was a decree for the sale of the

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property, which \*was offered for sale by Master W. D. Clancy, and bid off by one Rudolph Hopke for \$2,500. The said purchaser now refuses to comply with his bid, on the ground that he had received notice that the children of Mrs. Sherwood were entitled to an interest in the property and should have been made parties, and, not having been, the master is unable to make good titles; and he has filed this petition in re to have that point decided. The question submitted was whether the Sherwoods, children of a daughter of William Clark, who died before the testator, and, of course, before her father, the life-tenant, were entitled to an interest in the property, so as to make it necessary that they should have been parties to the partition proceedings.

The case was heard by Judge Aldrich, who held that the Sherwoods, whose mother died



before the testator, Henry Clark, took no interest under his will, and adjudged that the titles tendered were good, and should have been accepted by Hopke, whose petition was dismissed. From this decree the petitioner, Hopke, appeals to this court upon the grounds: "1. That the presiding judge erred in holding that under the will of Henry Clark, upon the death of William Clark, William J. Clark took a life-estate, and his children then living alone took the fee to the property in question, as this construction is clearly inconsistent with the intention and will of the testator. 2. That the presiding judge erred in holding that the purchaser, Rudolph Hopke, was bound to accept the title tendered."

What is the proper construction of the will of Henry Clark in respect to the rights of the children of Mrs. Sherwood? All the interest which William J. Clark and his children have under the will was covered by the decree of sale, and passed to the purchaser; so that it will be unnecessary to consider the rights of these parties as between themselves. The only matter which touches the alleged insufficiency of the title is the question whether the Sherwoods should have been before the court as parties having an interest in the property when the order for sale was made.

In the construction of a will, of course the main object should be to ascertain the intention of the testator; but that intention must be gathered from the will itself, assist-

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ed by the light of \*the circumstances surrounding the testator at the time of its execution. At the time this will was written, William Clark had two children, Mrs. Martha A. Sherwood and William J. Clark, and it is reasonable to assume that the testator, Henry Clark, in giving the property to his brother William for life, with remainder over "to his children," intended as great a benefit to Mrs. Sherwood as to her brother William J. Clark. Indeed, if the will had disposed only of personalty, and had been made by William Clark, the father, instead of Henry Clark, the uncle, the law would have intervened in behalf of the children of Mrs. Sherwood, (Gen. Stat., § 1865,) notwithstanding she died in the life-time of the testator. But, as the will disposed of land, and was not made by the father, the terms of that law do not cover the case. The intention, which is so manifest, must, however, be carried into effect, unless, in the events which have occurred, there is some controlling principle of law which interdicts it.

In the first place, we do not consider the doctrine of lapse as involved in the case. The testator disposed of his whole interest to certain persons in a particular manner, viz.: to his brother William for life, with first remainder to William's children as a class for life, and with a second remainder

to their children. Both the children of William have children now living, and the fact that one of them (Mrs. Sherwood) died in the life-time of the testator, cannot reach to and cause to lapse the ulterior limitation to her children. "However much it may have been once doubted, it is now clearly settled, that when an interest in property is given by will to one person with a limitation over of the same interest, either to his children or to any other persons upon the death of the first devisee or legatee before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, although in the life-time of the testator, does not produce a lapse of the limitation over of that interest to the substituted object of the testator's bounty," &c. *Mowatt v. Carow*, 7 Paige 328; *Johnson v. Harrelson*, 6 S. C. 340. There is nothing decided in the case of *Lesly v. Collier*, 3 Rich. Eq. 129, inconsistent with this doctrine.

Again, if, as contended, there is no good

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limitation over of the \*half of the lot intended for Mrs. Sherwood, then another rule of construction intervenes. In that case, the share intended for Mrs. Sherwood, being given to her as one of a class—"children of William"—would pass to her brother, William J. Clark, as the only surviving member of the class, to which the property was given, so that in either view the doctrine of lapse does not touch the case. The whole interest was effectually given, and the only question is, whether the share intended for Mrs. Sherwood, (according to the event, one-half interest) who died leaving children before the testator, Henry Clark, shall go to the children of her brother, William J., or to her own children. "A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals, described by their several names and descriptions, though they may together constitute a class, implies an intent to benefit the individuals named. In a gift to a class you look at the description and inquire what individuals answer to it, and those who do answer to it are the legatees described."

\* \* \* If a testator gives a legacy to be divided among the children of A., at a particular time, those who constitute the class at the time will take." *De Veaux v. De Veaux*, 1 Strobb. Eq. 283; *Cole v. Creyon*, 1 Hill Eq. 311 [26 Am. Dec. 208]; *Swinton v. Legare*, 2 McC. Eq. 444.

Does the will create a good limitation over of the share of Mrs. Sherwood to her children by way of executory devise or otherwise? For the sake of clearness, the clause under construction may be divided into three parts: First, a life-estate was clearly given to William, the brother, and to this we will not have occasion again to refer. Second, "and on his death to his children." If this were all of it, and no other words had been

added, there would be no serious difficulty. Mrs. Sherwood having died before the testator, the whole interest, upon the death of William, would have gone to William J. in fee, according to the authorities above cited, as to the survivor of a class. William J. would have been the only person living at the time fixed for distribution answering the description of "children." There are, however, other significant words in the clause which we think indicate and express a different intention. Third, "and then to their

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children living at his death, share and \*share alike." This sentence is very condensed, and in consequence is somewhat obscure, but it seems to us that there is no great difficulty in ascertaining with reasonable certainty the intention of the testator.

It must be kept in mind that he was mounting a second limitation over upon the second life-estate to the children of William, who were more than one when he wrote the will, and, therefore, he used the pronoun in the plural number—"their children." And "then," that is, after the termination of this second life-estate respectively to Mrs. Sherwood and William J. Clark, to "their children." Whose children? Most manifestly the children of both of them, who were alive when the will was written, and for whom the provision was made, that is to say, the share of each child of William to his or her children. Putting ourselves in the place of the testator, it will appear that he could not have foreseen that Mrs. Sherwood would die before him, and it is, therefore, impossible that he could have used expressions only applicable to the event which has happened. To suppose that in writing his will he had reference alone to the children of William J. Clark in using the words "their children," would be to ascribe to him the gift of prescience, which cannot be accepted. So, too, as to the words "his death." They cannot refer to the death of William Clark, for that would fix the termination of the second life-estate upon the same event as that of the first, thus annihilating the very life-estate which he was in the act of constructing. The words "his death" follow the words "their children living at," and it is plain that to make sense it is absolutely necessary to supply or understand the words "or her"—"their children living at his (or her) death."

It seems clear to us that the testator had reference to the children of both Mrs. Sherwood and William J. Clark, and that the sentence properly understood should be read as follows: "and then to the children of each respectively, living at his or her death, share and share alike." This construction seems to be required by the terms used, and is the only one in harmony with the facts which are known to have existed at the time the will was written, and the manifest intention of the testator. As was said by Chief

Justice Marshall, in *Finlay v. King's lessee*,

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\*3 Pet. 377 [7 L. Ed. 701]: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance." See *Duncan v. Harper*, 4 S. C. 76.

Thus interpreted, the doctrine of gifts to a class does not apply, and the case becomes the simple one of a testator (leaving out the first life-estate to William) devising to his nephew and niece, under the designation of "the children of William," a life-estate to each in a house and lot, with limitation over to their children respectively, living at his or her death, which was, in effect, giving one-half to Martha A. Sherwood during her life, and then to her children living at her death. The niece died before the testator, never having been vested with any interest in the property, but she left children, who, after her death, had an interest, and were entitled to the share intended for the mother, not from or through her, but as purchasers by substitution, as a substantive and original devise to them under the will of Henry Clark, the testator.

"Whether the remainder is vested or contingent, if the event has happened on the occurrence of which it is to take effect, and there are those alive at the death of the testator who, by the words of the bequest, can be held to be the objects of the testator's bounty in substitution of the prior legatee, who may have died in his life-time, they take the share of such legatee. The intention must be express, or satisfactorily implied from the language employed by the testator. When the gift is absolute, and the object of it dies in the life-time of the testator, it must, necessarily, fall into the residue of his estate, for there would be no one to claim it by substitution, though a limitation over." *Johnson v. Harrelson*, 6 S. C. 338; *Reeder v. Spearman*, 6 Rich. Eq. 92; *Mathis v. Hammond*, Id. 124, and authorities there referred to. In the case last cited, Chancellor Johnston states clearly the reason for the rule: "Upon general principles, it would seem that where a testator gives property in succession to two persons, there

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is evidence of \*such a state of his affections as would warrant the inference of an intention on his part that the secondary object of his bounty would have induced a direct gift to him if the primary object had never existed or were out of the way. The difference made between them exhibits a mere preference of the one over the other, but both are preferred over the heirs or distributees,



otherwise there is no motive to make the will," &c.

The will of Henry Clark, in the state of facts which have occurred, gave to his niece, Mrs. Sherwood, one-half interest in the property in question, and if she had survived the time fixed for her right to be reduced to possession, it is difficult to doubt that such interest, at her death, would have gone to her children. We cannot think that her death before that of the testator either transferred that interest to her brother, William J. Clark, as the survivor of a class to whom it was given for life, or lapsed it, so as to prejudice and destroy the limitations of that interest over to her children. Upon the death of William Clark the children of Mrs. Sherwood (she having previously died) were entitled to take among them, as purchasers, the interest (one-half) originally intended for their mother for life, with limitation over to them as remaindermen under the will.

The judgment of this court is that the judgment of the Circuit Court be reversed; that the question submitted be decided in the affirmative; that the Sherwoods, children of a predeceased sister of William J. Clark, have an interest in the property described, under the will of Henry Clark, so that they must be parties to the proceedings for a sale of the same and participate in the proceeds; and that the petitioner, Hopke, is not bound to accept the titles tendered to him, the Sherwoods not having been parties to the proceedings.

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#### PIEDMONT MANUFACTURING COMPANY v. COLUMBIA AND GREENVILLE RAILROAD COMPANY.

(November Term, 1882.)

##### [1. *Carriers* ⇨147.]

A common carrier is responsible to the full extent of his liability as such, notwithstanding any contract he may make with reference thereto; but one not a common carrier may make any lawful contract which the parties choose.

[Ed. Note.—Cited in Wallingford & Russell v. Columbia & G. R. Co., 26 S. C. 266, 2 S. E. 19; Mathis v. Southern Ry., 65 S. C. 282, 43 S. E. 684, 61 L. R. A. 824.]

For other cases, see *Carriers*, Cent. Dig. §§ 637-640, 646-648; Dec. Dig. ⇨147.]

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##### [2. *Carriers* ⇨4.]

\*The true test of a common carrier is: Is it optional with him whether he will carry or not, or is it his legal duty to carry for all alike? If the latter, he is a common carrier; if the former, he is not.

[Ed. Note.—Cited in Willett v. Southern Ry., 66 S. C. 481, 45 S. E. 93.]

For other cases, see *Carriers*, Cent. Dig. §§ 1, 462-478; Dec. Dig. ⇨4.]

##### [3. *Carriers* ⇨4.]

A company chartered and organized for railroad transportation is a common carrier over

its own line, but it is not so beyond its termini and over connecting lines unless it has become so by usage, character of business or contract.

[Ed. Note.—Cited in *Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 30, 43 S. E. 307.]

For other cases, see *Carriers*, Cent. Dig. §§ 1, 462-478; Dec. Dig. ⇨4.]

##### [4. *Carriers* ⇨177.]

The payment of freight and passenger fare through to points beyond the termini of a railroad does not make it a common carrier over other roads to the point of destination.

[Ed. Note.—Cited in *Dunbar v. Port Royal, etc.*, Ry. Co., 36 S. C. 117, 15 S. E. 357, 31 Am. St. Rep. 860; *Venning v. Atlantic Coast Line R. Co.*, 78 S. C. 49, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768.]

For other cases, see *Carriers*, Cent. Dig. § 781; Dec. Dig. ⇨177.]

##### [5. *Carriers* ⇨172.]

The duty or obligation to convey the goods beyond its own line of road, and to deliver them at a point beyond its own line, is not imposed by law, but depends upon the contract between the shipper and the company.

[Ed. Note.—Cited in *Bethea v. Northeastern R. Co.*, 26 S. C. 97, 1 S. E. 372.]

For other cases, see *Carriers*, Cent. Dig. §§ 99, 743-746; Dec. Dig. ⇨172.]

##### [6. *Carriers* ⇨53.]

The bill of lading is the contract between the shipper and the company by which the company agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties.

[Ed. Note.—Cited in *Hill v. Georgia, etc.*, R. Co., 43 S. C. 469, 472, 21 S. E. 337; *Terry v. Southern Ry.*, 81 S. C. 281, 62 S. E. 249, 18 L. R. A. (N. S.) 295.]

For other cases, see *Carriers*, Cent. Dig. §§ 131, 165-167; Dec. Dig. ⇨53.]

##### [7. *Carriers* ⇨49.]

The signature of the shipper is not necessary to establish his assent to the terms of a bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 144; Dec. Dig. ⇨49.]

##### [8. *Trial* ⇨136.]

It is the duty of the judge to construe a written contract, but where there is dispute as to which of two agreements the parties acted under, that is an issue of fact which it is the province of the jury to determine.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 321; Dec. Dig. ⇨136.]

9. This case distinguished from *Kyle v. Laurens Railroad Company*, 10 Rich. 382 [70 Am. Dec. 231].

##### [10. *Evidence* ⇨244.]

Letters from the president of a railroad company, written after the destruction of goods by fire admitting the liability of his company therefor, are not evidence against the corporation in action brought to recover for such loss.

[Ed. Note.—Cited in *Schlapbach v. Richmond, etc.*, R. Co., 35 S. C. 521, 15 S. E. 241; *Salley v. Manchester & A. R. Co.*, 62 S. C. 129, 40 S. E. 111; *Machen v. Western Union Tel. Co.*, 72 S. C. 259, 51 S. E. 697.]

For other cases, see *Evidence*, Cent. Dig. § 933; Dec. Dig. ⇨244.]

[This case is also cited in *Crawford v. Southern Ry. Co.*, 56 S. C. 145, 34 S. E. 80, and distinguished therefrom.]

Mr. Justice McGowan, dissenting.

Before Aldrich, J., Greenville, April, 1882. In his dissenting opinion Mr. Justice McGOWAN makes a full statement of the case, as follows:

In the case first named in the title, the plaintiff corporation brought an action against the defendant corporation for \$240, the value of three bales of domestics, shipped by the former at their factory in Greenville, upon the railroad of the defendant, to be carried by its own and connecting lines to Baltimore, in the State of Maryland, and there safely delivered to Woodward, Baldwin & Norris, for freight, at the rate of fifty-six cents per one hundred pounds. The allegation was that the defendant corporation did not safely carry and deliver the goods pursuant to agreement, but, on the contrary, the defendant and connecting lines

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so negligently acted in regard to the same, in their calling as carriers, that said goods were lost and never delivered. The defendant corporation made several defenses: First, they denied the contract as alleged. Second, that there was any negligence on their part, as they delivered the goods to the Charlotte, Columbia and Augusta Railroad at Columbia, and that their liability ended with such delivery. And third, that they received the goods under a special contract, exempting them and all connecting lines from liability from loss by fire, and if there was any liability it should fall only on that line in whose actual custody the property was at the time of the loss; and that the said three bales of domestics were destroyed by fire while in transit, viz.: at West Point, Virginia, on board the steamer Shirley, belonging to the Baltimore, Richmond and Chesapeake Steamboat Company.

The second case named was for \$1,600, the value of twenty bales of domestics, shipped at the same time and under the same circumstances to Woodward, Baldwin & Co., New York. These bales were destroyed at the same time and place and by the same fire, there being no difference in the facts except that the three bales were actually on board the steamer, and the other twenty were on the wharf when destroyed. The cases on the Circuit were considered as similar, and the result in one determined the other. It appeared that Mr. Hammet, president of the Piedmont Manufacturing Company, wishing to ship his fabrics North, met in Columbia the general freight agent of the Columbia and Greenville Railroad, and made with him an arrangement for "through rates" to Baltimore, for which the Piedmont Company was to pay fifty-six cents per one hundred pounds to Baltimore, and sixty cents per one hundred pounds to New York. At that time nothing whatever was said about limiting the liability of the defendant.

Some time afterwards, November 22d, 1880, under this general arrangement, those

having charge at Piedmont (Mr. Hammet was absent from the State) sent three bales of domestics to the Piedmont station on the railroad, and delivered them to one W. B. Vaughn, agent of the railroad company at that point, who gave a printed receipt for the same. This paper was headed "Greenville and Columbia Railroad, through bill of

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lading." \*It acknowledged the receipt of the three bales, "to be transported by the Greenville and Columbia Railroad to Columbia, Greenville or Seneca City, as the case may be, and thence by connecting lines—same to be delivered in like order and condition—to Woodward, Baldwin & Norris, Baltimore, Maryland."

This paper was not signed by the shipper, but contained in small type "conditions," declaring the railroad companies exempt from liability in many cases stated at length, and among other things as follows: "That the said Greenville and Columbia Railroad and connecting railroads and steamship lines shall not be liable for loss or damage on any article of property whatever, by fire or other casualty while in transit or while in depot, or in other places of shipment or transshipment, or at depots and landings at points of shipment and delivery. \* \* \* And it is further stipulated and agreed, that in case of any loss, detriment or damages done or to be sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of happening of such loss, detriment or damage; and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods, &c. In witness whereof the agent hath affirmed to one bill of lading, all this tenor and date, one of which being accomplished the others to stand void. (Signed,) W. B. Vaughn,

For agent."

A similar receipt was given on the shipment of the twenty bales to New York.

It appeared that the property in its transportation had reached West Point, Virginia, where it was placed on board the steamer Shirley, to be forwarded to Baltimore, but, before the steamer left the wharf, it, with everything on board, was consumed by fire, on the night of November 28th, 1880. At the same time the twenty bales were burnt on the wharf. The fire originated about one o'clock at night, and consumed not only the steamer, but all the wharves and property

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thereon. The cause of the \*fire was unknown, and no evidence was offered as to whose fault it was, or whether it occurred from negligence. Some correspondence was had upon the subject of liability for the loss



with Mr. R. L. McCaughrin, then president of the Columbia and Greenville Railroad Company, who thought the claim ought to be paid, but desired the plaintiff to sue, as "it was necessary to have a judgment determining the liability in order to fasten the loss upon the insurance companies and on the parties responsible to us," &c. These letters, against the objection of the defendant, were received in evidence.

The charge of the judge was as follows: †

On the 22d November, 1880, Mr. Hammet, the president of the Piedmont Manufacturing Company, shipped twenty bales of drills, at Piedmont, to be delivered to Woodward & Co., New York, worth \$1,600. He says: "Our agreement for shipments, through rates, was made with the general agent in Columbia. We were to pay sixty cents per hundred pounds to New York. There was no contract as to limiting the liability of defendant. No allusion was made as to such limitation. We were not insured, and did not know of the fire. I was in New England at the time, and did not learn of it until after my return to the State. When I learned of the loss, I wrote Mr. McCaughrin, the president of the Columbia and Greenville Railroad Company, who, while acknowledging the justness of the claim, requested me, after several letters had passed, to bring this 'friendly suit' to fix the liability. I gave no instructions on what line to ship the goods. The Greenville and Columbia Railroad were shipping by three routes. My contract was made with agent of defendant. Signed no release. West Point is on the Piedmont Air Line. The bill of lading was signed by Vaughn. The Charlotte, Columbia and Augusta Railroad receipted for the goods at Columbia. They were burned at West Point, Virginia."

The receipt given by Vaughn, the agent, is the subject of this litigation. It is dated 22d

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November, 1880, headed Greenville \*and Columbia Railroad, "through bill of lading." It purports to have received of the Piedmont Manufacturing Company certain packages, "to be transported by the Greenville and Columbia Railroad to Columbia, Greenville or Seneca City, as the case may be, and thence by connecting lines; same to be delivered in like order and condition to Woodward, Baldwin & Co., New York." Then follows a description of the goods in writing and printing in distinct type and letters; also, a "Release," in fine type, which is not signed by the shipper. Then follows the "Conditions," also in fine type; the whole paper, at the end of the conditions, is signed by "W. B. Vaughn, Freight Agent."

The question is: Who is liable to this

plaintiff—the defendant or some of the connecting lines? Undoubtedly, Mr. McCaughrin, the president of the Greenville and Columbia Railroad, held his company liable. His correspondence shows that. With perfect frankness and fairness he admits the liability of his company in the first instance. But finding there was some difficulty about the insurance, under the advice of counsel he requested this suit to be brought to fix the liability. I do not clearly see, if he thought his company was liable, why this should be desired, but suppose, as a prudent man, he thought it better to act under the advice of counsel rather than to follow the dictates of his own judgment as to whom the responsibility first attached. Hence this suit.

Now the question presented to you is, What was the contract? Was it the contract made by the President of the Piedmont Company and the general agent of the Greenville and Columbia Railroad in Columbia, or this paper signed by Vaughn? When the goods reached Piedmont station was a new contract made, or did Vaughn sign that bill of lading, to carry out the contract made with the general agent? Mr. Hammet was not there; he did not sign the paper, and expressly says the goods were shipped under the contract made in Columbia, in which there was not a word said about limiting the liability. You will observe this bill of lading is a "through bill," in which the Greenville and Columbia Railroad agree to transport by connecting lines and deliver to Woodward, Baldwin & Co., New York, the goods lost. Is not that the very contract

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Mr. Hammet \*made with the general agent in Columbia? What right had he to alter the terms of that contract, at Piedmont, and attach a release and conditions? None in the world that I can see. There is no proof on that subject, and I regard that bill of lading simply as a receipt to carry out the agreement previously entered into between Mr. Hammet and the general agent of the defendants.

It does seem unreasonable to hold, that when a shipper intrusts his goods to a common carrier, who stipulates that he will deliver them by connecting line in New York, that he is discharged from liability when he delivers them to the first connecting road on the line of connection. The shipper has made no contract; sent no freights to any other line on the route.

This "through" line, North and East, South and West, was not made for his convenience, but for the benefit of the common carriers composing the line. It is true, it is a convenience to the shipper; but if, when he makes a contract with the Greenville and Columbia Railroad, he is to place his goods to the Charlotte, Columbia and Augusta Railroad and all the other lines of connec-

†This charge is printed in both briefs, both cases being submitted to the jury together; the agreement being that the result in one case should determine the other.—REPORTER.

tion, and can only hold that line liable on which the goods were lost, and with which he made no contract, it has to me very much the appearance of a snare.

Evidently Mr. Hammet thought that when he made his agreement with the general agent to have his goods transported on the connecting lines he represented, North and East, West and South, at a stipulated rate of freight which they were to divide, he had a binding contract with the initial road with whom he made the contract, and that the initial road of the connection could not shift its responsibility by any device of releases or conditions in consequence, signed by a local agent at a local station. Is it reasonable, nay, is it just to make the shipper look to any other company than the company with whom he has made the contract? Is it fair, after he has made a contract with the general agent of the combination, in which there was no stipulation whatever, to hold him bound by a printed form, filled with limitations and stipulations, signed by a local agent, to which the shipper has not given his assent by attaching his signature? In all probability, if he went to any other

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company \*than the one with whom he made the contract, he would be told, "We made no contract with you; go to the company with whom you contracted."

This war between common carriers and shippers has been going on from time immemorial. Every device that the ingenuity of man can suggest has been adopted to avoid and shift their responsibility. Since the introduction of railroads, so great is their influence that some States have been induced to change the English rule and adopt what Mr. Lawton calls the American rule. That time has not yet arrived in South Carolina, and we still hold to the English rule, the rule of our ancestors, from whom we have borrowed our jurisprudence.

Admit that a corporation is only liable for the loss of goods shipped over its corporate territory. This is good law. But suppose several corporations, in contiguous States, contract to carry "through freights" over their respective roads and connecting lines, and for that purpose appoint a general agent, who receives pay for the freight at the initial point: I hold that the English rule prevails, and the corporation receiving the freight and giving the receipt at the initial point is responsible.

It is true, as was argued, the legislature has given its construction, that the initial road is responsible until it produces the receipt of the connecting road. But that does not apply to the shipper; it applies to the roads forming the combination. The corporation making the loss is liable to the other corporations forming the connecting line; but the shipper looks only to the corporation who received his goods, took his money, and

contracted to deliver the freight in New York. If the loss is disputed, who is to sue? Why, the road who gave the bill of lading, and not the shipper. They must adjust their difficulties among themselves, and not put the confiding shipper to the trouble and expense of running from State to State to find out where the goods were lost, how they were destroyed; if it was negligence, or the act of God, or the public enemy; and, perhaps, when he does make the discovery, the corporation may be bankrupt, while the initial company, with whom he had made the contract, is perfectly solvent. I hold such a construction to be unjust and unwarrant-

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able, either by law or reason. My view \*of the legislative construction is, not that the initial road receiving the goods and giving the bill of lading to the shipper is not relieved from liability to the shipper, but as among the companies composing the corporation or through line, that company making the loss shall bear the whole liability, and not distribute it among them all.

If you determine that the contract was the agreement between Mr. Hammet, president of the Piedmont, and the general agent of the through line at Columbia, and that the bill of lading was a mere receipt in pursuance of that agreement, your verdict will be for the plaintiff for the sum of \$1,600, with interest from the first day of December, 1880.

The judge subsequently instructed the jury to include the interest on the amount of damages found, if plaintiff has proved himself entitled to any, but not to find interest eo nomine.

The jury found a verdict for plaintiff in both cases. From the judgments entered upon these verdicts the defendant appealed upon the following exceptions:

I. Because his Honor refused to instruct the jury as prayed by the defendants.††

(a.) That the legal duty and obligation of the Columbia and Greenville Railroad Company as common carrier, was only to convey over its own line of road. The corporate franchise and legal duty are commensurate.

(b.) That the duty or obligation to convey the goods beyond its own line of road and to deliver them at a point beyond its own line is not imposed by law, but depends upon the contract between the shipper and the company.

(c.) That the bill of lading is the contract between the shipper and the company, by which the company agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties.

(d.) That by the terms of the contract the

††It nowhere else appears in the brief that the judge was requested so to charge, but no objections were urged upon this omission.



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was not to be liable for goods \*destroyed by fire in transit or at depots and landings or in depots or other places of transshipment. And if the goods in question were destroyed by fire while in transit beyond the line of defendant's road, or while in depot or other place of shipment or transshipment, or while at depots and landings at points of shipment and delivery beyond the line of the defendant's road, then the defendant is not liable and the verdict should be for the Columbia and Greenville Railroad Company.

(e.) That in and by the sixth clause of the contract between plaintiff and defendant, it is stipulated and agreed that in case of loss during transportation whereby legal liability may be incurred by the terms of the contract, that company alone shall be answerable for such loss in whose actual custody the property was at the time of the happening of the loss. And if the jury are satisfied that the goods in question were in the actual custody of some other carrier when burnt, then this defendant is not liable. And under the terms of the contract the action must be against the company in whose actual custody they were when destroyed.

II. Because his Honor submitted as the only question for the jury to decide, Who is liable, defendant or some other person?—whereas one of the main questions in the cause was, whether under the bill of lading any one was liable.

III. That the bill of lading was the only contract for the carriage of these goods that was proved, and that his Honor erred in submitting to the jury whether the contract for carriage of these goods was the agreement between Mr. Hammet and the general freight agent, or the bill of lading, signed by the agent of the company when the goods were delivered to the company.

IV. That the plaintiff having put in evidence the bill of lading signed by Vaughn, agent of defendants, no previous parol agreement could alter or affect the terms of the bill of lading or substitute any other agreement for the contract evidenced by the bill of lading.

V. Because his Honor erred in instructing the jury that the real contract was that made between Mr. Hammet and the general freight agent, and the agent at Piedmont had no right to alter the terms or annex condi-

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tions; and erred in instructing the \*jury that the bill of lading was simply a receipt to carry out the agreement previously entered into with the general freight agent.

VI. That whether the contract was the contract of the Columbia and Greenville Railroad Company for the entire carriage or the contract of each successive line, the exceptions in the bill of lading of responsibility for loss by fire at depots &c., at-

tached to the goods and accompanied them from Piedmont to their destination. That this is the English, as well as the American doctrine, and that his Honor erred in ruling to the contrary.

VII. That his Honor erred in holding that the signature of the shipper was necessary to establish his assent to the terms of the bill of lading.

VIII. That the act of the legislature of 1882, does require shipper to go from road to road, until he finds the party in default. And that his Honor erred in ruling to the contrary.

IX. That his Honor erred in admitting the letters of President McCaughrin. That the liability of defendants was a legal question to be determined by the courts, and the declarations or opinions of the president after the loss are not admissible to impose liability on defendants.

Messrs. Conner & Cheves, for appellant.

Messrs. Wells & Orr, T. Q. Donaldson, contra.

October 25th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In November, 1880, the plaintiff delivered to the defendant at Piedmont station, Greenville county, twenty bales of domestics, to be transported to Woodward, Baldwin & Co., at New York, and at the same time and place three bales for Woodward, Baldwin & Norris, at Baltimore. The bill of lading given by the defendant will be found in the brief. It contains a stipulation, that, in case of loss, "the company in whose actual custody the property was at the time of the loss should be answerable." Also an exemption for loss by fire. The twenty bales were destroyed by fire in transit on the wharf at West Point, Va., and the three bales at the same place on board the steamer Shirley, lying at the

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wharf. This \*action was brought to recover damages for the loss of these goods.

The defendant relied upon the exemption in the bill of lading as to fire—that being one of the excepted perils in said bill—and also upon the stipulation as to the liability of the company actually in custody. Two actions were brought below, but as the facts and principles involved were substantially the same in both, it was agreed that the result of the trial in one should determine the other. The jury found for the plaintiff in both cases. The defendant has appealed.

It is admitted that common carriers in this State cannot limit their common law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them. This was specially provided by act of legislature (Gen. Stat., 1872, p. 336,) of force at the time of this loss. The first and prominent question, therefore, in the case is, Was the defendant a

common carrier as to the goods in question when they were destroyed? If so, then the exemptions in the bill of lading (supposing that to contain the contract) would not avail. If, however, the defendant did not sustain the relation of common carrier as to these goods at the time of their destruction, then, upon equally as well-settled principles as the above, its liability would depend upon the terms of the contract by which the company undertook to ship the goods beyond the terminus of its own line. In other words, the law is, that a common carrier is responsible to the full extent of his common carrier liability, notwithstanding any contract he may make with reference thereto as to all goods, &c., to which he sustains the relation of common carrier; while, on the other hand, one who is not a common carrier may make any contract for transportation which the parties choose, not contrary to law. *R. R. Co. v. Pratt*, 22 Wall. 129 [22 L. Ed. 827]; *R. R. Co. v. Manufacturing Co.*, 16 Wall. 324 [21 L. Ed. 297].

The true test of the character of a party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it is his legal duty to carry for all alike, who comply with the terms as to freight, &c., then he is a common carrier, and is subject to all

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\*those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the States, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them. While the law has imposed duties and heavy responsibilities upon common carriers, which they cannot avoid, limit or shake off, yet it has never attempted to hamper and surround those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case.

Now the important question arises: Was the defendant a common carrier with reference to the goods in question? The defendant is a corporation created under an act of the legislature, and was formed and organized for railroad transportation between certain points in this State, and as to this railroad and between these points it is certainly a common carrier in the full sense of that term, subject to all the laws and principles, statutory and otherwise, which have been established in this State in reference to common carriers. And if this loss had occurred between the termini of the road there would be no difficulty in the case. In

fact, in that event, we suppose the case would not have been here.

It is equally as certain that, so far as the charter of the company is concerned, under its provisions this corporation is not a common carrier beyond its own termini, there being no legal duty imposed to receive and transport goods beyond those points. It would seem to follow then, from these principles, that if liability has attached to the company it must be either because the said company has become a common carrier beyond its termini and over the connecting lines by usage, its character of business, or by contract, express or implied; or it has become liable in this special case by a special contract covering the case.

There is no foundation for the first position; in fact, it has not been urged in the argument that this company has become generally a common carrier outside and beyond the limits of its charter and over its connect-

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ing lines, and that it is legally \*bound to transport goods to any point beyond its line as may be designated by the shipper. It is true that the destination of the passengers embarking on this road, and of the goods shipped thereon, is frequently beyond its own termini, and at points reached only by connecting roads; but this fact cannot, nor does the payment and receipt of the fare and freight through to the destination, which is as much for the convenience of the traveler and shipper as for the roads, make the company first concerned *ex vi termini* a common carrier through the whole distance. Such a doctrine would make railroad enterprises a fearful business. It would destroy them utterly, and it finds no place in the books or in reason.

Railroad corporations, however, while being common carriers between their termini, and bound inflexibly by the law on this subject; with no power to alter, amend or limit it as to transportation on their immediate line, may yet contract to deliver consignments at any point beyond such terminus as may be agreed upon, and this contract may be either absolute or conditional, and when made it is subject to the adjudication of the courts, as all other contracts are. The defendant being a carrier only to the extent of its line under its charter, was not bound to receive and ship the goods of the plaintiff beyond its termini. This was optional, as we have seen, and its liability, therefore, in such cases must depend entirely upon the contract made between the parties. Was it absolute, or was it conditional? and if conditional, did the conditions happen which were to exempt the road?

The complaint charges that in consideration of a certain sum the defendant "agreed safely to carry from Piedmont station to the city of New York, over their connecting lines, and there deliver to Woodward,



Baldwin & Co., in good order," the goods in question. This is an allegation of an absolute and unconditional agreement, and, had it been sustained by the evidence, there would have been no escape for the defendants: the case of *Kyle v. Laurens R. R. Co.*, 10 Rich. 382 [70 Am. Dec. 231], would have been directly in point. The answer of the defendant puts in a positive denial of the charge in the complaint, and sets up a special and conditional agreement as to the ship-

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ment of these special \*goods. Upon the complaint and answer, the first question before the court below, as it appears to us, was one of fact, and for the jury, to wit: Was the contract absolute and conditional, as alleged in the complaint, or was it, as stated in the answer, subject to conditions and contingencies?

The testimony on this subject on the one side was the evidence of Mr. Hammet, the president of the plaintiff company, where he said generally: "All our arrangements for shipment and through rates were made with the general freight agent of the Columbia and Greenville Railroad Company at Columbia. We were to pay sixty cents per one hundred pounds freight to New York. No contract as to limiting liability of defendant was made or even alluded to. I was in New England when goods burnt." The evidence of the agreement set up in the answer was the bill of lading given when the goods were received at Piedmont station by W. D. Vaughn, agent of the Columbia and Greenville Company, and signed by him as such agent. This bill of lading, it seems, was given to the plaintiff, and by it forwarded to the consignee in New York.

The judge, in his charge, instructed the jury that the agreement between the parties was the one detailed in the testimony of Mr. Hammet; that this agreement was unconditional and had no limited liability attached; that the agent, Vaughn, had no right to alter the terms of this contract and attach conditions, and that, in his judgment, the bill of lading was simply a receipt to carry out the agreement previously entered into between Mr. Hammet and the general agent of the defendants.

We think this charge was erroneous. It is true that it is the province of the judge to construe agreements and extract their meaning, but it is first the province of the jury to determine what agreement has been made. Here, it seems to us, the judge went beyond construction and charged upon facts, the finding of which is alone the province of the jury. The charge in this respect is subject to the fifth exception of defendant. It is not for this court to adjudge or indicate what the precise agreement between the parties was. This, as we have said, is a question of fact for the jury, and the jury should have been left untrammelled in the duty of determining

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the fact; and as, in our opinion, they \*were not so left, the cases must go back on this ground if no other.

But, even supposing that the evidence of Mr. Hammet is the controlling testimony in the case, and that he detailed truthfully what occurred between himself and the general agent (of which there is no doubt), yet we think it was error of law in the Circuit judge to hold that that agreement amounted to an unconditional contract on the part of the defendants to transport and deliver at all times and to all points whatever goods the plaintiffs might ship over the road of the defendant to some destination by connecting lines beyond its termini, and that the agent of the defendant, who gave the bill of lading, could not alter the terms of this previous contract.

We do not see anything of a positive agreement in the interview between Mr. Hammet and the general agent of Columbia, except as to the rates upon which his goods were to be shipped. He says: "All our arrangements for shipment and through rates were made with the general freight agent of Columbia and Greenville Railroad Company at Columbia." But what these arrangements were is not specified, except as to the rates. Under such circumstances we do not see why the agent of the company and the plaintiff might not specify the terms and conditions of the shipment, when he came to receive a special consignment. It would certainly not be illegal for the shipper and the agent at that time to include in the bill of lading such stipulations as might be agreed upon. Whether both parties consented and agreed upon the stipulations, or understood them alike, might be a question dependent upon the facts, but that they would have the right to insert such as they deemed proper, there could be no question. The error of the charge was, that the Circuit judge assumed that the stipulations found therein were inserted by the agent of defendant without the knowledge and consent of the plaintiff. This we think was a question of fact, and should have been left to the jury.

The legal propositions mainly relied on and earnestly pressed by the respondent's counsel, need not be nor can they be successfully contested. They are sustained by abundant authority. "Where a carrier undertakes, without more, to transport beyond

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\*its own line, the liability attaching at the commencement will continue throughout the transit to destination; all connecting lines of carriers employed in furthering and completing such transportation become the agents of the first carrier, and for their defaults he becomes responsible to the owner of the goods."

We need not go behind *Kyle v. Laurens Railroad Company*, 10 Rich. 382 [70 Am. Dec.

231], for support to this proposition. There the Laurens Railroad undertook to deliver cotton in Charleston. The cotton was burnt on a connecting line. The Laurens road was held responsible, and why? Because its contract had been breached; it failed to deliver in Charleston. The court did not hold that the Laurens Railroad was a common carrier as to this cotton, and upon that ground liable for its loss, but that it had contracted to do what it had failed to do, and therefore was liable. And here, if it had appeared as a fact found by the jury, that the defendant had made a contract which, upon a legal construction, was without conditions and absolute, then the defendant would be responsible upon the same principle as in *Kyle v. Railroad Company*, supra.

The respondent further contends, that a common carrier cannot generally limit his liability by a special agreement. And in no event can he shield himself from the consequences of negligence or misconduct by an unconditional exemption from certain perils as fire, &c. This, too, he sustains by abundant authority. But it seems to be overlooked in the application which is sought to be made of these principles on behalf of the respondent, that they apply to common carriers and to common carriers alone; that they have no reference to others who may happen to transport goods at a certain time and place, when and where they are under no legal obligation to do this work, but have assumed it voluntarily, perhaps as much for the convenience as otherwise of the owner of the goods. It is conceded that they do have reference to common carriers; those who have undertaken the business of a common carrier either as a chartered company or otherwise, but we fail to see their application to the other class suggested.

The argument of respondent, it appears to

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us, has assumed the \*real point at issue, to wit: that defendant, as to the goods in question, was a common carrier. We do not think that the defendant was a common carrier beyond its termini under its charter. We hold that there was no legal duty on it to deliver goods beyond its line; that it might contract to do so, however, according to such terms as might be agreed upon between it and the shipper. This agreement might be either absolute or conditional. It might make the company substantially a common carrier, and therefore subject it to all the rules and principles contended for by the respondent, or it might contain limitation and restriction far short of this. But, whatever may be the contract in a given case, is a question of fact for the jury, which, when found and properly construed, must become the law of the case.

There is really no great difference between the English and American doctrine on this subject. The one holds that, to exempt a

carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so he is bound by his undertaking. In the one case, if the contract contains no exemption it is absolute; in the other, if conditions are specified they must govern. This is nothing more than saying that the whole thing is per contract, and that whatever the contract is that must be enforced—the legal construction being, that in the one case, in the absence of exemptions, the carrier has contracted, unconditionally, to deliver; the other, with conditions inserted, they must control. But if there be a difference, that difference is immaterial here, because both parties claim a contract—the plaintiff an unconditional contract made with Mr. Hammet, and the defendant a conditional one made by Vaughn and accepted by the plaintiff in the receipt of the bill of lading. So at last, as we have said, the case hinges in the first instance upon a question of fact.

The principles announced in the leading case referred to by respondent's counsel (*Railroad Co. v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627],) do not conflict with those above.

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The court in this case, \*as is said in the argument, after a most careful examination of the principal authorities, both English and American, reached the conclusion, as announced in its opinion: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly, that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for negligence of himself and servants. Thirdly, that these rules apply both to carriers of goods and carriers of passengers, and with special force to the latter."

These, no doubt, are all sound conclusions, and are not only well sustained by authority, but are founded on justice and wisdom, when applied, as this case evidently intended they should be, to the business of common carriers acting within their sphere—which business, in this day, has assumed such important and immense proportions. There is not a word, however, in this case, or in the conclusions announced, which make these principles applicable to one who is not a common carrier, or denies to such one the privilege and right to contract for himself. It must not be taken for granted that, because one is a common carrier between certain points, that he is also a common carrier beyond those points, and then apply the principles which have been established in reference to common carriers to him, both within and beyond his lines.

This distinction, it appears to us, has not



been clearly observed in this case. Hence we think that many of the authorities cited are not applicable. In *Railroad Co. v. Lockwood*, *supra*, Mr. Justice Bradley, drawing the true distinction, said: "A common carrier may undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to convey something which it is not his business to convey. \* \* \* In such case such agreement might be made in reference to his taking and conveying the same, as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a cor-

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poration created for the purpose \*of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

Neither is there any conflict between the principles herein, and the well-considered case from New Hampshire, where the court held that where several common carriers are associated in a continuous line, one price for through freight being received by the initial company, the goods being marked and received to be delivered at a distant point beyond the termini of such initial company, that in such case the initial company is bound to carry them or see that they are carried to their final destination, and is liable for loss happening at any point along the line. *Nashua Lock Company v. The Worcester and Nashua Railroad Company*, 48 N. H. 339. That was upon the ground that from the facts mentioned, and nothing more, the court would conclude in accordance with the English doctrine, that the contract to deliver in that case was not an absolute contract to deliver at the point mentioned, and, of course, should be enforced as made by the parties. But there is nothing in that case which even intimates the idea that the initial company was bound to receive the goods, whether it wished to do so or not, or that the parties could not make a contract with stipulations if they saw proper to do so. That case is authority for the position that, where the initial company receives the goods, marked, and to be delivered to a distant point, with the freight paid to that point, and no stipulations are made to the contrary, the contract is absolute. It decides nothing more, and it is in accord with *Kyle v. Laurens Railroad Co.*, *supra*, but not at all in conflict with the positions taken herein above.

We think the charge of his Honor is subject to exception first and the specifications (b) and (c) thereunder, in that he declined so to charge. The other specifications under this exception assume a question of fact

which the judge was not authorized to assume. These cannot be sustained.

Exceptions third, fourth and sixth are overruled. The third because the request is based on an assumption of fact, to wit: that the bill of lading was the contract.

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This, as we have seen, \*was a question of fact for the jury and could not be assumed by the judge. The fourth claims that no previous agreement could alter the terms of the bill of lading. This would be true if the bill of lading constituted the contract, but that was the very question at issue. The sixth called upon the judge to charge that "whether the contract was the contract of the Columbia and Greenville Company or the contract of each successive line, yet that the exemption from the peril from fire attached to the goods all through." Each successive company was certainly a common carrier along its line, and while the goods were on each line, the common law liability of a common carrier, with all its absolute force, attached, and exemptions could not be made by which the company in possession could divest itself of the character of a common carrier; hence, the judge could not have charged this request.

Exceptions second, fifth, seventh and ninth are sustained.

Exception eighth we do not consider in the case. The exceptions have not been set out in full in this opinion, as this would have encumbered it too much. It is to be hoped that the reporter, in giving a statement of the case, will set them out.

Next and last, as to the admissibility of the letters of McCaughrin, the president of the defendant company. These letters were the written declaration of an agent, and their admissibility must depend upon the rules of evidence in such cases. These rules would allow such declarations when constituting a part of the *res gestae*, or when made within the scope of the agency, but declarations made some time after the act and beyond the scope of the agency should not be allowed. The letters contained an admission by the president of the liability of his company, or rather the expression of a legal opinion to that effect, and they were written some time after the controversy began. We do not think that this opinion was within the scope of the agency of the president, nor its expression a part of the *res gestae*. They were, therefore, inadmissible. Had they contained an admission of some fact connected with the contract, it would have been otherwise.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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\*Mr. Justice McGOWAN dissenting. In these cases I cannot concur in the judgment of my brethren for the reasons herein stated.

[Here follows his statement of the case.] We will not follow the exceptions, but endeavor to dispose of the questions as they arise in order. First, as to the contract between the parties. The exceptions charge in various forms that it was error to leave it to the jury to decide what was the contract between the parties; that the only contract was the printed bill of lading; that all previous verbal negotiations upon the subject were absorbed into that, which became the only contract between the parties.

We believe it is the general rule in such cases where there have been no previous negotiations, to consider the bill of lading, although not signed by the shipper, given on one side and accepted by the other, as the contract of the parties. But when there has been a previous general engagement on the subject, the question often arises whether the shipment was made on the terms of the bill of lading or upon the faith of the previous arrangement. The rule of evidence is that "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, \* \* \* but the rule is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any existence or binding force either by reason of fraud or for want of due execution, or for the illegality of the subject-matter. 1 Greenl. Evid., § 248.

In this case the plaintiffs denied that they had ever accepted the terms proposed in the printed receipt, which was not signed by them, or made any such contract, but, on the contrary, insisted that the only agreement they had made was that made in Columbia by President Hammet with the general freight agent of the defendant corporation, in which nothing was said about limiting liabilities, but was as follows: "We shipped goods on November 22d, 1880, to Woodward, Baldwin & Norris; were delivered on that day at Piedmont to be carried to Baltimore. All our arrangements for shipment and through rates were made with the general freight agent of Columbia and Greenville Railroad Company. We were to pay

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fifty-six cents for one hundred \*pounds of freight to Baltimore. No contract as to limiting liability of defendant was made or ever alluded to." They insisted that upon the faith of this agreement alone they had shipped the domestics in question, and the defendant corporation could not at the last moment, after the property had been actually delivered, interpolate upon that contract new terms and conditions never submitted before nor agreed to by them.

The question as presented was not as to altering the terms of a written agreement, but whether the paper contained a contract at all. It certainly requires two to make a contract. It is elementary "that in order to

constitute a binding contract there must be a definitive promise by the party charged, accepted by the person claiming the benefit of such promise. There must be a request on one side and an assent on the other. No contract is raised by a mere ex parte affirmation in discourse, a mere assertion, or offer to enter into an agreement not expressly and absolutely assented to by both parties." Chit. Cont. 9. Both parties must assent in the same sense. If the printed bill of lading had been before Hammet and the agent in Columbia when they made the general arrangement, and its terms had been agreed to, then it would have been the written contract of the parties beyond the reach of alteration by parol evidence, and to be construed by the judge alone. But whether the various stipulations in the receipt were ever agreed to and became the contract of the parties was a very different question.

It is true that the bill of lading seems to have been offered in evidence by the plaintiffs, probably because it contained the receipt of the defendant for the property; but it does not follow that they are bound by the numerous conditions, exceptions and alleged agreements therein. Ordinarily a receipt is only evidence of a single fact, the closing fact of a transaction, and the act of but one of the parties. We would not expect to find in it original terms and conditions stated as agreed to by two contracting parties. "A receipt in itself does not express the terms of any contract or writing of the words of the parties between whom it has passed, but merely evidences, by way of admission, the fact stated in it, consequently it is not governed by the rules which prescribe the effect of instruments adopted by

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parties as the \*special means of evidencing some compact or understanding had between them, but like evidence not enjoying any special privilege, is capable of being contradicted or modified by other classes of evidence." *Heath v. Steele*, 9 S. C. 92.

It could not be assumed conclusively that the Piedmont Company had agreed to the terms of the receipt, only because it was retained by the person, possibly a mere employé, who delivered the property at the depot. *Whiting v. Sullivan*, 7 Mass. 107; *Bostwick v. Railroad Co.*, 45 N. Y. 712; *Hutchinson on Common Carriers*, § 238, and *Lawson on Contracts of Carriers*, § 101. It seems to me that the point is fairly stated by Mr. Lawson at page 138, when he says: "When the shipper of goods, who has previously entered into an oral agreement with a common carrier, takes a receipt for the same, he has a right to assume, in the absence of notice to the contrary, that his agreement is embraced in the paper, or at least that his receipt contains nothing to the contrary, and that it is in the nature of a fraud on the part of a carrier, having



entered into such oral agreement, to insert in the receipt a contract of an entirely different character and present it to the shipper without calling his attention to it or getting his assent." The question of what was the contract, whether the general agreement in Columbia, or the paper handed to the servant when the bales were delivered at the depot, was one of fact, and I cannot say that the judge erred in submitting it to the jury.

Assuming then, as we may do, that the jury found that the conditions expressed in the printed bill of lading were never agreed to by the Piedmont Company, but that the bales of domestics marked for Baltimore were sent to the depot under the general arrangement entered into by the president at Columbia, the verdict might be rested on that alone and go no further. In this view the defendant corporation undertook to transport the property to Baltimore; in the words of Mr. Hammet, that it was to be "carried to Baltimore" and there delivered to Woodward, Baldwin & Norris, to whom the bales were directed. This arrangement was made with the defendant corporation alone, without any reference to the means by which it was to be done or limitation as to responsibility.

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There was no privity of \*contract with any other company whatever. So far as appears, the defendant corporation or its agent had no authority to make a contract binding upon intermediate companies for their respective share of the service to be rendered; but they, without any reference to any such agencies, undertook themselves to give through transportation, to do or have done the whole work and to deliver in Baltimore, thereby, as I think, making for that purpose and to that extent, all connecting lines their agents, or, as it were, extending their own road to Baltimore. If their own track did not actually extend to Baltimore, they, nevertheless, undertook the business through to that point and received pay for it, and they cannot now be permitted to disclaim their own contract or escape the liabilities incident to it.

If time permitted I might review the numerous authorities upon the subject, but we can only deal with conclusions. After much discussion and some difference of opinion, we regard the law as properly held, both on principles of justice and the preponderance of authority, in the well-considered case of *The Nashua Lock Company v. The Worcester and Nashua Railroad Company*, 48 N. H. 339, where, after a full review of the authorities, it was held that, "When several common carriers are associated in a continuous line of transportation, and in the course of the business goods are carried through the connected lines for one price, under an agreement by which the freight money is divided among the associated carriers in pro-

portion fixed by the agreement; if the carrier at one end of the line receives goods to be transported through, marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them or see that they are carried to their final destination, and is liable for an accidental loss happening at any part of the connected line."

I refer to this case for the authorities cited, and the reasons upon which the doctrine is based. This New Hampshire case was much stronger than the one in hand. There the initial company was held liable for doing nothing more than receiving and transporting the goods marked to be delivered at a point beyond their own road. Here

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this was done, but there was also \*an agreement that the goods should "be carried to Baltimore;" that is, delivered in Baltimore. Upon this very point as to what shall be regarded as sufficient evidence of an undertaking to transport through, there has been much diversity of opinion in the American courts, which (Mr. Hutchinson informs us at section 148 of his book on Carriers) are about equally divided on the point "whether a carrier receiving goods marked for delivery beyond the end of his line is, in the absence of special agreement, only responsible for safe carriage over his own line and safe delivery to the next carrier." See late *Tennessee case of the Louisville & Nashville Railroad Company v. Weaver*, 9 Lea 39, and 42 Am. Rep. 655, and notes. I believe that when the company receiving the goods is known to be one of a continuous line of associated companies, and there was, as here, a special agreement of the initial company to transport through, there has never been a doubt expressed in any court.

It is, however, earnestly urged on the other side that the defendant corporation was a common carrier by law only as to their own road, and that their duties should be correlative to their rights and not beyond; that as to so much of the Columbia agreement as was to be performed beyond Columbia, the company must be considered as an individual undertaking to transport certain bales of goods for hire, which single transaction would not make him a common carrier or subject to the rigorous liability imposed upon carriers. The obvious answer to this is that the defendant corporation, when they agreed to transport these goods, was already a common carrier all the way to Baltimore, by virtue of their being engaged with the associated lines in the regular business of through transportation to that point.

The transportation of the few bales of domestics in this case was not a single, isolated act for accommodation or compensation, but one of the acts done in the course of through business, in which they were regularly en-

gaged. It appeared that they canvassed for through business, had arranged the price for which they could do it, and prepared a most elaborate through-receipt. As Mr. Hammet proved, they were at that time engaged in extensive through business "shipping over

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these routes." As I understand it, common carriers are not limited to those created by charter, but may become such by virtue of their occupation. *Railroad Company v. Lockwood*, 17 Wall. 357 [21 L. Ed. 627]. Mr. Tomlinson, in his *Law Dictionary*, says: "All persons carrying goods for hire, as masters and owners of ships, lightermen, stage coachmen and the like, come under the denomination of common carriers." In the case of *Clarke v. Swearingen*, 6 S. C. 292, Mr. Swearingen was treated as a common carrier, for the reason that during the winter months he was engaged in the business of boating cotton for hire down the Savannah river to Augusta.

The Greenville Company were common carriers to the extent of their road by charter, and beyond that by virtue of being engaged in the business of through transportation. Their liability as common carriers should not be measured by the length of their road, but by the extent of their undertakings in their business of through transportation either by themselves or in connection with other associated lines. We think there was competent evidence before the jury that the company undertook to carry this property to Baltimore, and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendant, for whose fault they are responsible. *Railroad Company v. Pratt*, 22 Wall. 133 [22 L. Ed. 827]. A man who owns a private ferry may make himself a common carrier if he undertake to carry for hire all persons indifferently. *Littlejohn v. Jones*, 2 McMull. 368 [39 Am. Dec. 132]. And this is a question of fact to be determined by the jury. *Ibid*.

The law is so well stated in the case from Tennessee (as late as 1882) above cited, that I will venture to make a somewhat long quotation: "It is well settled that a railroad company, as a common carrier, may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at that point, and that the liability thus attaching at the commencement, will continue throughout the whole transit, all connecting lines of carriers employed in furthering and completing such transportation, becoming its agents, for whose defaults it is responsible. *Railroad v. Stockard*, 11 Heisk. 568; *Hutch. Carr.*, § 145. But the courts are not in accord as to what will, *prima facie*, constitute such a contract.

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\*"In England the courts from the first adopted the rule, to which they have formal-

ly adhered, that when a railroad company, as a common carrier, receives goods directed to a place beyond the terminus of its own line, without limiting its responsibility by express agreement, such receipt of the goods so directed is *prima facie* evidence of an undertaking to carry the goods to the place to which they are directed, and all connecting railroad companies, or other carriers along the route, are merely the agents of the first company. The latter is alone subject to suit for any loss or damage to the goods, the other companies not being responsible to the owner for want of privity of contract. *Muschamp v. Railway Co.*, 8 Mees. & W. 421. The rule, founded as it is in common law principles, has much to recommend it by reason of its uniformity and simplicity, and has been found to work well for the comparatively short distances of carriage on the British island. It has been followed by the courts of a number of States in this country, but modified, generally, so as to give an action against the carrying company actually guilty of the wrong out of which the cause of action arises, although not the original contracting company. All of the American courts, perhaps, except it may be those of Georgia, concur in adopting the English rule, with the modification suggested, wherever the contract is clearly a through contract, or the circumstances show that the contracting company has an interest, or partner, or otherwise, in the entire route. *Hutch. Carr.*, § 160. The courts of the State of Georgia seem to have adopted the English rule without qualification. Many of the States have been led to modify the rule, not only in allowing the actually defaulting carrier, other than the first, to be sued, but in the matter of the *prima facie* evidence of a through contract and the burden of proof," &c.

In the case at bar there was no need of resorting to the rule as to *prima facie* proof of the contract; the proof was positive, and besides the circumstances showed most conclusively that the contracting company had an interest in the through transportation "as partner or otherwise." This was properly a question for the jury, and they have so found.

But, suppose we assume that the person

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who carried the \*domestics to the depot at Piedmont had the authority to act for the company in receiving the printed receipt with the numerous stipulations embodied therein, and the jury found that to be the only contract between the parties: I incline to think that, even in that case, the verdict should stand. At the time these goods were shipped the act of 1864 was of force in this State. It has since been superseded, but we must consider it in determining the rights of these parties. Section second declared: "That no public notice, or declaration, or



special contract shall limit or in any wise affect the liability, at common law, of any railroad company within this State, for or in respect of any goods to be carried and conveyed by them, but such railroad company shall be liable, as at common law, to answer for the loss of or injury to any articles or goods to be carried or conveyed by them, any public notice, declaration or special contract by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." Rev. Stat. 366.

The defendant corporation was a "railroad company within this State," and, of course, subject to the law, and there can be no doubt that, according to its terms, the exemptions from liability inserted in the bill of lading, were void and of no effect so far as they concerned transportation on the track of the Greenville and Columbia Railroad Company proper. But it is insisted that the liabilities of the company must be limited to their own road; that not being carriers beyond, they were not compelled to take the business, and if they did so they had the right to attach their own conditions, and the provisions of the act did not apply to any agreement to transport beyond Columbia.

This might be so if this had been a single act of transportation, undertaken by contract for the accommodation of the Piedmont Company, but we have already endeavored to show that by engaging in the business, they had previously acquired the character of a common carrier as to the through transportation, and must be held to an accountability as such. If so, was not a contract as to that business as much under the inhibitions of the act as business upon their own rails? It has been decided in this State that the agreement of a railroad company to deliver articles at a point beyond the terminus

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of their own road, made \*them liable as carriers until the point was reached and the articles delivered. *Kyle v. Laurens Railroad Company*, 10 Rich. 382 [70 Am. Dec. 231]; *Hutch. Carr.*

In the case of *Kyle*, the plaintiff shipped cotton on the Laurens Railroad, to be delivered in Charleston; two other roads had to be used in reaching Charleston; part of the cotton was lost after it left the lower terminus of the Laurens road, and yet it was held that the Laurens Company was liable for the loss, "their undertaking being special to deliver in Charleston." That is to say, their contract as carriers extended beyond their own road to the point of delivery.

But it is said while that may be so as to roads within the State, the principle does not apply and our State law did not reach transportation on railroads beyond the limits of the State. I do not understand why not. I do not see why the South Carolina law which applies to railroads in the State, should not apply to them as well while run-

ning the road of another company beyond this State. In either case one carrier is using the road of another carrier in doing carrier business. Both are carriers and it would seem that the one which undertakes to transport the property, should be subject to the law applicable to common carriers in the State where it is located, and the contract is made. The contract was an entirety for the whole distance, made in the State, to be paid in the State, and to a corporation of the State, and I suppose the fact that the property was to be carried beyond the State through other associated lines, could not change the rule which requires that a contract shall be construed according to the *lex loci contractus*. *McDaniel v. Railroad*, 24 Iowa 412; *Cantu v. Bennett*, 39 Texas 303.

It is not, however, necessary to affirm anything upon this point. If we assume that the special law of this State, declaring null efforts to restrict liability in certain cases, did not apply to so much of the printed receipt as stipulated to transport beyond her borders, still, as I suppose, the defendant corporation being a common carrier quoad the through transportation was amenable to the general law upon the subject of the liability of carriers; which, while it allows parties

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to limit their liability by special \*contract, does not allow such limitations as will destroy the character of the parties as common carriers.

For many good reasons the law is very watchful of the rights of shippers. The general doctrine, as I understand it, is laid down in 2 Greenl. Evid. 260: "If the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exceptions, but also that there was on his part no negligence or want of due care." See *Singleton v. Hilliard*, 1 Strobb. 203; *Swindler v. Hilliard & Brooks*, 2 Rich. 302 [45 Am. Dec. 732]; *Baker v. Brinson*, 9 Rich. 201 [67 Am. Dec. 548]; *Railroad Company v. Lockwood*, supra; *Hutchinson on Carriers*, § 260. The last named authority, at the section given, says: "That the weight of authority in this country is in favor of excluding negligence altogether as an element of contract between the carrier and his employer and of holding the former to a rigid accountability for every degree of negligence, without the power by contract or in any other mode to divest himself of it."

In the case of *Swindler v. Hilliard*, supra, the defendants had a steamboat running between Charleston and Columbia. They received cotton in Columbia and, gave a bill of lading with these words incorporated into it, "Damages of fire and navigation only excepted." The cotton was burnt on the boat, and it was held, "That carriers can not by any special contract exempt themselves from liability for losses arising from negligence,

and when there is a special acceptance the onus of showing not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier."

In the case from the Supreme Court of the United States, *supra*, after exhaustive consideration of the whole subject and a careful examination of the authorities, it was held, "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; and second, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

I conclude, even if the printed receipt con-

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stituted the only contract between the parties, that the defendant corporation having assumed the business of a common carrier as to the through transportation, and received the property addressed to Baltimore, was bound, notwithstanding the stipulations of exemption, to carry out the main undertaking therein, "to transport to Columbia, and thence by connecting lines to Baltimore." The law will not allow parties to do the business of common carriers and to receive pay as common carriers and at the same time to renounce all responsibility as common carriers. The onus was upon the defendant corporation to show that the property was not destroyed through negligence, which they did not do.

In the language of Judge Withers, in the case of *Baker v. Brinson*, *supra*: "Whilst in this State we recognize the doctrine that a carrier may limit by special contract his common law liabilities, there is not the slightest disposition further to modify the rules justly applicable to such transactions. Learned judges in England and America have regretted the recognition of such exceptions. Notwithstanding their apparent rigor, there is a salutary policy in these common law doctrines, and those who are called to administer the law must see to it that they are not wholly evaded."

I think the judgment below should be affirmed.

Judgment reversed.

19 S. C. 384

FRASER & DILL v. CITY COUNCIL OF CHARLESTON.

(November Term, 1882.)

[1. *Executors and Administrators* ⇨127.]

Where an executor qualifies after his co-executor has fraudulently misapplied the estate, and afterwards a receiver is appointed without objection, the court will not, upon the death of

the guilty executor, restore the management of the estate to the survivor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 527; Dec. Dig. ⇨127.]

2. The rulings in this case on former appeals, (11 S. C. 515; 13 Id. 542,) as to the judgments obtained at law against the executor, stated.

[3. *Executors and Administrators* ⇨453.]

Judgments obtained at law by innocent creditors against an executor on notes purporting to bear the testator's signature, but which had been forged by the executor in the testator's life-time, are conclusive upon the executor and upon the legatees, as his privies.

[Ed. Note.—Cited in *Huggins v. Oliver*, 21 S. C. 153; *Bell v. Bell*, 25 S. C. 154; *Ruff v. Doty*, 26 S. C. 176, 177, 1 S. E. 707, 4 Am. St. Rep. 709; *Bleckley, Brown & Fretwell v. Branyan*, 28 S. C. 450, 6 S. E. 291; *Faust v. Faust*, 31 S. C. 580, 10 S. E. 262; *Earle v. Earle*, 33 S. C. 504, 12 S. E. 164; *Curtis v. Renneker*, 34 S. C. 495, 13 S. E. 664; *Suber v. Chandler*, 36 S. C. 350, 15 S. E. 426; *Greenwood Drug Co. v. Bromonia Co.*, 81 S. C. 519, 62 S. E. 840, 128 Am. St. Rep. 929.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1902; Dec. Dig. ⇨453.]

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[4. *Executors and Administrators* ⇨255.]

\*A judgment rendered on a creditors' note against an estate on the same day that an injunction was obtained and filed in a creditors' suit restraining actions, the creditors' bill being afterwards discontinued, is not evidence of collusion on the part of the creditor suing at law, nor notice sufficient to put him upon inquiry as to the genuineness of the signature to his note.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 907-909; Dec. Dig. ⇨255.]

[5. *Fraudulent Conveyances* ⇨172.]

That fraud avoids everything is a principle which cannot be invoked by the party himself, who committed the fraud, nor by his privies.

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 52 S. C. Append. 601.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 523-529, 542; Dec. Dig. ⇨172.]

[6. *Executors and Administrators* ⇨438.]

Legatees are proper parties to a bill to marshal the assets of their testator, but not to an action at law against the executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1772; Dec. Dig. ⇨438.]

7. This case distinguished from *Wilson v. Kelly*, ante p. 160.

Before Fraser, J., Charleston, March, 1882. The opinion fully states the case.

[For subsequent opinion, see 23 S. C. 373.]

Messrs. G. D. Bryan, A. G. Magrath, Robert Chisholm and B. J. Whaley, for appellants.

Messrs. McCrady & Sons, S. Lord and James Conner, contra.

November 23d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. It will be useful to precede the consideration of the several



questions made in this case by a brief statement of the facts out of which they arise.

On January 26th, 1872, Joseph Whaley died possessed of a large estate, which he disposed of by will, appointing as his executors his son William Whaley and his kinsman William James Whaley. Soon after his death William Whaley qualified, and continued to act as sole qualified executor until July 7th, 1874, when William James Whaley also qualified. Up to this time a number of persons claiming to be creditors of the testator, Joseph Whaley, had recovered judgments, mostly by default, against William Whaley as executor; but of these it will only be necessary to state the following, which are particularly assailed, viz.: R. K. Scott, for \$5,373.01, May 30th, 1874; Fraser & Dill, \$2,069.76, June 8th, 1874; Mary F.

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Davie, \$1,400, June 8th, 1874, and the judgment of Gadsden and wife for \$15,129. This latter action was commenced in 1873 against William Whaley as executor, but, he having died in the meantime, judgment was finally recovered against William James Whaley, as surviving executor, after he had qualified in October, 1880.

On June 8th, 1874, the Peoples' Bank of South Carolina, claiming to be a bond creditor of Joseph Whaley, filed a complaint in the nature of a creditors' bill to marshal the assets of Joseph Whaley, and on the same day obtained an order for temporary injunction against parties suing at law. On July 13th, 1874, Fraser & Dill, having obtained judgment, as above stated, against the executor, William Whaley, instituted this action charging insolvency and maladministration against the acting executor, William Whaley, and praying that he should be held to account for the estate of Joseph Whaley, and especially for certain stocks of the city of Charleston, which were standing in the name of the testator at the time of his death, and for the appointment of a receiver, &c. This cause, by consent, was incorporated into that of the bank above referred to, under which the creditors of Joseph Whaley had been called in.

To this proceeding the beneficiaries under the will of Joseph Whaley were not made parties; only William Whaley, executor, and the city council; but afterwards, by order, William James Whaley, lately qualified as executor, was also made a party, and he answered: "That all the transactions referred to in the complaint occurred a long time before he qualified as executor, and took place with William Whaley, the first executor, and the defendant is in no wise connected with the same; wherefore he asked to be dismissed with his costs," &c. At this time the Charleston stock was the principal matter in controversy. Judge Reed made a decree from which there was no ap-

peal, and this court sent the case back for further testimony, &c. 8 S. C. 318.

Upon the second investigation it appeared that most of the scrip for the Charleston stock had not been transferred by the testator, Joseph Whaley, in his life-time, but that his son William, afterwards his acting

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executor, had signed his name without authority. During this inquiry as to the genuineness of the signatures purporting to be those of Joseph Whaley, experts as to handwriting were examined and comparison of signatures resorted to, when it seems that some witnesses testified that the endorsements on the notes of plaintiffs and other creditors, who, as before stated, had obtained judgments on their endorsements against William Whaley, as executor, were in the same handwriting as the transfers of the Charleston scrip; but the referee, Mr. Dingle, made no report on testimony which fell out thus incidentally, confining himself to the matter of the Charleston scrip, which alone had been referred to him. As to that, he reported, as matter of fact, that the transfers of scrip, with one exception, were not in the proper handwriting of the testator, Joseph Whaley.

Judge Wallace confirmed this report, held the city council liable, and ordered the appointment of a receiver of the estate of Joseph Whaley. In his decree Judge Wallace said: "In the argument at the hearing, the testimony to the effect that the signatures of Joseph Whaley upon the notes held by plaintiffs and other creditors were in the same handwriting as the disputed signatures upon the city scrip, was pressed upon my attention, and it was suggested that if the disputed signatures upon the scrip were not genuine then the signatures upon said notes were not genuine, and the holders thereof had not the right to sustain the relation of plaintiffs to this action. \* \* \* It was said, on the other hand, that the notes referred to were in judgment, and had been, therefore, passed upon by a court of competent jurisdiction and could not be collaterally impeached, and could only be assailed in a direct proceeding instituted for that purpose. The issue thus raised is not ripe for decision in this decree, but may again arise in the subsequent progress of the cause. \* \* \* It is further ordered that the receiver have leave to institute such proceedings as he may be advised may be proper and necessary to try the validity of any claims against the estate of Joseph Whaley, and defend such proceedings as may be instituted against him," &c. This judgment was affirmed in this court. See 11 S. C. 515.

About this time (1879) William Whaley,

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the acting executor, \*died. The receiver, T. W. Bacot, Esq., did not exercise the author-

ity given him in assailing judgments recovered against William Whaley while he was acting as sole qualified executor; but the city council of Charleston procured the assignment of the shares of Josephine M. Porter and Sabina Morris, granddaughters of Joseph Whaley, and entitled to two-thirds of the legacy of \$20,000 of city stock, under his will given to Maria Evans Morris, and as such assignee made application to the Circuit Court to allow them to be made parties in order to protect their interest. The Circuit judge (Fraser) refused the motion, but upon appeal to this court, under the very peculiar circumstances, the order was reversed and the parties allowed to come in—Judge McIver, in delivering the judgment of the court, saying: "But when there is no such representative before the court, and especially when, as in this case, the person appointed as such representative (the executor) has been declared unfit to be entrusted with the administration of the assets of the testator, not merely on the ground of negligence or want of capacity, but upon the allegations and proof of the grossest fraud, he certainly cannot be regarded by a court of equity as the representative of the legatees, one of whom is a minor, and, therefore, peculiarly entitled to the protecting care of the court. In such case the legatees must necessarily represent their own interests, and for this purpose must be brought before the court as parties. \* \* \* The legatees undoubtedly had a right to be let in as parties and to have the receiver restrained from distributing the fund until they could have an opportunity of asserting their rights in such form as they may be advised," &c. See 13 S. C. 542.

Under this judgment the plaintiffs filed a supplemental complaint, making the said legatees parties, and they, through the city council, answered, claiming affirmative relief. They deny that the open accounts to a large amount set up as claims against Joseph Whaley are his debts and as to them they demand strict proof. They also claim that as legatees they have the right in a creditors' bill to assail and set aside judgments previously obtained against the sole qualified executor before they were called in as parties upon the ground that the signa-

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tures of the \*endorsements, on which the judgments were obtained, were not in the handwriting of the testator, Joseph Whaley, "and said judgments were obtained by and through the fraud of the executor, who knew but suppressed the fact that the signatures were not the handwriting of Joseph Whaley, and the rights of his legatees cannot thus be affected and destroyed; and all the debts, and especially those upon which judgment was allowed to pass on June 8th, 1874, are no more than the debts of William Whaley,

and not chargeable upon the estate of his testator."

No new testimony was offered on this new issue, but, by consent, the case was tried upon the testimony taken before the referee in the original cause as to the city scrip. Judge Fraser held that: "Some of the claims had been put into judgment by suit against William Whaley, at the time the only qualified executor, and others have been established only under the original proceedings, to which this case is supplemental. In the absence of collusion, I must regard a judgment against an executor as conclusive against the world whenever the same matter comes in question again. It seems to me that any other rule would make it necessary to change the whole practice of suing claims against the estate of deceased persons. With these views, I hold that all the judgments proved before the referee, G. W. Dingle, Esq., including the judgment of Edward H. Gadsden and wife v. William Whaley, executor of Joseph Whaley, and as to all of which there was evidence before me, are valid claims against the estate of Joseph Whaley," &c.

He, also, in relation to the claim of William James Whaley, surviving executor of Joseph Whaley, to have restored to him the custody of the estate of Joseph Whaley, held as follows: "If the court is to administer the fund it must have control and possession of it, and especially when William James Whaley, the surviving executor, while entirely free from fault otherwise, does not seem to have used any exertion to aid in saving the estate from the alleged fraudulent administration of his co-executor, William Whaley. The motion, therefore, made before me and earnestly pressed, to take the estate of Joseph Whaley out of the hands of the receiver, appointed by this court, and

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to \*restore it to the custody of William James Whaley, surviving executor, is refused."

From this decree the legatees, the city council of Charleston, as assignee, and William James Whaley, as surviving executor of Joseph Whaley, appeal to this court. But the exceptions are long and sometimes duplicate the same matter; and those of the city council, as assignee, and of William James Whaley, as surviving executor, it is believed, make all the questions necessary to be considered.

Exceptions of William James Whaley, surviving executor:

1. "We adopt the grounds of appeal made and served by the city council of Charleston on October 13th, 1882.

2. "Because the Circuit judge erred in refusing to take the estate out of the hands of the receiver and restore it to the custody of the defendant.

3. "Because the defendant is, as sole sur-



viving executor, the only proper party to represent the estate of Joseph Whaley.

4. "Because the defendant, as executor, has never been removed.

5. "Because the defendant has been prevented, by want of funds, in defending and protecting the estate of Joseph Whaley as well as his own rights and interests in the case.

6. "Because the appointment of a receiver in this defendant's stead and place was never prayed for in plaintiffs' complaint, was unnecessary, was done without cause shown or alleged against him, when he was free from fault, and against his consent, and unjust to him.

7. "Because the judgments against the estate of Joseph Whaley were entered on claims which were fraudulent, and known to be so by the then sole executor, William Whaley, and before this defendant had qualified as executor; and the counsel for plaintiffs (Mr. S. Lord) admitted on the trial of the cause before Judge Fraser that the papers upon which the judgments against the estate were obtained were never signed in the handwriting of Joseph Whaley.

8. "Because the judgments having been obtained upon paper whereon the names of Joseph Whaley were not in his handwriting, nor authorized by him, should be set aside and the estate protected; and that this ap-

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pellant, as sole surviving \*executor, is the proper party to do it, is anxious to do so, and is prevented from doing so because the custody of the estate has not been restored to him.

9. "Because the defendant was never made a party to the suit, as required by the order of Judge Graham, of the 13th August, 1874, in that no summons or complaint were served on him, nor was he a party to the action at the time of the order of Judge Graham of 12th September, 1874.

10. "Because the receiver has not protected the estate against parties claiming to be creditors.

11. "Because, when an executor does not appeal (nor object) from an order appointing a receiver at the time the order is made, it will not prevent his subsequently asking the consideration of the court whether the order ought to be sustained.

12. "The necessity for a receiver having ceased to exist, the property should be restored to the legal owners."

Exceptions of city council, as assignee:

1. "Because the evidence before his Honor, Judge Fraser, clearly and positively establishes the fact that the causes of action on which judgments were entered against William Whaley, executor of Joseph Whaley, and which judgments were claimed to be debts for which the estate of Joseph Whaley was liable, were not causes of action for which the said Joseph Whaley in his life-

time was liable, or which, after his death, were claims or demands for which his estate was liable.

2. "That the said causes of action, so far as they were claimed to be a charge on the estate of the said Joseph Whaley, purported to be endorsements on promissory notes drawn by William Whaley; and the evidence produced at the hearing clearly and positively established the fact that the endorsements purporting to have been made by Joseph Whaley were not so made by him, and not in his handwriting.

3. "That the testimony before the court, as given by experts in the question of handwriting, clearly and positively established the fact that the handwriting in what purported to be the endorsements of Joseph Whaley was the handwriting of William Whaley, the maker of the said notes and drawer thereof.

4. "That no agency, express or implied,

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direct or indirect, was \*proved or attempted to be proved, by which William Whaley had power or authority to endorse on the said notes, or any of them, the name of Joseph Whaley, or to bind Joseph Whaley in his life-time, or his estate after his death, for any liability because of such endorsements, or in any manner whatever for the payment of the same.

5. "Because, whatever may have been the consideration for which William Whaley gave the said notes to the holder thereof, no testimony was offered which showed that such consideration, in whole or in part, passed to Joseph Whaley, or that he was in any manner concerned or interested therein.

6. "Because, so conclusive, and beyond the range of discussion, was the fact that what purported to be the endorsements in the handwriting of Joseph Whaley, but were in the handwriting of William Whaley; that the counsel representing the plaintiff, at the hearing before Judge Fraser, stated that it was conceded that the endorsements were not in the handwriting of Joseph Whaley, but were made by William Whaley, the principal debtor; that he, the personal representative of the testator, could not interpose the defense without criminating himself, but nevertheless, in the cases in which judgments had been entered, because of such endorsements, against William Whaley, as executor of Joseph Whaley, such judgments were conclusive and bound the estate of Joseph Whaley; nor could the causes of action, because of which such judgments were entered, be inquired into.

7. "Because, with the testimony in the case before the court, it is held in the decree of Judge Fraser to be the law of this case and of the State, that where the name of the testator has, during his life, been written as endorser of a note by one who afterwards

becomes the executor of the testator, and being sued because of such forged endorsement, allows judgment to be entered against him as such executor, the judgment so entered on such forged endorsement cannot be drawn in question, unless collusion is charged and proved to have existed between the plaintiff in the judgment and the defendant, he being the maker of the note and the executor in whose handwriting the name of his testator was placed on the note as such endorser.

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\*8. "Because, while the facts of the case prove that a wrongful act was thus done to all who are or were entitled to the estate of Joseph Whaley, and which would have been redressed if known to the court before such judgment was rendered by it, to hold that when the judgment was entered the court could not control and correct it, would be to affirm that an act done by the court because of a fraud which had been practiced on it, could not be undone by it, and so that it must confirm the wrong.

9. "Because the Supreme Court of the State had, in the strongest terms, declared that the personal representatives or legatees of Joseph Whaley could not be considered as represented by or bound by the acts of William Whaley in his capacity as the executor of Joseph Whaley, whom the court, in its own language, declared to be "unfit to be intrusted with the administration of the assets of the testator," and, therefore, the representatives or legatees were, by the direction of this court, made parties in this case. And the case was sent back to the Circuit Court that the personal representatives or legatees might protect themselves and their interests in the estate of the testator against the wrongful acts of the executor. But if a wrongful act done by William Whaley before they had been so made parties could be shielded from all inquiry or relief by a fraud upon the court in admitting a judgment to be entered in a case wherein no legal cause of action existed to bind the estate of the testator, this would be, in fact, to deny the relief that the court professed to give, and admit parties in a case to defend their rights and interests, yet exclude them from the relief which, being parties in the case, they were entitled to ask.

10. "Because all the circumstances in the case being known to the Supreme Court, that court, in the strong terms used by them, indicated its purpose that there should be a full investigation of all the claims made against the representatives and legatees of Joseph Whaley; a purpose wholly defeated if, in the case of parties claiming to be creditors of Joseph Whaley, because of judgments admitted by the executor to be entered on endorsements of his own notes, in which he had wrongfully used the name of Joseph Whaley, such representatives and legatees were, because of judgments so entered, excluded from

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denying \*that the endorsements so made could bind the estate of Joseph Whaley. The fact, moreover, being that such judgments so entered constituted a large part of the so-called claims and demands against the estate of Joseph Whaley.

11. "Because the case was before the court in the form of a creditors' bill, with the fund to be distributed under the order of the court, and distributed, therefore, according to the proof of the lawful and just character of each claim made against it. And although that claim may have been, by the assent of the executor, carried into judgment, if creditors or representatives or legatees of the testator showed the court that it was not a lawful and just claim, the mere circumstance that a judgment on it had been admitted to be entered by the executor, who had himself, and not his testator, created the claim by unlawful and dishonest means, could not make that a lawful and just claim which all the testimony before the court concerning the cause of action on which the judgment was entered, conclusively proved was not a lawful and just claim against the estate of Joseph Whaley. And if the plaintiff had been, without collusion on his part, made a victim of the fraud and wrong of the executor, and if a court, in giving its judgment, had been made also the instrument of giving protection, by its judgment, to that fraud and wrong, all these could never, in a court of equity, lead it to apply to the payment of a claim not just or lawful, the property of one who was not in conscience or in law liable for its payment."

First. As to the exceptions of William James Whaley, surviving executor. It is a mistake to suppose that the court ever undertook to "remove" the executors in the sense claimed, or that such was the effect of the appointment of a receiver. This court has held in reference to these very executors that "The Court of Equity has not the power to remove the executor," and after the death of William Whaley, the first qualified executor, actually substituted by order in place of his name, that of William James Whaley, as surviving executor on the record of a case which had been commenced against William Whaley alone, before the appointment of a receiver. *Gadsden v. Whaley*, 14 S. C. 214.

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\*But the same case also held that the court may appoint a receiver as an executive officer "to administer the assets of the estate under the direction of the court, which may, for the purpose of preserving the property, restrain the executor from meddling with the management of the estate, and compel him to give up the control of it to the receiver." That is precisely what was done in this case, and nothing more was meant when, in giving a reason why the legatees should be let in as parties to a creditors' bill, this court said:



"When, however, the executor is insolvent the rule [as to parties] is different, and especially when, as in this case, the executor is not only insolvent, but has been removed from office, as it were, on the ground of misconduct, and has become thereby not only incompetent, but has been rendered incapable of representing the legatees," &c.; that is to say, restrained from meddling with the administration of the estate. There was certainly ample cause for the appointment of a receiver, so far as concerned the acting executor, William Whaley, who had shown, to say the very least of it, that he had been unfaithful to the trust reposed in him.

But, it is urged that in doing so the effect was to supersede, also, the other executor, William James Whaley, against whom there was and is no charge of improper conduct; and the claim is now made that since the death of William Whaley, who first qualified, the administration of the estate should be taken from the receiver and intrusted to him as surviving executor. It is true there is no evidence that William James Whaley joined with his co-executor, William Whaley, in the maladministration of the estate, but it must be remembered that he did not qualify until all the damage had been done by his co-executor, and when he did so and was made a party he disclaimed all responsibility, and prayed to be "dismissed with his reasonable costs and expenses," &c. He did not object to the appointment of a receiver or appeal from the order. "The death of one of two executors (or his maladministration) and the refusal of the other to act, afford abundant reason for the interference of equity by appointing a receiver to take charge of the assets," &c. High Rec., § 718.

At the time the appointment was made the

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circumstances \*were such that the court, in the interest of all concerned, could do no less than take possession of the assets by a receiver, and now, when he has possession, after the lapse of years and a long litigation, the court cannot reverse all that has been done only for the reason that the surviving executor, William James Whaley, has changed his mind upon the subject and is now willing to undertake the active administration of what remains of the estate. So much of Judge Fraser's decree as refused the motion to take the estate of Joseph Whaley out of the hands of the receiver appointed by the court and restore it to the custody of William James Whaley, as the surviving executor, is affirmed.

Second. The exceptions of the city council of Charleston, assignee of legatees, as to the judgments of Fraser & Dill and others, which were recovered against William Whaley while sole qualified executor.

Upon this subject, also, there seems to be a misapprehension as to the scope and effect of former orders. It is earnestly urged that

the right of the legatees to set aside these judgments has already been practically decided; that Judge Wallace's order appointing a receiver and giving him authority to institute proceedings to try the validity of any claim against the estate, and the former judgment of this court allowing the legatees to be made parties after the facts had transpired in the examination of the city scrip, as to the manner in which William Whaley signed his father's name, amounted, substantially, to a declaration in advance against the validity of the said judgments.

This is not only a mistake, but a gross injustice. It would be improper to prejudice any question. The court never undertakes to decide anything until the issue is made, the proof offered and the parties heard. The developments on the former trial in reference to the city stock were extraordinary; they were of such a character as, in our judgment, to make proper the largest scope of inquiry allowed by law as to all the transactions of William Whaley as executor of his father's will. In actions to marshal assets, especially when the executor is insolvent, the legatees have an interest and should be made parties, and we think that is the general practice.

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The condition of this estate \*was very peculiar, and, if any ever did, needed the attention of the real parties in interest. In the progress of the litigation against the acting executor, it suddenly appeared that, by signing his father's name, he was appropriating the estate intrusted to his care to the payment of his own debts. In the interest of justice the court is always inclined to full investigation, and to give parties interested the right to be heard.

Under these circumstances a receiver was appointed with authority to institute proceedings to try the validity of claims against the estate, and the legatees who applied were made parties. But by these orders there was not the slightest intention to prejudice anything. The only object was to give those who had been grossly wronged by one supposed to be acting for them, the fullest opportunity of making any and all questions they might be advised. It could not then be foreseen what precise issues could or would be made or what facts could be proved. It might turn out that besides the matters in judgment there were other claims, which the executor, left to himself, might decline to contest, or, as to these already in judgment, it might appear that the creditors had knowledge of the improper acts of the executor, and that the judgments were obtained by fraud and collusion between them and the executor.

By opening the door to inquiry, the court did not intend to decide, or to give the least intimation of opinion as to the case which might be made. On the contrary, Judge Wallace expressly said, that the question as to

the judgments was not then "ripe for decision but may again arise in the subsequent progress of the case;" and this court, in the judgment allowing the legatees to be made parties, said, "What steps they may or ought to take for the protection of their interests after they have been made parties, we regard it premature to discuss now." So that in the subsequent progress of the case, the question for the first time has arisen, and it must now be decided according to the rights of the parties, without being affected in the least by any former proceedings or orders in the case.

Have then the legatees (through the city council) the right now to impeach the judgments recovered against William Whaley as executor, upon the ground that he fraudu-

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lently omitted to \*make a defense which would have prevailed, and of which he had knowledge at the time?

1. As to the judgment of Gadsden and wife for \$15,129. We have not been able to discover the slightest proof that this judgment was recovered upon paper alleged to have been signed by the executor, William Whaley, for his father, or that he fraudulently allowed it to pass into judgment without defense, in violation of his duty as executor. On the contrary, in this case at least, the executor, William Whaley, made vigorous defense, and after his death the surviving executor, William James Whaley, was made a party (the case having been commenced before a receiver was appointed), and the judgment affirmed upon appeal to this court as late as 1880. The judgment is clearly beyond the reach of impeachment. See *Gadsden v. Whaley*, 14 S. C. 214.

2. As to the judgment of R. K. Scott. This judgment was not rendered in Charleston, but in Columbia, where the record remained. We do not see any evidence that the obligation sued on was ever before the experts who testified as to the handwriting of Joseph Whaley in Charleston. From the exemplification of the record, it appears that the obligation sued on was a guaranty purporting to have been signed by both William Whaley and Joseph Whaley in the presence of Julian Mitchell, Esq., as a witness, and that there was a defense and the verdict of a jury. Under these circumstances we see no evidence in the case tending to impeach the validity of this judgment.

3. Then as to the judgment of Fraser & Dill, and others in the same condition, which were rendered in Charleston. It seems that the plaintiffs Fraser & Dill (taken as a representative case) gave value for a note of William Whaley, which had upon it what seemed to be the endorsement of Joseph Whaley; that after his death they sued William Whaley, as the executor of Joseph, and recovered judgment on the endorsement, June 8th, 1874, which was entered up in the usual

form, was proved before the referee in the earlier stages of the case, and lay undisputed until after the developments in the matter of the city scrip, in which inquiry, it will be remembered, certain experts, examined as witnesses as to the comparison of the differ-

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ent \*signatures of Joseph Whaley, gave it as their opinion that the endorsement on the note, like the transfer of the Charleston scrip, was not in the handwriting of Joseph Whaley, and thereupon (1881) some of the legatees assigned their interest to the city council, and in that way asked the court to set aside the judgment on the ground that the executor, William Whaley, fraudulently allowed it to be recovered against him as executor, when he could have made a successful defense.

This is the most difficult question in the case, and its inherent difficulty has been increased by the use of testimony which fell out incidentally upon another branch of the case, and which, if offered directly in the new issue against the judgment, would have been inadmissible. In reference to this testimony, it may be proper to say, in passing, that Judge Fraser, in settling the case, ordered stricken out the folios which claimed that its truth had been admitted by counsel. "The admissions therein referred to, having been made by counsel in the argument, and only for the purpose of the argument," &c.

It is elementary that the judgment of a competent court, having jurisdiction of the subject-matter, is absolutely conclusive against all the parties, and the matters decided by it are *res adjudicata*, and may not be stirred again by them. "A judgment is properly a bar, on principles of public policy, because the peace and order of society, the structure of our judicial system and the principles of our government, require that a matter once litigated should not again be drawn in question by the same parties or their privies." *Freem. Judg.*, § 247; *Manigault v. Deas*, Bailey Eq. 293, and authorities.

Was the identical matter now sought to be inquired into, viz., whether the endorsement was that of Joseph Whaley, decided in the former action at law against the executor on that endorsement? It does not clearly appear that proof was offered, and the point in question actually decided by the court; but that was not indispensable, provided the precise matter was involved in the issue, so that it had of necessity to be decided before the judgment could have been given. *Hart v. Bates*, 17 S. C. 42. It seems to us that the identical matter now charged was necessarily involved in the action at law upon the en-

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dorsement. If \*the proof of handwriting was not made, it should have been required, and, failing to require it, the result must be the same as if it had been formally made.

It may be that the precise matter of gen-



uineness would not have been necessarily adjudged, if, at the time the judgment was rendered, the endorsement covered a hidden fraud which was unknown to the defendant as well as the plaintiffs, on the principles announced in the above stated case of *Hart v. Bates*, "that it is not necessary for a party in ignorance to assail every paper proved as fraudulent in order to escape the penalty of being precluded from doing so at a future time in case he should discover evidence that would justify such charge."

But we cannot see how the executor, Whaley, can claim the benefit of this principle. If, as alleged, the endorsement was in his own handwriting, he must have known it when he was sued—indeed, he was probably the only one that did know it. He was certainly bound by the judgment, and, if now living, he could not be allowed to impeach it. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to any other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate province of the original action, both in respect to matters of claim and defense." *Freem. Judg.*

The executor being bound, the legatees, his privies in estate, are also bound, unless there is something in the extraordinary circumstances of the case which makes it exceptional. "A judgment against an administrator (or executor) is binding on the creditors and legatees of the estate." *Freem. Judg.*, § 163; *Mauldin v. Gossett*, 15 S. C. 578, and authorities. This is admitted to be the general rule; but it is insisted that this is a peculiar case and does not fall within the rule. It is insisted, in behalf of the legatees, that they should not be bound by the judgment, for the reason that, when the action was brought at law against the executor, they were not made parties, and never had an opportunity to be heard as to that endorsement or the judgment upon it.

We think the legatees should have been

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made parties to this bill on the equity side of the court to marshal assets, and when some of the legatees made an application to be let in as parties, this court so held. But it was very different as to the action at law upon the endorsement. To that action the legatees had no right to be made parties; the regularly qualified executor was the proper representative of the estate, and was the only party to be sued. *Winstanley v. Savage*, 2 McC. Eq. 435; *Fretwell v. Neal*, 11 Rich. Eq. 571.

It was further strongly urged upon us that this case was exceptional, because the executor had betrayed his trust, and had not only neglected the interest of the legatees, but, through his powers as executor, had systematically appropriated the assets of the estate

to the payment of his own debts; and that, in consequence of such conduct, this court actually superseded him in the administration of the estate by the appointment of a receiver, for the reason that he "was unfit to be intrusted with the assets of the testator." It is undoubtedly true that the executor grossly wronged the legatees, but the position which enabled him to do it was intrusted to him by the testator himself, from whom the legacies came, and under whose will they claim as beneficiaries. We know of no principle which would authorize the court to deny to him the full measure of rights belonging to other executors up to the time when the administration was taken out of his hands; or to qualify in any way the effects of acts done by him while he acted as sole qualified executor of the will. The law applicable in the case of other executors must be applied to him and his acts.

It was still further pressed in argument that there must have been fraudulent collusion, in obtaining the judgments, between William Whaley, the executor, and the creditors, and especially *Fraser & Dill* and the others who obtained their judgments on June 8th, 1874, for the reason that on that very day an injunction was granted in the cases first filed against Whaley as executor—that of the People's Bank of Charleston, restraining creditors from suing at law—and that such haste and disregard of the order indicated knowledge of something wrong, and if the forgery was not actually

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known, proper inquiry would have disclosed it. We cannot see in this circumstance alone any evidence of collusion. Such restraining order is the usual incident of a creditors' bill, and affords no notice of frauds perpetrated or to be perpetrated. Although on the same day, it does not appear whether the judgments were entered before or after the restraining order.

Besides, Judge Fraser says: "It does not appear that the order was in any way served on the creditors, and if it had been it could only have rendered the creditors liable to attachment for contempt. The full record of the case of the People's Bank of Charleston is now before me, and it seems to have been allowed to drop, and that it has been superseded by these proceedings, under which there has been no order of injunction against creditors," &c. From the nature of the case, Whaley would not be apt to make disclosures implicating himself in forgery to creditors who had trusted him, and whom he had deceived. They never doubted that they had Joseph Whaley's endorsement, and in that view there was nothing to conspire about. We see no evidence that the creditors fraudulently colluded with the executor Whaley in the rendition of the judgments.

Besides, suppose we pass by the doctrine

of technical estoppel, and consider this as a direct assault upon the judgment by the legatees and the proof regularly made in the case, how would the matter then stand? In that case would the fraud of the executor in allowing it to pass against him, alone be sufficient to set aside the judgment regularly recovered by creditors, who were ignorant that there was any defense, and innocent of any fraud, and who had probably paid their money on the faith of the endorsement of the father?

After reflection and with some hesitation we are inclined to think that the recent *ex parte* fraud of the executor alone was not sufficient for that purpose as against innocent judgment creditors. It is true that, as a rule, fraud avoids every thing it touches. It is also true that the courts abhor it, and will not give effect to it to the injury of innocent third parties; but, as we understand it, this righteous principle does not cover the case where the prayer for relief comes

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from the party himself \*who committed the fraud, or from his privies, who, though not in fact participating, cannot, as to the estate, be considered third parties in the sense intended. "To entitle a party to relief from a judgment it must be made evident that he had a defense upon the merits, and that such defense has been lost to him without such loss being attributable to his own omission, neglect or default. The loss of a defense, to justify a court of equity in recovering a judgment, must, in all cases, be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent. \* \* \* Equity will not relieve a party from a judgment procured by his own fraud." *Freem. Judg.*, §§ 486, 489.

The executors deceived both the creditors and legatees—the first strangers and the latter privies. The legatees, of course, have their redress against the executor who betrayed their trust, but, we think, as against innocent third parties, they cannot have removed a judgment which the executor allowed to be recovered against himself as executor, without fraud or collusion on the part of the judgment creditors. *Russell v. Walker*, *Rich. Eq. Cas.* 232; *Walker v. May*, 2 *Hill Eq.* 24; *Vaughan v. Hewitt*, 17 *S. C.* 444; *Castellaw v. Guilmartin*, 54 *Geo.* 299; *United States v. Throckmorton*, 98 *U. S.* 68 [25 *L. Ed.* 93].

In the case last cited Mr. Justice Miller, in delivering the judgment of the Supreme Court, said: "We think the decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to

frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." &c.

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\*The judgment of this court is that the judgment of the Circuit Court be affirmed.

In this case there was a petition for rehearing upon the grounds considered by this court in their order refusing it.

December 8th, 1883. The following order was passed

PER CURIAM. We have carefully examined the grounds stated for a rehearing in this case, and find that they were all gravely considered before the judgment was pronounced.

First. It is true that this court held that the legatees were proper parties in this proceeding to marshal the assets of Joseph Whaley's estate, and as to such as applied ordered them to be brought in as parties; but that is a very different matter from their being proper or necessary parties in the action at law against William Whaley as executor on the endorsements, in which the judgments in controversy were obtained. The cases are as different as possible.

Second. This court, in its judgment, gave the city council all the rights which belonged to their new character as assignees of legatees, precisely as if they had never, in any capacity, been parties before. Their rights were decided as if the legatees themselves had been before the court.

Third. It is a mistake to suppose that the judgments which were the subject of this contention, were "orders, decrees or acts done in the progress of this case," as alleged, either before or after the legatees (represented by the city council as assignees) were made parties. These judgments were obtained at law against the executor, as the proper representative of the estate, before this action to marshal the assets of the estate was commenced on the equity side of the court.

Fourth. The order directing the complaining legatees to be brought in as parties, to make any questions they might be advised, did not commit the court in advance upon any issue which they, being admitted, might be advised to make, as appears fully in the judgment. Every issue had to be decided according to the principles applicable to it.



Fifth. The court had carefully considered

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the case of *Wilson v. Kelly*, ante 160, referred to in the petition, before the judgment was pronounced. There was nothing ruled in that case inconsistent with the rulings in this. In that case the judgment assailed was recovered against the administrator in a suit in equity to foreclose a mortgage upon real estate in which the heirs-at-law (to whom the title of the land had descended) should have been made parties in the action to foreclose, while in this the judgments contested were recovered in actions at law upon alleged endorsements, in which the legatees were not proper parties. In that case, therefore, the contest was between heirs-at-law and a creditor, while in this the only issue was between legatees and creditors who had obtained judgments against the executor representing the legatees, and before the proceeding to marshal assets was instituted or the legatees had any right to be heard except through the executor. In the case of *Wilson v. Kelly* the court say (page 166): "Now, while it may be true, so far as the personal estate is concerned, that the administrator does represent the distributees, who, under our statute, are the same persons as the heirs, inasmuch as the legal title to that kind of property vests in the administrator upon the death of the intestate, the same cannot be said as to the real estate, for with that the administrator has nothing to do. *Mauldin v. Gossett*, 15 S. C. 578. The heirs, not having been represented by the administrator in the action in which the judgment in question was obtained, have never been heard, or had an opportunity of being heard, upon the issues in that action; and, therefore, it would seem to follow that they ought now to be allowed the opportunity of being heard upon such issues, one of which is as to the amount legally due upon the bond, and that they will not be estopped by a judgment obtained in an action to which they were not parties or privies." There is nothing in the case of *Wilson v. Kelly* which even intimates that legatees under a will have the right under a subsequent proceeding to assail a judgment rendered against the executor, upon the ground that they were not parties in the action. In this case there is no complaint except by legatees who were privies of the executor, and represented through him when the judgment at law was rendered against him.

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\*No question as to the rank of the demands in marshaling the assets was before us, and, of course, nothing was decided on that subject.

The petition for a rehearing is refused.†

† This completes the cases of November Term, 1882.

19 S. C. 406

LYONS v. HOLMES.

(April Term, 1883.)

[1. *Slaves* ⇐3.]

A person of African descent, whose freedom is not traced back to a date prior to the act of 1820 (7 Stat. 459), cannot be presumed to have been free before the general emancipation of slaves, although reputed free for more than twenty years. A presumption cannot arise of emancipation by deed, for that act prohibited it; nor by statute, for it was contrary to the settled policy of the State. *Vinyard v. Passalaigne*, 2 Strobb. 540, recognized and followed.

[Ed. Note.—Cited in *State v. Pacific Guano Co.*, 22 S. C. 84.

For other cases, see *Slaves*, Cent. Dig. § 9; Dec. Dig. ⇐3.]

[2. *Slaves* ⇐23.]

The change of policy in this respect, since 1865, cannot be permitted to affect title to land claimed to have been transmitted through such a person before that time.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 112; Dec. Dig. ⇐23.]

[3. *Evidence* ⇐264.]

The admission by defendant of a deed in plaintiff's claim of title extends only to its execution, and does not admit its legal validity or the truth of its recitals.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1028; Dec. Dig. ⇐264.]

[4. *Ejectment* ⇐15.]

A claim of title by defendant in his answer, as devisee of R., who was sole heir-at-law of S., does not estop him from contesting plaintiff's title upon the ground of the incapacity of S., as a slave (through whom plaintiff claims), to acquire and transmit property.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 59; Dec. Dig. ⇐15.]

Before Witherspoon, J., Richland, July, 1882.

This cause has once before been before this court, and will be found reported in 11 S. C. at p. 429. It was an action by Jacob C. Lyons, devisee of Henry Lyons, against Bella Holmes and others, devisees of Richard Holmes, to recover the possession of a lot of land in the city of Columbia. Plaintiff claimed as devisee of Henry Lyons, who purchased from Sarah Hane, apparently a free person of color, who purchased from Guignard. Defendants claimed under the will of Richard Holmes, who was the sole heir-at-law of Sarah Hane. Sarah Hane died in 1862 or 1863, and Richard Holmes in

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1870. The deed from \*Guignard was "admitted in evidence without proof." It recited a consideration, "to me paid by Sarah Hane, a free woman of color, of Columbia," and bore date in November, 1855. This deed was objected to only to the extent that Sarah Hane, as a slave, could take nothing under the deed and could convey nothing. The same objection was made to the deed of Hane to Lyons.

So much of the charge as is contained in

the brief is stated in the opinion. Verdict for plaintiff, and defendants appealed upon the following exceptions:

1. "Because it was proved that Sarah Hane, who died some time in 1862, was a person of African descent, and there was not a particle of testimony to contradict this fact.

2. "Because this fact being proved, then, as a conclusion of law, Sarah Hane was a slave at the making of the so-called deed from her to Henry Lyons, and as such she could neither hold nor transmit real estate by deed or otherwise.

3. "Because there was not a particle of evidence (1) that Sarah Hane was emancipated by deed, according to act of 1800, at any time before the act of 1820; (2) nor that she was emancipated by act of assembly after the act of 1820; (3) nor that she had passed as a free person of color for twenty years, or any shorter period, before the act of 1820, whereby a presumption might arise of a deed of emancipation under the act of 1800; (4) nor was her pedigree established so as to show that she had descended from a free mother before the act of 1800, or 1820, or since.

4. "Because upon these facts his Honor refused to charge, when so requested, that no length of time within which Sarah Hane may have passed as a free person of color after the act of 1820 could raise the presumption of a deed of emancipation, unless it were first established that Sarah Hane passed as a free person of color before the act of 1820, thereby raising the presumption that she was emancipated by deed in the manner permitted by the act of 1800.

5. "Because, under these circumstances, his Honor permitted the so-called deed of Sarah Hane to go to the jury, when it was objected to as constituting no link in the title of Jacob C. Lyons to the property, or by which said plaintiff could connect him-

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\*self with any grant, actual or presumptive, as he is required to do by law."

Mr. J. D. Pope, for appellant.

Mr. W. A. Clark, contra.

June 27th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff in this action seeks to recover the possession of certain real estate in the possession of the defendants, and to make out his title relies upon evidence tending to show that both parties claim from a common source. He contends that one Sarah Hane at one time held the title of the premises in dispute, and that both parties claim under her, his being the superior claim. The defendants, on the other hand, contend that Sarah Hane was a slave, and, therefore incapable of holding or transmitting title to any one, and the

real controversy in the case is as to the status of Sarah Hane.

It seems to be conceded that Sarah Hane, who died in 1862 or 1863, was a colored person of African descent, and therefore she was prima facie a slave. Act of 1740, 7 Stat. 397-8; State v. Harden, 2 Speers 152, note; Nelson v. Whetmore, 1 Rich. 324; Huger v. Barnwell, 5 Rich. 274; State v. Brown, 2 Speers 135; State v. Motley, 7 Rich. 334. To rebut this presumption established by statute and recognized and applied in the cases just cited, the plaintiff relies upon the fact that Sarah Hane had, for many years prior to her death, been in the enjoyment of apparent freedom and had been recognized in the community as a free person of color, and that from this it should be presumed that she had been emancipated. Under the law as it stood prior to the passage of the act of 1820 (7 Stat. 459), there is no doubt but that a colored person of African descent who had been in the enjoyment of apparent freedom and had been recognized in the community as a free person of color for the requisite period of time would be presumed to have been emancipated; because by the act of 1800 (7 Stat. 442), the mode of emancipating slaves was by deed, and such a deed, like any other, might be presumed from lapse of time, with the other

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necessary attendant circumstances. Miller v. Reigne, 2 Hill 592; State v. Hill, 2 Speers 161.

But since the passage of the act of 1820, forbidding emancipation, except by act of the legislature, a different question is presented. In face of the fact that emancipation of slaves was against the declared public policy of the State as evidenced by the repeated acts with ever-increasing stringency upon the subject, to which it is needless to refer, will an act of the legislature emancipating a slave ever be presumed? To this question we think but one answer can be given, whether looked at in the light of reason or authority. It would seem to be an extraordinary assumption of power on the part of the judiciary, bordering on usurpation, to presume that the legislative department of the government had passed an act to effect a purpose which, by repeated legislation, it had declared to be contrary to the public policy of the State, and would amount to a presumption that the legislature had deliberately gone counter to what itself had declared to be the best interests and true policy of the State. It is unnecessary, however, to argue the question, as we think it has been conclusively settled by the case of Vinyard v. Passalaigne, 2 Strobb. 536, in which the precise question was discussed and decided in accordance with the view which we have indicated. See also McCarty v. McCarty, 2 Strobb. 6 [47 Am. Dec. 585], where it was held that an act of



the legislature granting a divorce, would not under any circumstances be presumed because it was against public policy in this State to grant divorces.

It is argued, however, that since the change in the policy of this State in respect to emancipation, this doctrine ought not now to be applied. We are unable to appreciate the force of this position. The question is, Did Sarah Hane ever have lawful title to the premises in dispute? And, she having died before the change in the policy of the State took place, it is difficult to see how such change could affect her alleged title. If she lived and died as a slave, she never could have been invested with title, and no events occurring subsequent to her death could invest her with the capacity to take and transmit title to property.

It does not appear to us that there is any evidence tending to show the condition or status of Sarah Hane prior to 1820. No

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\*witness seems to have known her until some years after that time. The witness Dinah Collins, whose recollection of her extends further back than any of the others, could not have known her until some time between the years 1825 and 1830, and most probably later. At the trial in July, 1882, she says: "I must be now going into the sixties" (whatever that may mean). "I knew her some forty or fifty years, ever since I was a girl about so high" (holding her hand up about four feet from the floor). Even if it be assumed that this witness was sixty-five years of age at the time of the trial, and that she was therefore born in 1817, she must, from her own account, have been eight or ten years of age when she first knew Sarah Hane, and therefore she could not have known her until some time in 1825 or 1827, and hence we are without any evidence as to the condition of Sarah Hane prior to 1820.

Having thus stated the law which we conceive to be applicable to the facts as gathered from the case as submitted for argument here, we will proceed to consider so much of the charge of the Circuit judge as relates to the real point in controversy. The second request to charge was in these words: "That there can be no presumption of freedom by proof of a general reputation of one being a free person of color, since the act of 1820, directing that emancipation shall be by act of the legislature only; that no such act of assembly being produced, twenty years' enjoyment of apparent freedom does not presume emancipation either by deed or by act of assembly." This request was refused and the jury were charged in general terms, "that if they were satisfied from the evidence that Sarah Hane was a free person of color, that was enough, and they must judge of the evidence. If they were satisfied from the evidence that Sarah Hane was

a free person of color, her deed would be good." The exception applicable to this request was, "that his Honor refused to charge that no length of time within which Sarah Hane may have passed as a free person of color after the act of 1820, could raise the presumption of a deed of emancipation, unless it were first established that Sarah Hane passed as a free person of color before the

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act of 1820, thereby raising the \*presumption that she was emancipated by deed in the manner permitted by the act of 1800."

From what we have said, it is clear that the defendants were entitled to have the jury charged as demanded by this request. The manifest object of the request was to have the jury instructed that the enjoyment of apparent freedom, and being regarded in the community as a free person of color since the act of 1820, constituted no evidence that the person whose status was in question was a free person of color, because these facts would not authorize the presumption of a deed of emancipation, as that mode of emancipation was no longer lawful, nor of an act of the legislature, because such an act, being contrary to public policy, could not be presumed; and when, on the contrary, the jury were told in general terms, that all that was necessary was that they should be satisfied, from the evidence, that the woman was a free person of color, without explanation of the legal bearing of the evidence, they were practically left to pass upon a question of law as well as of fact, and permitted to infer emancipation from the long enjoyment of apparent freedom after the passage of the act of 1820, which, as we have seen, the law did not permit.

The criticism of respondents' counsel, in his argument upon the phraseology of this request to charge, is not sound. The request must be construed as a whole, and not in detached portions. So construed, we think it obvious that it does not practically assert that twenty years' enjoyment of apparent freedom, whether before or after the act of 1820, or partly before and partly after said act, does not presume freedom. On the contrary, properly construed, it plainly asserts that the presumption of emancipation cannot arise from twenty years' enjoyment of apparent freedom after the act of 1820.

We do not think that the position in respondents' argument, that the defendants are estopped from denying Sarah Hane's capacity to hold and convey property, can be sustained. The grounds of estoppel relied upon are: 1. That they have admitted the deed from Guignard to Hane, in which she is described and takes as a free person of color. 2. That the defendants, in their answers to the original complaint, claim title as dev-

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isees of \*Richard Holmes, who claimed as the sole heir-at-law of Sarah Hane. As to

the first ground, it is very obvious that the admission only extends to the execution of the deed, and, certainly, such an admission cannot be regarded as committing the parties to an admission of its legal validity, or of the truth of any recitals which it may contain.

As to the second ground of estoppel, the pleadings are not before us, and we are, therefore, unable to say what the facts are. But even if they be as alleged, we are unable to see how the title set up by the defendant in his answer to an action like this can estop him from contesting each link in the plaintiff's chain of title. In an action to recover possession of real estate the plaintiff must stand upon the strength of his own title, and not rely upon the weakness of his adversary's. He must make out his title, and until he does so the defendant may fold his arms and close his lips.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

#### 19 S. C. 412

### BLACK v. CITY OF COLUMBIA.

(April Term, 1883.)

#### [1. *Pleading* ⚡34.]

The word "understanding" falls short of alleging a distinct and express contract between the parties.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 70; Dec. Dig. ⚡34.]

#### [2. *Municipal Corporations* ⚡739.]

The plaintiff brought action for damages against a municipal corporation, based upon the destruction of his house by fire, resulting from an inadequate supply of water, to a sufficient supply of which he claimed to be entitled by reason of a water tax assessed upon such property by the city and paid by him. *Held*, on demurrer, that the action was for a tort, and, therefore, as against a municipal corporation, could not be sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1557; Dec. Dig. ⚡739.]

#### [3. *Municipal Corporations* ⚡739.]

A contract made by the officers of a municipal corporation to insure to a taxpayer an adequate supply of water to extinguish fires, would not be binding upon the corporation unless the officers had the right to make such a contract. The officers of the city of Columbia have no such right.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1557; Dec. Dig. ⚡739.]

#### [4. *Municipal Corporations* ⚡753.]

An action cannot be maintained in this State against a municipal corporation for the non-performance of a public duty, there being no statute authorizing it. The functions of municipal corporations considered.

[Ed. Note.—Cited in *Young v. City Council of Charleston*, 20 S. C. 118, 47 Am. Rep. 827; *Gibbes v. Town Council of Beaufort*, 20 S. C. 218; *Chick v. Newberry and Union Counties*, 27 S. C. 424, 3 S. E. 787; *Chapman v. City Council of Charleston*, 28 S. C. 380, 6 S. E. 158, 13 Am. St. Rep. 681; *Parks v. Green-*

*ville*, 44 S. C. 172, 21 S. E. 540; *Bramlett v. City of Laurens*, 58 S. C. 63, 36 S. E. 444; *Matheny v. Aiken*, 68 S. C. 182, 183, 47 S. E. 56; *Bryant v. City Council of Orangeburg*, 70 S. C. 140, 49 S. E. 229; *Ancrum v. Camden Water, Light & Ice Co.*, 82 S. C. 291, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; *Irvine v. Town of Greenwood*, 89 S. C. 514, 517, 72 S. E. 228, 36 L. R. A. (N. S.) 363; *Parish v. Town of Yorkville*, 96 S. C. 26, 79 S. E. 635.

For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. ⚡753.]

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#### [5. *Municipal Corporations* ⚡733.]

\*Power to supply the city with water having been given by statute to a municipal corporation, a duty was thereby imposed which required the exercise of judgment and discretion, and was not, therefore, purely ministerial.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549, 1561; Dec. Dig. ⚡733.]

6. *White v. City Council of Charleston*, 2 Hill 571, and *Coleman v. Chester*, 14 S. C. 286, recognized and followed.

[This case is also cited in *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559, and distinguished therefrom.]

Before Witherspoon, J., Richland, July, 1882.

This was an action by Joseph R. Black, as trustee for himself and others, against the city of Columbia. The opinion states the case. The order of the Circuit judge, omitting its statement of the pleadings, was as follows:

The two causes of action will be considered separately and in the inverse order in which they are laid in the complaint. I regard the second cause of action *ex delicto* in its nature, as the plaintiff claims damages by reason of the non-performance of a duty devolved upon defendant under the law. No statute is pleaded giving the right to maintain an action for tort against defendant, nor was any such statute referred to upon the hearing. Whilst the rule is different in regard to private corporations, it seems to be well settled that such an action will not lie against a municipal corporation, like a city or town, created for the public good, unless authorized by statute. See *Coleman v. Chester*, 14 S. C. 286, affirming *White v. City of Charleston*. The defendant's demurrer to plaintiff's second cause of action must, therefore, be sustained.

I regard the first cause of action in the complaint as uniting two causes of action, damages being claimed as well for defendant's breach of contract as for breach of duty in not keeping the water pipes in order and furnishing plaintiff with a proper supply of water, which resulted in the destruction of plaintiff's property by fire. Plaintiff might have waived the tort and relied upon the contract, or vice versa. If plaintiff wished to rely upon both the tort and the contract he should have set up each as a separate cause of action. He has not done so. Defendant, before demurrer, by motion,



could have required plaintiff to separate these two causes of action, or at least have

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required plaintiff to elect \*between them.

If either of the causes of action so united (in the first cause of action) can be maintained, the demurrer as to such cause of action must be overruled. In *Coleman v. Chester*, supra, it is held that a municipal corporation may make contracts and be bound by them without statutory authority.

It is true that this cause of action, whilst in its nature *ex contractu*, is not as formally or definitely pleaded as it should be, yet I am not prepared to hold that it is defective in substance; on the contrary, it substantially appears on the face of the complaint that defendant agreed with plaintiff, in consideration of the payment of the special water tax, to furnish water pipes in order and a sufficient supply of water to protect plaintiff's property from fire; that defendant failed to comply with this undertaking, by reason of which failure plaintiff's property was destroyed by fire, for which plaintiff claims damages. The facts stated cannot be disregarded because plaintiff also rests his demand for damages upon defendant's breach of duty. The informality in the statement of the cause of action for breach of contract must also be disregarded, if the facts are sufficiently presented as a cause of action. *Hammond v. R. R. Co.*, 15 S. C. 10.

It is therefore ordered and adjudged that defendant's demurrer to plaintiff's second cause of action be sustained, and that said demurrer to first cause of action for damages for breach of contract be overruled, but with leave to defendant to answer over within thirty days from service of notice of the filing of this decree, without prejudice to any right of defendant to require the first cause of action to be made more definite and certain upon the matter of contract therein relied upon. Upon defendant's failure to answer within the time herein directed, the plaintiff may have his damages assessed at the next or some subsequent term of court, as in case of default.

Mr. J. T. Sloan, Jr., for defendant, appellant, cited 19 Ohio St. 19; 29 Ind. 187; 12 Ohio St. 375; 69 Pa. St. 420; 17 B. Mon. 722; 2 Ill. 571; 3 Pet. 409; 14 S. C. 286; 1 Greenl. Evid., § 256.

Messrs. Bacon & Moore, contra, cited 14 S. C. 286; Dill. Mun. Corp., §§ 373, 374, 383-5, 750, 774-8, 957, 1048, 1027, 1021,

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\*789, and the authorities referred to in the notes; Story Ag., § 52; 16 Cal. 255; 24 Ill. 105; 2 N. & McC. 537; 1 Spears 31; Cooley Tax. 416, 427; 43 Ind. 574; 91 U. S. 551; 102 Mass. 489; 38 Geo. 334; 2 Den. 433; 11 H. L. Cas. 686; 11 R. I. 141; 2 Hurlst. & N. 204; 22 Pa. St. 54; 124 Mass. 564; 126 Id. 324; 73 N. Y. 365.

June 29th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action against the city of Columbia to recover \$2,500 damages, the value of a dwelling-house and outbuildings destroyed by fire on February 22d, 1882, by reason, as alleged, of the failure on the part of the defendant corporation to keep its water pipes, hydrants and fixtures in repair, so as to furnish a sufficient supply of water to enable the engines to extinguish fires. The fire did not originate on the plaintiff's premises, but in a neighboring building, and, it was alleged, could have been extinguished before it reached and consumed the plaintiff's house, had there been a sufficient supply of water in the pipes, and that the want of such supply was caused by the negligence of the corporation.

The complaint contained two causes of action. The first, among other things alleged: "That the defendant is a municipal corporation, and by virtue of several acts of the legislature, is clothed with a general power of taxation, and also with certain special powers of taxation within the corporate limits of the city. \* \* \* And also with the power of laying down all pipes, fixtures, fire plugs, hydrants, water works and cisterns, within the said corporate limits, with ample power at any and all times to make ordinances, rules and regulations necessary to the execution of their said powers. That by virtue of such powers and the said charter, and of the ordinances passed thereunder, the said defendant corporation did lay down or cause to be laid down in the streets leading to and upon plaintiff's premises, certain water pipes, and did place and cause to be placed in said streets certain hydrants connected with said pipes. \* \* \* That said defendant did assess upon plaintiff's said property an annual tax for the use of the said pipes, and of the water to be furnished thereby to the plaintiff by defendant for cer-

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tain purposes, among others, in case of fire in or about the said premises and for the extinguishment thereof. That in consideration thereof, and with the understanding that the plaintiff was to be furnished with an ample supply of water by means of the said pipes and hydrants for the extinguishment of any fires that might occur as aforesaid, the said plaintiff did agree to pay and did pay to the said defendant the annual tax so assessed and imposed. \* \* \* That by reason of the premises and of the powers and duties imposed by said acts and by reason of the ordinances of the said defendant, and in consideration of the tax so paid, and in consideration of the said understanding that the pipes and hydrants aforesaid should be properly laid down and placed so as to furnish the said plaintiff with an adequate supply of water for necessary purposes, and for the ex-

tinguishment of fires as aforesaid, it became and was the duty of the defendant to lay down such water pipes, and to place such fire plugs and hydrants as would furnish a full and adequate supply of water for the purpose aforesaid, and at all times to keep in said pipes, fire plugs and hydrants, such adequate supply of water and to keep said pipes and hydrants in proper order. \* \* \*

"That the said city of Columbia, unmindful of its duty in the premises under the charter and ordinances aforesaid and its understanding with the plaintiff, and notwithstanding the taxation and assessment of the said sum of money and in utter disregard of the plaintiff's right, wholly failed and neglected to comply with its obligations or perform its duties and to keep said water pipes and hydrants in proper order, and to keep in the same a sufficient supply of water for the extinguishment of fires as aforesaid. \* \* \*

That on or about February 22d, 1882, the house of one Carr, adjoining plaintiff's lot, took fire; that the alarm being given, the fire department and other persons repaired to the spot in sufficient force, with engines, &c., in ample time to extinguish the fire and prevent its extending to plaintiff's buildings; but, although strenuous efforts were made to draw water from the pipes and hydrants aforesaid, it was impossible to obtain therefrom a sufficient quantity, said pipes and hydrants not being in proper order, and there not being in said pipes and hydrants a suffi-

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cient quantity of water to extinguish \*said fire or to enable the engines to play upon plaintiff's buildings, or in any manner to check or extinguish said fire, whereby plaintiff's said dwelling-house and other buildings were totally consumed, to the plaintiff's damage twenty-five hundred dollars," &c.

The second cause of action made substantially the same allegations. It omitted, however, the statements that the city had the pipes laid down and that there was an understanding between the plaintiff and the defendant corporation that there should be, at all times, a sufficient supply of water in the pipes for the purpose of extinguishing fires. This cause of action simply stated "that the city of Columbia, a corporation, found and took possession of the water-pipes, hydrants, &c., and passed an ordinance in the following terms: 'That each and every owner of real estate upon any street where water is brought by pipes or otherwise from the city reservoir, shall pay to the city treasurer, at the same time with the other taxes imposed by this ordinance, a general tax of one dollar for each fifty feet of frontage when there are buildings, and one cent per foot of frontage when there are no buildings upon lots so taxed; provided, that every one shall pay a water tax of not less than one dollar; and provided, further, that no property-holder shall be charged with more than one front-

age for each piece of property owned by him,'" &c. That the plaintiff paid the tax assessed upon him as an owner of real estate under this ordinance, "by reason whereof it became the duty of the defendant corporation to keep said water pipes, fire plugs and hydrants in good order, and to keep in said pipes and hydrants a sufficient quantity of water, at all times, for the extinguishment of fires," &c. It further alleged that the plaintiff performed all the conditions required of him; but the defendant corporation did not, and that in consequence the plaintiff's said dwelling-house and other buildings were totally consumed by fire, to the plaintiff's damage twenty-five hundred dollars.

The defendant corporation demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the cause coming on for trial be-

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fore Judge Wither\*poon, he sustained the demurrer as to the second cause of action, holding that it was *ex delicto* in its nature, and as such could not be maintained against a municipal corporation for a non-feasance. But he overruled the demurrer as to the first cause of action, holding that it contained the elements of two causes of action, "damages being claimed as well for defendant's breach of contract as for breach of duty in not keeping the water-pipes in order and furnishing plaintiff with a proper supply of water, which resulted in the destruction of his property by fire," stating at the same time that, whilst the first cause of action was, in its nature, *ex contractu*, it was not as formally or definitely stated as it should have been.

From this ruling the defendant corporation appeals to this court upon the following exceptions: "1. For that his Honor erred in holding that the defendant's demurrer to the plaintiff's first cause of action be overruled. 2. For that his Honor erred in holding that he could sustain the first cause of action to the complaint herein, when, as he decided, two causes of action were united in it—one for breach of contract and the other for breach of duty—by separating the one from the other. 3. For that his Honor did not hold that the injury complained of is too remote, and is not the proximate or natural consequence of the act, and that no liability on this account can attach to the defendant. 4. For that his Honor did not hold that an action to recover damages for a tort cannot be maintained against a municipal corporation, unless provided for by statute."

The plaintiff, whilst resisting the appeal of the defendant, gave notice that he also appealed to this court upon the following grounds: 1. "Because his Honor sustained the demurrer to the second cause of action. 2. Because his Honor decided that cause of action to be a cause of action *ex delicto*. 3. Because his Honor decided that such an action, unless authorized by statute,



will not lie against a municipal corporation. 4. Because his Honor decided that the first causes of action united in itself two causes of action, 'damage being claimed as well for defendant's breach of contract as for breach of duty.' The questions made by these exceptions will come under review

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in connection with \*the consideration of those filed by the defendant, and therefore they will not be taken up separately or considered seriatim.

The effect of the defendant's demurrer was to admit the allegations of the complaint, but this being the result of a rule of law and not of evidence, these statements are not to be amended by intentment, but must be taken as they stand.

Without stopping to consider the effect of mixing, in the first cause of action, allegations which indicate a tort with those which may be supposed to point towards a cause of action *ex contractu*, we have grave doubts whether the allegations made in that cause of action—taken as a whole and considered together—make out a cause of action upon a contract with the plaintiff personally, to insure or guarantee to him at all times an ample supply of water in the pipes for extinguishing fires, &c. It is certainly the general rule that the contract of a corporation should be evidenced by proper corporate proceedings, and nothing of that kind appears here. Neither the word "contract" nor "agreement," as referring to the action of the corporation, is stated. As applied to the corporation the strongest term used is "understanding" which is equivocal, or at least falls short of alleging a distinct and express contract between the parties.

Looking at the situation of the parties and the subject-matter, we can not resist the conclusion that the plaintiff merely meant to allege the existence of certain facts—such as the power to make the assessments—the payment of the tax for water frontage, &c., and that these facts raised a legal obligation which authorized the fiction of an implied *assumpsit*. We do not understand that the plaintiff meant to allege or did allege that there was a distinct agreement beyond what could be implied from the facts stated, and this view is strengthened by the manner in which the alleged breach is stated, "that the defendant corporation, in utter disregard of its duty, wholly failed and neglected to comply with its obligations or perform its duties, and to keep said water pipes and hydrants in proper order and to keep in the same a sufficient supply of water for the extinguishment of fires," &c. We regard both causes of action as substantially charging a non-feasance on the part of the corporation, a tort.

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\*If, however, we consider that there was alleged a distinct express contract of the of-

ficers with the plaintiff personally, undertaking to insure to him an adequate supply of water in the pipes at all times for the purposes aforesaid, it does not necessarily follow that the action could be maintained upon such contract. That would involve another question, whether the officers of the corporation had the right to make such a contract. Doubtless there are cases in which a contract by a municipal corporation will be implied from facts. These, however, arise for the most part out of transactions in which the corporation itself has in some way received and used property or money which, *ex equo et bono*, does not belong to it. But in all cases, either of express or implied contract on the part of the corporation, the contract cannot be enforced against the corporators, if it is in violation of the charter or beyond the scope of the agency created by it. In such case the principle of *respondeat superior* does not apply, but the alleged contract is *ultra vires* and void. To this class belongs an alleged contract which restricts the exercise of legislative discretion vested in the municipality or its officers in reference to public duties, and "upon such contract the corporation can not be held liable either in special or general *assumpsit*." *Thomas v. City of Richmond*, 12 Wall. 349 [20 L. Ed. 453]; *Dill. Mun. Corp.*, §§ 61, 372, and notes.

In the case from Wallace, notes were issued by the City of Richmond to circulate as money in contravention of law, and it was held that they could not be recovered. The court said: "Municipal corporations represent the public, and are themselves to be protected against the unauthorized acts of their officers when it can be done without injury to third parties. Persons dealing with such officers are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchise which has been conferred upon it; and the receiver of the bills being chargeable with notice, is in *pari delicto* with the officers and should have no remedy against the corporation. \* \* \* The protection of public corporations from such unauthorized acts of

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\*their officers is a matter of public policy in which the whole community is concerned," &c.

If, as alleged, there was in this case a contract by the officers of the city insuring to the plaintiff an adequate supply of water at all times and under all circumstances, we incline to the opinion that it was a contract restricting the discretion of the municipality, beyond the scope of the charter, and if actually proved, would not support an action against the corporation.

Assuming, then, that both causes of action substantially charged a tort, could the action

be maintained? There is no statute in this State authorizing an action against a municipal corporation for non-feasance as to a public duty. The general doctrine is, that civil or municipal corporations are public in their nature, but instrumentalities of the State which incorporates them to assist the State in more effectually discharging its duty. The powers conferred on such corporations are not always uniform, but they generally relate to the administration of justice, the support of the poor, the establishment and repairs of highways, &c., all of which are matters of State as distinguished from local concerns. It seems to have been considered that, as the State cannot be sued, these governmental agents of the State should not be liable in an action of tort, for either non-feasance or misfeasance; that they are not liable in case or trespass or other form of civil action for neglect of public duty unless such liability be expressly declared by statute.

In 1829 the Supreme Court of the United States so held in the case of *Fowle v. The Common Council of Alexandria*, 3 Pet. 408 [7 L. Ed. 719]. In delivering the judgment of the court, Chief Justice Marshall said: "That corporations are bound by their contract is admitted; that many corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a non-feasance—by an omission of the corporate body to observe a law of its own, in which no penalty is provided—is a principle for which we can find no precedent. We are not prepared to make one in this case."

In 1834 the same doctrine was announced in this State, in the case of *White v. City Council of Charleston*, 2 Hill 571, where it

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\*was held that: "There is a distinction between private corporations exercising their corporate functions for the benefit of its members, and public corporations instituted for the purposes of government. The former are liable to individuals for an omission or malfeasance of their corporate duties, but the latter, although subject to indictment for a breach of corporate duty, are not liable to an action by an individual unless it be given by statute; and, therefore, it was held that the city council of Charleston was not liable to an action for an injury to the plaintiff, in having his house blown up during a fire, although the fire was extinguished before it reached his house," &c.

Such seems to be the settled law of this State. As lately as 1880, in the case of *Coleman v. Chester*, 14 S. C. 291, Judge McIver, in delivering the judgment of the court, said: "While it is quite true that in some of the States a contrary conclusion has been reached, we think it settled in this State, by the case of *White v. The City Council of Charles-*

*ton*, supra, that an action to recover damages for a tort, unless it be provided for by statute, cannot be maintained against a municipal corporation, characterized by Marshall, C. J., in *Fowle v. Alexandria*, as 'a legislative corporation established as part of the government of the country.' The case of *White v. City Council*, so far from being shaken, is rather confirmed by the subsequent case of *Main v. Railroad Company*, 12 Rich. 82 [75 Am. Dec. 725]. In the last case it was held that an action of trespass could be maintained against a railroad company—a corporation formed and exercising its functions for the pecuniary benefit of its members—and not a public corporation, instituted for the purposes of government, &c. \* \* \* Hence, whatever may be the rule elsewhere, we are bound to declare it as established by *White v. City Council*, unless we overrule that case, which we do not feel justified in doing," &c.

As suggested in the foregoing opinion, in some of the later cases of other States modifications of the general rule as to the non-liability of municipal corporations have been adopted. Many of the cases upon the subject, cited at the bar, have been examined, and we confess that we are unable to see clearly the principle upon which these modifications rest. The general doctrine, as announced by Mar-

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shall and Harper, is clearly recognized in all of them; but the view seems to be, that all the powers granted to a municipal corporation are not civil or governmental in their character, but that some of them are what is called merely corporate; and the effort is made, first to separate these powers, distinguishing those which are civil or public from those which are private and local, and then, in regard to those assigned to the latter class, to impose responsibility for negligence only where the duty is not discretionary but purely ministerial in character.

With all due respect, it seems to us that if the powers granted to a municipal corporation are susceptible of such division and separation, it would be exceedingly difficult to carry the doctrine into anything like uniform practice. Opinions must certainly differ, both as to the proper classification of the powers and the character of the duty imposed by them. The necessity of determining in each case, whether a particular power should be ranked in the class of corporate as distinguished from civil powers; and, if the former, whether its exercise imposes a duty, discretionary or merely ministerial, must be the source of constantly-recurring difficulties, and tend to great confusion and uncertainty in the administration of the law.

But, be that as it may, we do not regard the question as involved in this case. If we were at liberty, notwithstanding our own decided cases, expressed in general terms without limitation or qualification, to consider the propriety of the modifications sug-



gested to the general rule, we do not think that the non-feasance complained of here can be properly said to be in reference to a power merely corporate in character, or that the duty imposed was merely ministerial. The system of water works and its management required, on the part of the city authorities, the exercise of discretion and judgment. The power was granted by law to a municipal corporation, and we do not see how it can be properly regarded as imposing a duty purely ministerial in its character.

In the case of *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, (2 Am. Rep. 368,) the plaintiff's house, situated in the city of Cincinnati, was destroyed in a fire, and he sued the corporation for damages on the ground that the corporation had failed to

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provide the necessary cisterns and suitable fire engines, and that certain officers of the fire department of the city had neglected to perform their duty in extinguishing the fire which consumed his house. The corporation, as in this case, filed a demurrer, which was sustained. Upon appeal to the Supreme Court it was held that: "The laws of this State have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire and preserve the buildings and property within their limit from conflagration; and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities; and for any defect in the execution of such powers the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies or their officers charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi-sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character. We know of no case in which an action like the present has been held to be maintainable. *Brinkmeyer v. Evansville*, 29 Ind. 187; *Western College of Medicine v. City of Cleveland*, 12 Ohio St. 375."

Mr. Dillon, who, in his general views, is very much inclined to make municipal corporations liable, in commenting on the case of *Wheeler*, says: "Nor is such a corporation liable to the owner of property destroyed or damaged by fire in consequence

of its neglect to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns. In that case (*Wheeler's*) a liability on the part of the corporation was sought to be sustained upon the ground of the neglect of a corporate duty, but the court considered that powers

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of this nature, conferred upon municipal corporations, were legislative and governmental, and excluded the notion of responsibility to individuals, based on neglect or non-feasance, and distinguished the case from those in which the duty is purely ministerial," &c. 2 Dill. Mun. Corp., § 474, and many authorities there cited in the notes.

The judgment of this court is that the judgment of the Circuit Court be reversed and the complaint dismissed.

## 19 S. C. 425

## LIPSCOMB v. SEEGERs.

(April Term, 1883.)

[1. *Convicts* ⇨12.]

The superintendent of the penitentiary may sue in his own name for the amounts due to the State by a hirer of convicts, on account of the loss of so many of them as were permitted to escape.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 33, 34; Dec. Dig. ⇨12.]

[2. *Prisons* ⇨7.]

Since 1878 the superintendent of the penitentiary holds his office under election by the general assembly, and not by executive appointment. The act of 1878 (16 Stat. 702) was, in effect, an amendment of the General Statutes, which had repealed the act of 1868, but, at the same time, re-enacted its provisions.

[Ed. Note.—For other cases, see *Prisons*, Cent. Dig. §§ 6-9; Dec. Dig. ⇨7.]

[3. *Convicts* ⇨12.]

A statute permitted the hiring of convicts, upon bond being given for their safe keeping, and the statute provided that the person so hiring should forfeit and pay to the State the sum of fifty dollars per annum for each year of the unexpired term of any convict who escaped through the negligence of the hirer. One of the directors hired convicts upon these terms, but did not give the required bond. *Held*, that he was liable for convicts negligently permitted to escape.

[Ed. Note.—Cited in *Finch v. Finch*, 28 S. C. 170, 5 S. E. 348, 13 Am. St. Rep. 665.

For other cases, see *Convicts*, Cent. Dig. § 34; Dec. Dig. ⇨12.]

[4. *Damages* ⇨79; *Limitation of Actions* ⇨35.]

The amount of fifty dollars stated as a forfeit for each year of the unexpired term of the escaped convict was not a technical penalty, but stipulated damages, and action therefor was not barred in two years.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 164; Dec. Dig. ⇨79; *Limitation of Actions*, Cent. Dig. § 161; Dec. Dig. ⇨35.]

[5. *Convicts* ⇨12.]

This fifty dollars was the rate per annum fixed upon as compensation to the State for the

loss, and for fractions of a year the amount would be a proportionate sum.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 33, 34; Dec. Dig.  $\S$  12.]

Before Witherspoon, J., Richland, July, 1882.

The opinion states the case. The brief does not contain the judge's charge in full, but only so much thereof as is complained of in the exceptions, which correctly state the propositions charged and those requested and declined.

[For subsequent opinion, see 22 S. C. 407.]

Mr. J. D. Pope, for plaintiff.

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\*Messrs. Melton, Clark & Muller, contra.

June 29th, 1883. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action brought by T. J. Lipscomb, superintendent of the penitentiary, against John C. Seegers, for \$1,100, alleged to be due the State on account of five convicts, which the said Seegers hired from the superintendent, and negligently allowed to escape while in his employment. In the year 1879, Seegers, being at that time one of the directors of the penitentiary, entered into an agreement with the superintendent to hire thirty male convicts to work on a farm in the neighborhood of Columbia. During the year, five of them escaped, and this action was for the damages thereby caused to the State.

The complaint alleged: "1. That by the tenth section of the act of assembly entitled 'An act to utilize the convict labor of the State,' as amended and approved March 1st, 1878, it was, among other things, provided as follows: 'That the contractor or company hiring said convicts shall enter into a bond payable to the State, in the sum of ten thousand dollars for every hundred convicts, and a bond in like proportion for a less number, for the safe keeping of the convicts; and for each convict that shall escape through negligence of any kind, the contractor or company shall forfeit and pay to the State therefor the sum of fifty dollars per annum for each year of the unexpired term of the sentence of such escaped convict; provided, further, that if the convict shall be captured within two months and returned to work free of cost to the State, no penalty shall attach.' 2. That some time thereafter the said defendant, who then was one of the directors of the penitentiary, did, under the provisions of the said act, agree to hire thirty male convicts, for which he agreed to pay \$3.66 per month per capita. 3. That in pursuance of said agreement the said convicts were delivered to the said defendant on or about the 20th day of January, 1879, but the defendant did not then secure, and has not since secured the State by entering into a bond for the forfeiture imposed by the said act for the safe keeping

of the said convicts which were delivered to and received by him as aforesaid. 4.

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That the \*said defendant did not safely keep the said convicts, but negligently did suffer five of them so hired, by deed delivered to him, to escape. The several names of the said escaped convicts, their several terms of sentence, the several dates of their delivery to defendant, and the several dates of their escape, being as hereinafter set forth," &c.

After stating the names of the five who escaped, the different times at which they respectively escaped, and the unexpired term of the sentence of each, the plaintiff demanded judgment for the aggregate amount of \$1,100.

The defendant demurred to the complaint upon two grounds: First, that the plaintiff was not superintendent of the penitentiary and had not legal capacity as such to sue; and second, that the complaint did not state facts sufficient to constitute a cause of action. Judge Wallace overruled the demurrer, and granted leave to the defendant to answer. He excepted, but, reserving his exceptions, answered, denying the plaintiff's capacity to sue, denying that he agreed to hire the convicts in accordance with the requirements of the "Act to utilize the convict labor of the State," and, also, denying that any of the hired convicts escaped through negligence. Upon these pleadings the case came on for trial before Judge Witherspoon. After the pleadings were read the judge allowed the defendant to amend his answer by pleading the statute of limitations, applicable to an "action upon a statute for a forfeiture or penalty to the State."

It appeared that the plaintiff had been elected superintendent of the penitentiary by the legislature, and he produced two commissions as such—the first bearing date January 3d, 1879, and the other, April 14th, 1882; that as such superintendent he entered into an agreement with the defendant, Seegers, to hire him thirty male convicts for the year 1879; that the contract was according to the requirements of the act upon the subject: that Seegers was to be responsible for the safe keeping of the hired convicts; that the contract and bond, as required by law, were reduced to writing, and handed to Seegers to be signed by him, but he failed to sign the papers, although the convicts had been delivered to him on the faith of the said agree-

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ment. \*There was some proof as to the time and circumstances under which the different convicts had escaped from the farm.

The Circuit judge held that the amounts sought to be recovered on account of the escape of the convicts, were technical penalties imposed by statute, and as it appeared from the face of the complaint that the action had not been brought within two years



and three months after the escape of any of the convicts, except that of David Spry, he sustained the plea of the statute of limitations as barring the action as to the sums alleged to be due on account of the escapes of all the convicts, except the said Spry. The case went to the jury only on this one (Spry's) item of the claim.

When Spry escaped, the unexpired term of his sentence in the penitentiary was something less than three years, viz., two years, one month and twenty days; but the plaintiff claimed damages to the extent of \$150, being \$50 each for three full years, insisting that the act, which was embraced in the contract, takes no account of fractions of a year, but requires that the contractor shall pay for the negligent escape of a convict "the sum of fifty dollars per annum for each year of the unexpired term of the sentence of such escaped convicts," &c.; whilst the defendant insisted that if he should be held liable at all he ought to be charged only for the actual unexpired term of the convict's sentence, at the rate of \$50 per annum. The judge charged in accordance with the defendant's view, and the plaintiff had a verdict, not for \$150 compensation for three full years, but for the actual time lost by the escape, \$104. Both the plaintiff and defendant appeal to this court.

The defendant's exceptions: "1. For that his Honor refused to charge the jury as requested by the defendant, that if they believe from the evidence that the plaintiff was elected by the general assembly and not appointed by the governor, superintendent of the penitentiary, then he was not de jure superintendent and could not sustain this action. 2. For that his Honor refused the defendant's motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. 3. For that his Honor charged the jury, that if they believed from the evidence that this action

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was commenced within two years after the expiration of three months from the escape of the convict, David Spry, then the defense of the statute of limitations set up in the answer did not apply so far as regarded the forfeiture claimed on account of the escape of that convict," &c.

The plaintiff's exceptions, for the purposes of this case may be condensed into the following:

"1. Because the agreement of the parties, although not reduced to writing, and the bond not given by defendant's own fault, was nevertheless made with reference to the provisions of the act upon the subject; and when the convicts were delivered to and received by the defendant under that agreement he was bound by all the provisions of the law embodied in that agreement.

"2. Because his Honor erred in refusing to charge that the act authorizing the contract

and its terms, and the sums to be forfeited under it, does not create a penalty imposed by statute, but, on the contrary, was clearly intended to define and limit the amount of damages for which any 'contractor or company,' should be held liable in the event of the violation of the stipulations, not of the act, but of the contracts made in pursuance of the requirements of such law, and as such the amounts so limited constitute stated damages and not a penalty.

"3. Because his Honor refused to charge that a year was the minimum of the division of time authorized by the act, and the fifty dollars each year applies in whole to every year and the fractional part of any year of the unexpired term of the sentence of the escaped convict, until the maximum of two hundred and fifty dollars shall be reached," &c.

As to the exceptions of the defendant, and first as to the legal capacity of the plaintiff to sue as superintendent of the State penitentiary. The state of the law upon the subject is as follows: The act of 1868 provided that the penitentiary should be under the direction of a superintendent to be appointed by the governor, by and with the advice and consent of the senate, and also provided, "That all actions or suits at law for the recovery of any debt or demand accruing from the business transactions of the penitentiary, or for the recovery of damages for

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injuries \*done to any of the property or effects of said prison, shall be brought and maintained in the name of the superintendent thereof for the time being; and the said superintendent is authorized and empowered to sue for and collect all such claims and demands, of every description, now due or which may hereafter become due and payable on account of said prison." Act of 1868, § 12, 14 Stat. 94; Gen. Stat. 763. The act of 1868 was expressly repealed by the general statutes (1872), but the provisions cited were reenacted therein.

In 1877 an act was passed "to utilize the convict labor of the State," which authorized the board of directors to lease or hire out the convicts upon certain terms. 16 Stat. 264. In 1878 an act was passed to amend the act of 1877 by adding thereto several sections, and providing that the superintendent should be elected by the legislature. 16 Stat. 393 and 702. Under this act the plaintiff was elected superintendent by the legislature, and has his commission as such officer signed by the governor. It is said, however, that the last act of 1878, changing the mode of the appointment of superintendent, is not and never was law, for the reason that it purported to be an amendment of the old law of 1868, which gave the appointment to the governor, but which law had been expressly repealed by the general statutes, and that an attempted amendment to a law repealed is

itself necessarily void. If such were the case the effect would be that we have no such officer as the superintendent of the State penitentiary, for the law authorizing his appointment by the governor has been expressly repealed, and that requiring him to be elected by the legislature is void.

But, fortunately, such is not the correct view. The amending act of 1878 does not, in express terms, refer to the act of 1868 as such. It is true, the act of 1868 was repealed by the general statutes, but, as before stated, its provisions, in terms, were re-enacted therein, and the amendment of 1878 manifestly had reference to the law as it stood in the general statutes, which had not been repealed, but, on the contrary, as now amended, giving the election to the legislature, is contained in the new general statutes, and is now the law of the State. Gen. Stat., § 2713. The plaintiff is now superin-

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tendent of the State penitentiary, both de jure and de facto, and under the law giving him the right as such officer to sue "for any debt or demand arising from the business transactions of the penitentiary," he had the right to sue. "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue," &c. Code, § 134.

We cannot say that Judge Wallace erred in overruling the demurrer for the alleged reason that the complaint did not state facts sufficient to constitute a cause of action. The demurrer admitted the facts stated in the complaint, which alleged that the defendant agreed with the plaintiff to hire thirty male convicts, under the provisions of the act upon the subject, for which he agreed to pay \$3.66 per month per capita; that he did not, as he agreed, safely keep the said convicts, but negligently suffered five of them to escape, naming them and giving the unexpired term of the sentence of each of those who were never recaptured. And the plaintiff, as the superintendent of the penitentiary, and the person with whom the agreement was made, demanded payment of the aggregate sum of \$1,100, on account of the said escapes. In our judgment this was a sufficient statement of a cause of action upon the agreement of the defendant, on the faith of which the convicts were delivered to him.

It is unnecessary to consider the alleged error of the Circuit judge in his ruling upon the statute of limitations as applicable to the claim on account of the escape of the convict David Spry, as the jury, from their verdict, must have found that the statute, even as expounded by the judge, did not apply to that one item of the demand. Upon that subject we do not think that the exception of the plaintiff is well founded. It was not error in the Circuit judge to apportion the unexpired term of the sentence of an escaped convict, when it was less than a full

year. The words of the act, which we regard as incorporated in the contract, are: "The sum of fifty dollars per annum for each year of the unexpired term of the sentence of such escaped convict." We do not understand the words "for each year" as properly meaning for each part of a year, be it large or small, but for the actual time at that rate. As will hereafter more fully appear, we cannot re-

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gard the fifty dollars per annum, stipulated to be paid for each convict allowed through negligence to escape, as a technical penalty to be recovered by suit on the statute, but we consider it rather compensation for the time of the convict thus lost to the State by his escape; and according to this view it would seem to be only just and proper that the State should receive compensation only for the services actually lost to it by the escape. We see no error in the charge of the Circuit judge as to the amount of compensation allowed for the escape of the convict Spry, and to this extent the judgment of the Circuit Court is affirmed.

The plaintiff's exceptions. He complains that the Circuit judge allowed the defendant at the trial to amend his answer by putting in the plea of the statute of limitations, applicable to "an action upon a statute for a forfeiture or penalty to the State," and ruled that the same so pleaded was applicable to the case, and barred recovery of the amounts claimed to be due on account of the escaped convicts, viz.: John Williams, Richard Robinson, William Talbert and James Blakely; the action as to them not having been brought within two years from the times the said convicts respectively escaped from the defendant. Was this error? Section 114 of the code provides that "an action upon a statute for a forfeiture or penalty to the State" must be brought "within two years." The first inquiry is whether the action was brought upon the statute for a penalty or on a contract made by the defendant in conformity with the terms of the statute.

It seems to us clear that the action was not brought upon the statute, but on the contract of the defendant made in conformity with its requirements. The complaint so states, and the plaintiff testified that all the convicts named were delivered to Seegers, who was to be responsible for their safe keeping. It is true that the defendant testified that he did not make an agreement to pay \$50 a year for the unexpired time in the penitentiary of those that might negligently escape. But all the circumstances tend to show conclusively that he received the convicts upon such a contract and none other. Without such a contract he had no right whatever to receive the convicts at all, and might have been indicted for intermeddling

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with and harboring \*prisoners under sentence. Lipscomb was the superintendent, and



it was his especial duty to keep the custody of the convicts, unless they were let out according to law, and Seegers was at the time a director of the penitentiary and well knew the terms made necessary to hire them.

To entertain the view that Seegers got and retained control of the convicts for a year without a contract with the superintendent, would be to admit that both the superintendent and the director violated their plain duty. Under these circumstances the court cannot assume that they violated their duty in the premises or allow averments contrary thereto. That there was a contract appears also from the fact that it was reduced to writing and received by Seegers. It can not alter the case that he, after getting possession of the convicts under the contract, refused to sign the papers. If he was unwilling to comply with the terms, he should have declined to take or returned the convicts. He can not escape responsibility by simply declining to sign the contract, which only put in writing what he had already verbally agreed to, and under which contract alone he had obtained possession of the convicts. The case must be considered precisely as if Seegers had signed the contract as reduced to writing.

This contract, though not in writing, must be regarded as corresponding in its terms with the requirements of the act. It was the duty of the parties to make such a contract or none at all; and thus considered we do not think that it imposed upon the defendant technical penalties for the negligent escape of convicts, but was the agreement of the defendant himself voluntarily assumed as a necessary condition to getting control of the convicts. It being the first and highest duty of the superintendent to keep the convicts safely, the legislature did not give him authority to let them go beyond the walls of the prison without positive voluntary agreement on the part of the hirer, not only to keep them safely, but in case of escape to be responsible for \$50 per annum as compensation to the State for so much of the unexpired sentence of each as was lost by such escape. This part of the agreement required by the act was not intended to be a technical

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penalty recoverable by the attorney-general on the act itself, but was to become the agreement of the parties in the nature of liquidated damages for services lost.

Considering the provisions of the act as incorporated into the contract, it is said that the act itself uses the words "forfeiture" and "penalty." That is true, but we think if the act is read carefully, it will be seen that the words are not used in their strict technical sense. The words used are not conclusive of the question. As was said by Mr. Justice Coltman in *Sainter v. Ferguson*, 7 Man. G. & S. 716: "Although the word 'penalty,' which would prima facie exclude the notion of stipulated damages, is used here, yet we must

look at the nature of the agreement and the surrounding circumstances to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages."

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated damages, is a question of law to be decided by the judge, upon a consideration of the whole instrument. And the principle upon which he is to proceed, is simply to ascertain the real intention of the parties, from the language they have used. *Wood's Mayne Dam.*, § 163. After citing the cases, the author in a note says: "To summarize, it may be said, when the damages are uncertain and not susceptible of ready ascertainment, and the sum fixed upon as damages is not unreasonable or unconscionable in view of the probable damages, and from the whole contract and the surrounding circumstances, such appears to have been the intention of the parties, such sum will be treated as liquidated damages."

Apply this rule to the case under consideration. The value of an unexpired sentence of a convict is, in its nature, "uncertain," and \$50 per year for each is not "unreasonable or unconscionable" in view of the probable damage, and from the surroundings, especially from the official knowledge of both parties of what was absolutely necessary, such must be considered to have been the

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\*intention of the parties. The amount to be paid was, like ordinary hire, in proportion to the time. See *Allen v. Brazier & Randolph*, 2 Bailey 293; *Worrell v. McClinaghan*, 5 Strobb. 115.

The plaintiff's claim consisted of an aggregate of different amounts for five escaped convicts, viz.: John Williams, Richard Robinson, William Talbert, James Blakely and David Spry. Each distinct, somewhat in analogy to different causes of action. The plaintiff's recovery for what was due on account of the convict Spry has already been affirmed. But as to the other four convicts, viz.: Williams, Robinson, Talbert and Blakeley, the Circuit judge held that the plaintiff's claim was barred by the statute of limitations applicable to an action for a penalty. In this we think there was error.

The judgment of this court is that the judgment of the Circuit Court, so far as concerns the claim on account of the escaped convicts, Williams, Robinson, Talbert and Blakeley, be reversed, and to that extent the case be remanded for a new trial.

## 19 S. C. 435

## STATE v. HILL.

(April Term, 1883.)

[1. *Judgment* ⇨264; *Jury* ⇨82.]

There being no authority for issuing a writ of venire to summon additional jurors, drawn from the tales-box, defects in such a writ furnish no ground for an arrest of judgment.

[Ed. Note.—Cited in *State v. Merriman*, 34 S. C. 33, 12 S. E. 619.

For other cases, see *Judgment*, Cent. Dig. § 481; *Dec. Dig.* ⇨264; *Jury*, Cent. Dig. § 331; *Dec. Dig.* ⇨82.]

[2. *Jury* ⇨67.]

The law does not require the name of the attorney-general or solicitor of the Circuit to be signed to a writ of venire.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 295; *Dec. Dig.* ⇨67.]

[3. *Jury* ⇨67.]

A writ of venire commencing "State of South Carolina, county of Spartanburg. To the sheriff of Spartanburg county." &c., is a sufficient compliance with the constitutional requirement, (Art. IV., § 31,) that "all writs and processes shall run in the name of the State of South Carolina."†

[Ed. Note.—Cited in *Information against Oliver*, 21 S. C. 323, 53 Am. Rep. 681; *State v. Robinson*, 27 S. C. 620, 4 S. E. 570; *Smith v. Jennings*, 67 S. C. 332, 45 S. E. 821.

For other cases, see *Jury*, Cent. Dig. § 295; *Dec. Dig.* ⇨67.]

[4. *Larceny* ⇨22.]

A person who steals a horse in another State, and brings it into this State and here converts it to his own use, can be indicted here for larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 49; *Dec. Dig.* ⇨22.]

[This case is also cited and followed in *State v. Gilreath*, 19 S. C. 603.]

Before Witherspoon, J., Spartanburg. March, 1883.

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\*The presiding judge thus reports the case:

The defendant, Lang Hill, was indicted and convicted for horse stealing. Evidence on the part of the State, the defendant offering no testimony, showed that the defendant, on or about October 10th, 1882, was at the house of one Thomas J. Neely, who lived in Transylvania county, N. C. Defendant was engaged in repairing sewing machines, and was several days at said Neely's and in his neighborhood. Defendant represented to Neely that he had a horse and buggy and some tools on Cane creek, in Henderson county, N. C., and desired to get the use of Neely's horse to go for them. He obtained said horse from Neely and promised to return the same in a week.

Neely received information in a few days that defendant was trying to sell his (Neely's) horse in the town of Henderson-

ville, N. C. He went in pursuit of his horse, and on the following week found it at the livery stable of one G. D. Carrier, in the town of Spartanburg, S. C. The proof was that Carrier had purchased the horse from defendant, who represented to him that it was his (defendant's) property; that Carrier had paid him a portion of the purchase-money; that the prosecutor, Neely, identified the horse as his, and the defendant admitted that it was the horse of Neely. The defendant was then arrested. The proof was that Cane creek was not in the direction of Hendersonville or of Spartanburg, but in the opposite direction, and towards Asheville, N. C.

The jury found the defendant guilty, and the defendant was sentenced to two years at hard labor in the penitentiary. A motion for new trial was made and argued before me, which I refused because I thought the evidence sustained the verdict. A motion in arrest of judgment was made upon the exceptions presented, which was also refused, because I could see no error in my rulings.

I charged the jury that the defendant was indicted for stealing a horse in Spartanburg county, S. C., and not for stealing a horse in North Carolina, and that if they were satisfied from the circumstances and facts of the case, that when defendant obtained the horse he intended to steal him, or convert it feloniously to his own use, and that the hir-

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ing or borrowing was only a pretext to obtain possession, the intent being to steal, and defendant brought the horse to Spartanburg and converted the property feloniously to his own use, and to deprive the owner of the same, it would be larceny. But of all this they must be satisfied beyond a reasonable doubt from the proof. That the question of intent was one for the jury, which they must determine from all the facts and circumstances of the case, and that they were bound to give the benefit of every reasonable doubt which might arise to the defendant. Requests one, two and five were charged as requested.

There was no proof whatever offered tending to show in any way the purpose of defendant to return proceeds of the sale of the horse to the owner, and I therefore declined to charge a supposed case, which is embraced in the third request to charge.

The defendant only challenged three jurors. On the first day of the term I ordered that the names of five persons be drawn from the tales or five-mile-box to fill the deficiency in the number of petit jurors, which was drawn under my direction by the jury commissioner in the presence of the clerk and sheriff, and the said order directed them be "summoned when so drawn forthwith." I regarded the venire facias for grand and

† See Notes of Causes, No. 1413, *State v. Gilreath*, at the end of this volume, where the same objections to the writs of venire for original jurors are raised and decided.



petit jurors as sufficiently regular, and that there was no irregularity in either writ, or in the drawing, summoning, returning or impaneling of the jurors, by which the defendant making objection had been injured, or to which any objection was made or exception taken before the returning of the verdict.

At the trial the defendant presented the following requests to charge:

1. "That unless the horse was taken from Neely with a larcenous intent, then the defendant cannot be convicted of horse stealing.

2. "That if the horse was hired with intent to return him to the owner, and afterwards determined to convert him to his own use, then the defendant cannot be convicted under this indictment.

3. "That if the prisoner sold the horse to Carrier with intent to account for his value to Neely, he cannot be convicted under this indictment.

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\*4. "That if the horse was taken in North Carolina with a felonious intent and brought into this State, he cannot be convicted here of horse stealing.

5. "That the prisoner cannot be convicted under this indictment if the facts show only a breach of trust with fraudulent intent."

The defendant appealed upon the following grounds:

1. "That his Honor erred in refusing to arrest judgment upon the following grounds: That neither the grand jury, which presented a true bill, nor the petit jury which rendered the verdict herein, was a legal jury; that neither of said juries was drawn, summoned or impaneled according to law in this case: (1). That neither in the original nor additional writs of venire are any names of persons who were to sit as either grand or petit jurors at the present term of this court. (2). That the names of said jurors were not even annexed to said writs of venire. (3). That no one of said writs are or were issued in the name of the attorney-general or of the solicitor of the Circuit. (4). That the original writs of venire contained no proof whatever of the summoning of many of the aforesaid grand or petit jurors. (5). That the said grand or petit jurors were not summoned either by the sheriff or deputy sheriff. (6). That the said writs do not show that they were summoned within the time required by law. (7). That the original writs of venire were not returned to the clerk before the time of opening and holding said court. (8). That the record shows no proof that any of said writs of venire were ever served upon the jury commissioners. (9). That no one of said writs of venire runs in the name of the State of South Carolina. (10). That neither of the writs of venire for grand jury, nor the writ of venire for the original petit jury, were issued under the seal of this court. (11). That the writ of ve-

nire issued for additional jurors in term time, and on the first day of the present term of this court, was not issued under the seal of the court. (12). That the additional jurors were not drawn as required by sections 2631 and 2637 of the general statutes. (13). That E. W. Cummings, one of the jurors who tried the case, was drawn as an additional juror.

2. "Because his Honor, the presiding

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judge, erred in not \*charging as requested, 'That if the horse was taken in North Carolina with a felonious intent and brought into this State, he cannot be convicted here of horse stealing.'

3. "Because his Honor erred in charging the jury that if they believed that when the defendant borrowed the horse in North Carolina he intended to commit larceny, and afterwards brought the horse into South Carolina and sold him, the defendant could be convicted in South Carolina under the indictment.

4. "Because his Honor erred in not granting a new trial, as asked, no larceny having been proved, but only a breach of trust."

Messrs. Bobo & Carlisle, for appellant, on the motion in arrest of judgment, cited Const. of S. C., Art. IV., § 31; 14 Rich. 49; 6 Binn. 179; Mill. Comp. 179; 1 Rich. 188; 2 Spears 211; 11 S. C. 321; Gen. Stat. (1882), §§ 742, 2243, 2246; 3 Strobb. 33; Circuit Court Rules, XXIII. The taking being in North Carolina, and the jury having found that the taking was with felonious intent, defendant cannot be convicted in South Carolina for horse stealing. Const. U. S., Art. III., § 2, Art. IV., § 2, VI. Amend.; 9 Rich. 113; Whart. Conf. L., § 322; Rorer Inter-State Law, 234; 3 Gray 434; 2 Johns. 477, 479.

Mr. Solicitor Duncan, contra.

June 29th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant having been convicted under an indictment for horse stealing, moves in arrest of judgment upon the ground of sundry alleged defects in the writs of venire, by which the jurors were summoned, and also for a new trial upon the grounds of certain alleged errors in the charge of the Circuit judge.

The grounds relied upon in arrest of judgment may be divided into two classes: 1. Those which rest upon alleged defects in the writ of venire, issued to summon five additional jurors, drawn from the tales-box to supply a deficiency in the number originally summoned. 2. Those which allege defects in the original writs of venire under which the grand and petit jurors for the term were

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summoned. Inasmuch as there was \*not only no necessity, but also no authority, for is-

suing a writ of venire to summon the five additional jurors drawn from the tales-box. (State v. Williams, 2 Hill 381; State v. Stephens, 11 S. C. 319.) the several objections urged to this writ require no further notice.

The principal objections urged to the original writs of venire are: 1. That they are not signed by the attorney-general or solicitor of the Circuit. 2. That they do not run in the name of the State of South Carolina; the other objections being either abandoned or so plainly untenable that they were not relied upon in the argument here. The first objection rests upon the provisions of section 742 of the General Statutes of 1882, but that section only requires the clerk "to issue every execution, bench warrant or other process issuable or directed to be issued by the courts of sessions, in the name of the attorney-general or solicitor of the Circuit," and has no application to a writ of venire to summon jurors both for the Courts of Sessions and Common Pleas.

The next objection rests upon the provisions of section 31, article IV. of the constitution, which provides that, "All writs and processes shall run and all prosecutions shall be conducted in the name of the State of South Carolina." The writs of venire in this case are in the following forms:

"State of South Carolina, }  
"County of Spartanburg County;"

"To the Sheriff of Spartanburg County:

"You are hereby strictly required and commanded," &c.

And it is urged that this is not the proper form, but that it should be as follows:

"The State of South Carolina.

"To the Sheriff of Spartanburg County, Greeting:

"You are hereby strictly required and commanded," &c.

It appears to us that this is a distinction without a difference. If it anywhere appears

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in the writ that it is issued in the name \*of the State, there is a sufficient compliance with the constitutional requirements; and surely the mere location of the words upon the paper can have no special virtue. Nor can the addition in the caption of the words, "County of Spartanburg," impair the validity of the mandate, for they may well be regarded as mere surplusage. Indeed, they may perhaps be treated as serving only to indicate that the officer who issued the writ, whose authority is limited to that county, was properly invested with authority to use the name of the State in that particular locality.

These views are well supported by authority. In State v. Smouse, 49 Iowa 634, the information was for violating one of the ordinances of the city of Washington. It was in the following form: "The State of Iowa, City of Washington v. Charles Smouse," and the objection taken was, that it should have

been in the name of the city and not of the State. The court held that the words "State of Iowa," should be regarded as descriptive merely, or rejected as surplusage, as it clearly appeared from the body of the information, that the prosecution was by and in the name of the city. In Mississippi, where the constitutional provision is like ours, it was held in Greeson v. State, 5 How. (Miss.) 33, that a formal statement in the indictment that it was found by the authority of the State, is not necessary if it appears from the record that the prosecution was in the name of the State. In White v. Commonwealth, 6 Binn. 179, (6 Am. Dec. 443.) the objection to the process for summoning the jury was, that it should have commenced: "The Commonwealth of Pennsylvania to the Sheriff, Greeting:" whereas it commenced: "The Judges to the Sheriff, Greeting: In the name and by the authority of the Commonwealth of Pennsylvania, you are hereby commanded, &c." The constitution then in force in that State, Article V., section 12, declared: "The style of all process, shall be, 'The Commonwealth of Pennsylvania,'" &c. The court held the objection untenable, saying: "It is of no consequence in what part of the process the Commonwealth is introduced, so that the command is given in its name."

We think that the writs of venire in this

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case conformed, substantially, to the constitutional requirement, and, therefore, the motion in arrest of judgment cannot be sustained.

The motion for a new trial presents a question which has been before the courts of the several States upon frequent occasions, and the decisions are conflicting. In this State we have no distinct adjudication upon the question, though there is a case hereinafter referred to, which, by analogy, seems to control it. The question is, whether one who steals a horse in another State and brings him into this State, and here converts him to his own use, can be indicted here for larceny. In 1 Bish. Cr. L. (6th edit.), §§ 136-143, the question is discussed, and the conclusion reached that such an indictment can be sustained.

This conclusion is well supported, both by reason and authority. The principle upon which this doctrine rests is, that the possession of stolen property, in contemplation of law, remains in the owner, and the thief, therefore, is guilty of larceny in every place into which he carries the goods, as "every moment's continuance of the trespass and felony amounts to a new caption and asportation."

The case of Watson v. State, 36 Miss. 593, furnishes an able and elaborate discussion of the question. In that case the learned judge who delivered the opinion of the court, Harris, J., shows that both upon principle and authority a person who steals goods in



the State of Alabama, and carries them into the State of Mississippi, and there converts them to his own use, may be indicted for larceny in the latter State, for the reason that the legal possession still "remaining with the owner, every moment's continuance of the trespass and felony amounts, in legal contemplation, to a new caption and asportation." He also shows that the cases which hold a contrary doctrine, resting, as they do, ultimately, upon *Butler's Case*, cited in 13 Coke Rep. 53, are based upon a misconception of the real ground upon which that case was founded. Again, he says: "The proof involves the intent and the act. The existence of the intent may be shown in any locality, county, State or country. The commission of the act must be shown in the county where the indictment was had. There is a wide difference between the proof of the act and the evidence of the intent

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with which it \*was done. The intent precedes the act, and may evidence at different times and in various jurisdictions. It may be shown by the declarations of the actor, or by facts and circumstances happening in a distant country or a different jurisdiction from that where the actual offense occurred."

Hence, we may well look to the felonious taking in another State for the purpose of ascertaining the intent, and when the act is consummated in this State by bringing the stolen property here and converting it to the use of the thief, the offense is complete here. In *State v. Ellis*, 3 Conn. 185, it was held that the stealing of a horse in another State and carrying him into the State of Connecticut constituted the crime of larceny there. In Massachusetts there are several cases holding a similar doctrine. *Commonwealth v. Cullins*, 1 Mass. 116, followed by *Commonwealth v. Andrews*, 2 Mass. 14, in which the decision is said to rest upon the principle "that the original taking being felonious, every act of possession continued under it by the thief is a felonious taking, and wherever he carries the articles stolen he may there be indicted, convicted and punished for the felony." These cases were recognized and followed in *Commonwealth v. Holder*, 9 Gray 7, and *Commonwealth v. White*, 123 Mass. 433, decided as late as 1877.

It is true that in the case of *Commonwealth v. Uprichard*, 3 Gray 434, it was held that one who steals goods in one of the British Provinces (Nova Scotia) and carries them into the State of Massachusetts, cannot be indicted there for larceny. *Shaw, C. J.*, delivering the opinion of the court, while recognizing the authority of the two cases above cited from 1 and 2 Mass., distinguishes the case of a larceny committed in a foreign country from one committed in another State. While plainly intimating the opinion

that if the question were an open one it might be decided differently, he undertakes to put those decisions upon the ground of the peculiar relations existing between the States of the Union, which, as he says, are somewhat analogous to the relations existing between the several counties of a State—a ground which we do not find taken anywhere else, and one which we are by no means disposed to adopt, and wholly ignores the true ground upon which these decisions,

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as well as \*others of the like character, do rest, viz.: that where one takes goods from another in any place, under circumstances which make the taking felonious, the possession of the owner, in contemplation of law, continues, and where the goods so taken are carried into another State, that constitutes a new taking and asportation in that State, for which an indictment for larceny will lie.

In *Worthington v. State*, 58 Md. 403, a very recent case, it was held that where a person steals goods in one State and carries them into another, the act of carrying the stolen property into the latter State is a new larceny for which the thief may there be indicted. This case furnishes a full collection of the authorities.

In this State, as we have said, the point under discussion has never been distinctly decided. In *the State v. Bryant*, 9 Rich. 113, our court held, that where a horse is stolen in one district (county) and is carried by the thief into another, and there sold, an indictment under the statute for horse stealing might be maintained in the latter district; but they declined to express any opinion upon the question now presented for our decision, as it was not then before them. It seems to us, however, that the reason given for the decision applies with equal force to the case now under consideration, and is practically the same reason as that given for the decisions in the other States, which we have hereinbefore cited. Judge Whitner, in delivering the opinion of the court, uses this language: "The property in the goods is not changed, and the law considers them in the possession of the proprietor until he is legally divested. The continuance of the trespass is as much a wrong as the original taking, and therefore the continued possession of the wrong-doer is a continued taking and at each moment manifests the same disposition (*animus furandi*) that prompted the original act." This case, then, may well be regarded as authority for the view which we have taken, as it really rests upon the same principle.

The ground taken in most of the cases which hold a contrary doctrine, that the view which we have adopted may render a person liable to be indicted twice for the same offense, we do not think entitled to any weight.

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In the first place, it may well \*be doubted whether it is the same offense; and even if it were, we know of no law which exempts a person from liability to answer for a violation of the criminal law of this State simply because he may be liable to indictment elsewhere for the same offense. What effect an indictment and conviction for the larceny committed in the State, where the property was originally stolen, might have, we are not now called upon to consider. Indeed, we are at a loss to see with what reason a felon who has rendered himself amenable to the laws of this State, can claim exemption simply because he has violated the law of another State. As is said in 1 Bish. Cr. L., § 142: "The common law either admits of two convictions in such a case, or it does not. If it does, there is nothing in the objection; if it does not, then the first conviction, in whichever locality it takes place, may be pleaded in bar of the second. The common law, however, knows no such plea in defense of a prosecution as liability to indictment elsewhere."

We see no error, therefore, either in the refusal to charge as requested or in that part of the charge which is excepted to. The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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STRAUB v. SCREVEN.

(April Term, 1883.)

[1. *Chattel Mortgages* ⇨6; *Sales* ⇨479.]

A note having been given for the purchase of goods delivered to the maker, the payee "retaining title, ownership and possession" until the note was fully paid, the parties stood toward each other in the relation of mortgagor and mortgagee, and, on default, the payee might seize some or all of the goods, or he might sue on the note.

[Ed. Note.—Cited in Talbott & Sons v. Padgett, 30 S. C. 170, S. S. E. 845; National Exchange Bank v. Holman, 31 S. C. 164, 9 S. E. 824; Perkins v. Loan & Exchange Bank, 43 S. C. 44, 20 S. E. 759.

For other cases, see *Chattel Mortgages*, Cent. Dig. § 33; Dec. Dig. ⇨6; *Sales*, Cent. Dig. § 1418; Dec. Dig. ⇨479.]

[2. *Sales* ⇨479.]

A subsequent mortgagee having seized some of these goods, and then, on threat of suit, surrendered a part to the payee of said note and paid \$50, the maker is entitled to credit on his note only for what the payee so received.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. ⇨479.]

[3. *Chattel Mortgages* ⇨266.]

A mortgagor of chattels is entitled to credit only for the net proceeds of sale of the chattels seized on default, the expenses of seizure and sale being deducted.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 548; Dec. Dig. ⇨266.]

[4. *Contracts* ⇨152.]

Contracts must be construed by the words which they contain, and not with reference to words omitted or erased.

[Ed. Note.—Cited in Watson v. Paschall, 93 S. C. 543, 77 S. E. 291.

For other cases, see *Contracts*, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⇨152.]

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[5. *Judgment* ⇨253.]

\*The complaint stated the note and credits, and demanded judgment for a specified sum. The answer admitted these allegations. The judge who tried the cause reduced the amount of one of the credits, and gave judgment for a sum larger than was demanded. *Held*, that to this extent there was error. This case distinguished from Kaphan v. Ryan (6), 16 S. C. 352, and Chapman v. Lipscomb, 18 S. C. 235.

[Ed. Note.—Cited in Sanders v. Bagwell, 37 S. C. 160, 15 S. E. 714, 16 S. E. 770.

For other cases, see *Judgment*, Cent. Dig. § 443; Dec. Dig. ⇨253.]

6. The appeal sustained nisi.

[This case is also cited in Ludden & Bates Music House v. Dusenbury, 27 S. C. 464, 4 S. E. 60, and distinguished therefrom.]

Before Kershaw, J., Richland, October, 1882.

The opinion fully states the case.

Mr. N. K. Perry, for appellant.

Mr. W. L. Lyles, contra.

June 29th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action on four notes under seal, all of the same tenor, except as to the time of payment, and the following copy of the first note will, for the purposes of this case, serve as a copy of each of the notes:

"\$120. Columbia, S. C., April 2d, 1880.

"On or before the second (2) day of November, 1880, I promise to pay A. W. Straub, or order, one hundred and twenty dollars, for value received in delivering to me of three 20" mills, and if not punctually paid at maturity, with interest from that time at 7 per cent. ~~(per annum and compound from of 10 per cent on the amount, if collected by law)~~, and I hereby waive the benefit of the homestead exemption, as to this debt. It is furthermore the express condition of the delivery of said three mills to me that the title, ownership or possession does not pass from the said A. W. Straub until the note and interest is paid in full, and he may take possession of said three mills now at Grange, Transylvania county, N. C., and sell the same for my account, at any time, in case this note is not punctually paid, ~~for which cause I hold myself liable for any and all loss or damage caused by my failure to meet this note.~~

"Witness: E. W. Screven, [L. S.]

"Newman K. Perry."

The erasures indicated in the foregoing copy, and relied upon by appellant in his



argument, were made before the notes were signed.

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\*The plaintiff, in his complaint, admitted that he had taken possession of one of the mills, which, he says, he had been unable to sell without a sacrifice, but he alleges that the value of said mill is not more than \$125. He also admitted the receipt of \$50 from one Dial for his interest in another mill which he had seized; and in making up the statement of the balance due he allows the defendant credit for this \$125, as well as for the \$50 received from Dial, and only demands judgment for \$325.30, with interest from November 2d, 1881. The defense was that the notes had been satisfied by the seizure of the mills by the plaintiff, under the authority contained in the notes.

The case was tried by the Circuit judge, without a jury, and he found, as matter of fact, that one of the mills which had been taken possession of by the plaintiff, had been sold since the commencement of this action, and brought the sum of \$100, and that it cost the plaintiff \$9 to transport the same to place of sale; that the notes sued upon were left by defendant in the hands of his attorney to be delivered to the plaintiff, but that defendant took possession of the mills as soon as the notes were signed; that after the notes were signed, but before June 18th, 1880, the defendant gave to Dial a mortgage on said mills, giving him notice of plaintiff's claim, and on that day, after the mortgage to Dial was executed, the said notes were delivered to the plaintiff; that the mills were taken to North Carolina by the defendant, and plaintiff had his mortgage recorded there; that Dial sent his mortgage to North Carolina, and seized the mills thereunder, denying notice of plaintiff's mortgage; that plaintiff threatened Dial with suit, and he proposed to divide the mills, to which plaintiff agreed, and each took one mill, Dial paying \$50 to plaintiff and retaining the other mill. And, as matter of law, he found: "That plaintiff is entitled to recover against the defendant on said notes, with interest, according to their tenor and effect, less the amount actually received by him from Dial and from the sale of the mill, which he recovered less expenses."

He therefore rendered judgment for the sum of \$359.30, with interest from November 2d, 1881, which, it will be observed, exceeds the sum for which judgment was demanded

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in the complaint, by the sum of \$34. This difference, doubtless, arose from the fact that the plaintiff, in computing the balance due on the debt, gave credit for \$125, the estimated value of the mill, of which the plaintiff had taken possession, which had not been sold at the time the complaint was filed, whereas the Circuit judge only gave defendant credit for the actual amount which the

mill brought when it was sold—\$100—less the expenses of such sale, \$9.

The defendant appeals upon the following grounds:

1. "Because his Honor erred in holding 'That plaintiff recover against the defendant on said notes, according to their tenor and effect.'

2. "Because his Honor erred in holding that the defendant pay expenses attending sale of one of said mills.

3. "Because his Honor erred in not holding that Dial, being a subsequent creditor with notice, and receiving one-half of the mills with consent of plaintiff, defendant was not liable for mills so released.

4. "Because his Honor erred in not holding that the plaintiff, having taken possession of said mills and detained the same with Dial, was an extinguishment of defendant's notes.

5. "Because his Honor erred in not holding that plaintiff's declaration of part possession of mills, and subsequent disposition by compromise to Dial of the other part, was possession of the whole, and such possession was a satisfaction of defendant's obligations.

6. "Because his Honor erred in adjudging for plaintiff \$359.30 and interest, while plaintiff only demands judgment for \$325.30, with interest from November 2d, 1881.

7. "Because his Honor erred in not holding that the complaint be dismissed with costs to defendant."

It is very clear that the plaintiff and defendant, by virtue of their contract, as evidenced by the notes, stood towards each other in the relation of mortgagee and mortgagor. The plaintiff had a right, upon default in the payment of the notes, to seize and sell the mortgaged property, or any part thereof, accounting to the defendant for the proceeds of such sale; but he was not bound to do so, and, on the contrary, he might al-

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together have disregarded the mortgage clause in the notes and brought his action for the money secured thereby, just as if no such clause was contained therein. So, too, he had a right to seize one of the three mills, without being bound to seize them all, and all that the defendant could require of him, in that event, would be to allow him credit for the proceeds of the sale of the mill so seized, and this is exactly what the Circuit judge required of him.

It does not appear from the facts, as found by the Circuit judge (and these are the only facts before us), that the plaintiff ever had possession of but one of the mills, and that has been sold and the proceeds applied as a credit to the debt of defendant. On the contrary, it appears that it was Dial, and not the plaintiff, who took possession of the mills under his mortgage, and that he, upon being threatened with a suit by the plaintiff, surrendered one of the mills to the plaintiff and paid him \$50, for which, likewise,

the defendant has been allowed credit. It seems to us, therefore, very clear that the defendant has been allowed all the credits which he could, by any possibility, claim against the plaintiff. To make the plaintiff responsible for the value of the other mills seized by Dial, would not only be unwarranted by any principle of law or justice, but would probably result in giving the defendant credit twice for the same thing; for, as far as we can see, there is no possible reason why the defendant should not be entitled to credit on his debt to Dial for the proceeds of the sale of the mills seized by Dial, and to allow him credit also for such proceeds, or for the value of the mills, as he claims, on his debt to the plaintiff, would certainly be giving him credit twice for the same thing.

Under the view which we take of the sixth ground of appeal, the point suggested by the second ground—that defendant was not liable for the expenses attending the sale of the mill—cannot now arise. But it may be well for us to say that we do not think the point well taken. There can be no doubt of the general proposition, that the mortgagor can only claim credit for the proceeds of the sale of the mortgaged property after deducting therefrom the expenses incident to the seizure and sale of the property. But it is contended that the erasures in the notes show that it was the intention of the parties

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in this case that the defendant should not be liable for such expenses. We cannot concur in this view. In the first place, the words erased do not distinctly point to the expenses that might be incurred in the sale of the mortgaged property; and, even if they did, we think the notes must be read as if the words erased had never been inserted, and when so read the contract falls within the general rule as to mortgages. Those words were not at all necessary to create a liability on the part of the defendant for the expenses of the sale, and if he had desired to exempt himself from such liability he should have inserted in the contracts words of exemption, as contracts must be construed by the words which they contain, and not with reference to words omitted or erased.

We are unable, therefore, to see how any of the grounds of appeal can be sustained, except the sixth, which we will now proceed to consider. The plaintiff, in his complaint, stated his several causes of action, together with the credits which he admitted to be applicable thereto, and demanded judgment for a specific sum of money, as the balance due after deducting the admitted credits; and we do not see how judgment could be rendered for a larger sum without an amendment, which was not asked for or ordered. The Code of 1882, § 297, provides that: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall

have demanded in his complaint; but, in any other case, the court may grant him any other relief consistent with the case made by the complaint and embraced within the issue." Here there was an answer, and hence the question is, whether the relief granted was "consistent with the case made by the complaint and embraced within the issue." The case made by the complaint was that the defendant was indebted to the plaintiff in a certain specified sum of money, which was the balance due on the notes sued upon after deducting certain credits stated and admitted in the complaint. Upon this and this alone was issue joined, and it seems to us that to vary the amount of one of these admitted credits, and more especially to allow an additional sum, nowhere alluded to in the pleadings, was granting relief not consistent with the case made by the complaint and not embraced within the issue presented for trial.

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\*The cases relied upon by the plaintiff to sustain the judgment below (*Kaphan v. Ryan*, 16 S. C. 352; and *Chapman v. Lipscomb*, 18 S. C. 235,) do not appear to be in point. In the former case the Circuit judge simply corrected an error in the calculation of interest, the complaint itself furnishing the materials for making such correction, and, therefore, it is clear that, in that case, the relief granted was entirely consistent with the case made by the complaint.

In *Chapman v. Lipscomb* the action was not brought on a money demand, but was for the recovery of possession of personal property as well as damages for its detention, and it was for the jury or referee by whom that case was tried, instead of a jury, to assess the value of the property as well as the damages, and the judgment, as rendered, was for an amount much less than the total amount demanded in the complaint. Indeed, the exceptions in that case were so extremely general and indefinite that the point now raised did not distinctly appear, and, therefore, it did not receive the attention which it would otherwise have received.

We are of opinion, therefore, that there was error in rendering judgment for \$34 more than the amount demanded in the complaint, the same not being warranted by the case as made in the complaint, and that the defendant is entitled to have the judgment corrected in this particular.


The judgment of this court is that the judgment of the Circuit Court be reversed and the case remanded to that court for a new trial, unless the plaintiff shall, within ten days after written notice of this judgment, remit upon the record in the Circuit Court \$34 of the recovery, in which event the judgment of this court is that the judgment of the Circuit Court, so reduced in amount, be affirmed.



## 19 S. C. 451

BÜRGES &amp; CO. v. POLLITZER.


(April Term, 1883.)

[Judgment  §4, 113.]

Complaint for goods sold and delivered was verified and its allegations were admitted by the answer, which set up a counter-claim. Plaintiff then filed with the clerk of court, an admission

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of the counter-claim, and on the call of \*the default docket at the next term, moved for judgment for the excess. *Held*, that plaintiff was entitled to judgment for such excess in like manner as in cases of default, and that notice to defendant of application for judgment was not necessary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 139, 207; Dec. Dig.  §4, 113.]

Before Fraser, J., Beaufort, June, 1882.

Action by George Burges & Co., against Mr. Pollitzer. The opinion states the case.

Messrs. Verdier & Talbird, for appellants.  
Messrs. Elliott & Fowles, contra.

July 2d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was brought to recover \$5,780.43, the price of goods sold and delivered by the plaintiffs to the defendant between the first day of September, 1880, and the first day of April, 1881. The complaint was verified. The defendant answered, admitting plaintiff's complaint to be true and setting up a counter-claim for \$365.72. At the June Term of the court succeeding, the plaintiff filed a statement with the clerk of the court admitting said counter-claim, and after the close of the court of sessions for said term, upon the call of calendar No. 6, moved for a judgment in the action for the excess of his demand over the counter-claim so admitted.

Defendant objected on the grounds, first, that his Honor the judge had no power to render the judgment; that the defendant having answered, the case could not be disposed of at said term, it not being a term for the trial of jury causes; and second, that if the case could be considered as one of "default" so far as the excess of demand over counter-claim was concerned, then the plaintiff, not having given notice to the defendant of the time and place of application to the court for judgment, the defendant having appeared by his answer, judgment could not be rendered. The Circuit judge overruled the objections and held that as to the excess over counter-claim the defendant stood as in default, and was not entitled to notice of application for judgment, and

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\*rendered judgment for the excess of plaintiff's demand over the counter-claim.

The defendant appeals to this court upon the following exceptions:

1. "Because the defendant having answered in the action admitting part of plaintiff's demand and setting up counter-claim for the balance, his Honor erred in holding plaintiff entitled to judgment by default for balance of his claim after filing statement admitting counter-claim, and his Honor erred in making the order for judgment.

2. "Because the defendant having appeared in this action by his answer, was entitled to eight days' notice of the time and place of application to the court for judgment, and his Honor erred in ruling that the defendant was not entitled to notice, and in making the order for judgment in the absence of notice to the defendant."

It may be this was not a case of technical "default," as the defendant filed an answer, but we think it is covered and provided for by sub-division 1 of section 267 of the code, which is as follows: "In any action on contract, the plaintiff may file proof of personal service, &c., and that no appearance, answer or demurrer has been served on him; it shall be the duty of the clerk to place all such cases on the calendar No. 6, and said calendar shall be called on the first day of the term. When the action is on a complaint for the recovery of money only, judgment may be given for the plaintiff by default if the demand be liquidated; and if unliquidated, upon proper proof of his demand. In all other cases the relief to be afforded the plaintiff shall be ascertained either by the verdict of a jury, or, in cases in chancery, by the judge, with or without reference, as he may deem proper. The order for judgment in such cases shall be endorsed upon or attached to the complaint. Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter-claim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting

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such \*counter-claim, which statement shall be annexed to and be a part of the judgment roll."

The defendant contends that the second paragraph of the above refers only to the action described in the last sentence of the first paragraph as "all other cases," and has no reference to the actions previously described in the same paragraph as "actions for the recovery of money only." We do not think that the words "any such action" in the second paragraph refer only to the class of cases described in the first as "all other cases," but refer to all actions described in the whole of the preceding paragraph, including as well those "for the recovery of money only" as all other actions.

The last paragraph is not merely a continuation of the last sentence of the first, but a separate and distinct provision, giving a remedy in a class of cases where the defendant has put in an answer, which is, at least, as necessary and proper in actions for recovery of money only as in any other. This construction makes intelligible the other words, "in like manner." That is to say, if the action is one for the recovery of money only, then as above described in that case; and if it belongs to the other class, then as above described as to such class. In no other sense can the words "in like manner" have their proper and natural force.

The action in this case was "for money only," and, according to the views taken, the proper course, after the statement admitting the counter-claim was filed, was to proceed for judgment as to the excess over the counter-claim precisely as if, to that extent, there had been no answer. The only question which could arise was whether judgment should be taken by default, as upon a liquidated demand, or upon proper proof, as upon a demand unliquidated. We gather from the case submitted that the action was not upon a note of the party, but upon an account "for the price of goods sold and delivered," and if there had been no answer it would have been necessary to prove the account. But we cannot doubt that the account in excess of the counter-claim, admitted by the defendant's answer, was, at least, a liquidated demand, and established without further proof.

By the code, as it stood before the late

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general statutes, which \*went into effect May 1st, 1882, before this question arose, it seems that in such case, where the defendant had give notice of appearance, he was entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint. See sub-division 2 of section 269 of the original code. But in the revised code, now of force, that provision seems to have been omitted, and there is now no such requirement. This would seem to be in accordance with principle, as there was no issue to be tried between the parties as to the excess of the plaintiff's demand over the counter-claim, which was admitted in the answer. And it would seem, also, to be in analogy to another provision of the code, which declares that "When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." Code, § 265.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 455

WALL v. DAVIS.

(April Term, 1883.)

[1. *Costs* ⇨234.]

Where the losing party appeals from the judgment of a trial justice, without stating in what particular he claims the judgment should have been more favorable to him, he will not be entitled to costs, unless the judgment appealed from be wholly reversed. And where the appellant is not entitled to the costs of his appeal, the respondent is. Code, § 373.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 892-899; Dec. Dig. ⇨234.]

[2. *Costs* ⇨228.]

A ground of appeal in the words: "Because the verdict was contrary to the law and the evidence, in that the jury did not find for the defendant," is not a statement of the particulars complained of within the meaning of this section.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 856; Dec. Dig. ⇨228.]

[3. *Costs* ⇨234.]

This provision of law as to costs where there is a specification of the particulars complained of in the judgment appealed from, relates only to appeals seeking a modification of the judgment below, and not to appeals which demand a reversal.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 892-899; Dec. Dig. ⇨234.]

Before Wallace, J., Spartanburg, October, 1882.

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\*Action by R. J. F. Wall against J. B. Davis, commenced in a trial justice's court, August 2d, 1880. The opinion states the case.

Messrs. J. S. R. Thomson and Duncan & Sanders, for appellant.

Messrs. Bobo & Carlisle, contra.

July 4th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff having recovered a judgment before a trial justice for the sum of \$39.38, defendant gave the following notice of appeal to the Circuit Court: "Please take notice that the defendant appeals from the judgment in the above stated case upon the following grounds: 1. Because the trial justice erred in admitting testimony to vary the terms of the written contract. 2. Because the trial justice erred in allowing a calculation made by a witness to be used by the jury in making up this verdict. 3. Because the verdict of the jury was contrary to the law and the evidence, in that they did not find for the defendant. 4. Because the trial justice had no jurisdiction of the case."

At the trial in the Circuit Court the plaintiff obtained a verdict for \$19.57, whereupon the Circuit judge passed the following order: "This action having been tried before me on appeal from a trial justice's court, and the verdict of the jury having been more favorable to the appellant than the judgment of



the court below, by an amount exceeding the sum of ten dollars, on motion of Bobo & Carlisle, attorneys for the appellant, ordered that the appellant have leave to enter up judgment for the costs and disbursements of the appeal, to be taxed by the clerk of this court, and that he have leave to issue execution thereon."

From this order the plaintiff appeals on various grounds, but under the view which we take of the fifth and sixth grounds of appeal, the questions presented by the other grounds cannot arise, and, therefore, it will be unnecessary to state or consider them. The fifth ground of appeal is as follows: "Because his Honor erred in allowing any costs and disbursements to the defendant." And the sixth is in the following words:

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"Because \*the defendant having failed to state in his notice of appeal from the judgment rendered against him in the trial justice's court, in what particular or particulars said judgment should have been more favorable to him, the plaintiff is entitled to costs and disbursements in the action and on the appeal."

The question raised by this appeal involves the construction of the language used in section 373 of the code of 1882, which reads as follows: "Costs shall be allowed to the prevailing party, in judgments rendered on appeal, in all cases, with the following exceptions and limitations: In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of appeal the respondent may serve upon the appellant and trial justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may, thereupon, and within five days thereafter, file with the trial justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly; and the same, so corrected, shall stand as his judgment and be enforced accordingly, and any execution which has been issued upon the judgment appealed from shall be amended by the trial justice to correspond with the amended judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment of the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs; provided, however, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such ap-

peal or be made more favorable to him to the amount of at least ten dollars. If the offer be made and accepted by the appellant, the appellant shall recover all his disbursements on appeal and all his costs in the court below. But the appellant shall not recover costs except as provided in this chapter. The respondent shall be entitled to recover

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\*costs where the appellant is not. Whenever costs are awarded to the appellant, and when the judgment in the suit before the court below was against such appellant, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages and render judgment for the balance. \* \* \* If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding five dollars. If the appeal be dismissed for want of prosecution, as provided by section 366, no costs shall be allowed to either party. In every appeal the trial justice before whom the judgment appealed from was rendered, shall receive sixty cents for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court. If, in the notice of appeal, the appellant shall not state in what particular or particulars he claims the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed."

We think it plain that the object of this section was to enable one who appeals from a judgment rendered by a trial justice, which he regards as erroneous in one or more particulars, while admitted to be correct in other respects, to take the judgment of an appellate tribunal as to such alleged errors without incurring the costs of the appeal, if the same should prove to be errors, provided he would in his notice of appeal specify the particular or particulars in which he claims the judgment appealed from is erroneous, so that the respondent may, if he desires, consent to the correction of such errors without further costs; or, refusing to do so, that he shall then take the risk of the costs to be incurred in determining the question of the correctness of the judgment in the particulars specified. So that, according to the scheme of the section, the first step is to be taken by the appellant by stating in his no-

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tice of appeal "in what particular or \*particulars he claims the judgment should have been more favorable to him;" and, unless he

does this, the last sentence of the section expressly provides that "he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed."

Inasmuch as the judgment appealed from was not wholly reversed, the practical question is, whether the defendant, who appealed from the judgment of the trial justice, complied with this condition precedent. We have set out in full his notice and grounds of appeal, and it is perfectly manifest that he has nowhere stated "in what particular or particulars the judgment should have been made more favorable to him." The only thing relied upon for this purpose is his third ground of appeal, which is in the following language: "Because the verdict of the jury was contrary to the law and the evidence, in that they did not find for the defendant." This, so far from stating any particular in which the judgment appealed from should have been more favorable to the defendant, could not well have been couched in more general terms. Indeed, as has often been held, an exception or ground of appeal taken for the purpose of an appeal to this court, in such general terms as these, would not be entitled to any consideration as it would not serve to point out the error which the court is asked to correct. But, more than this, we are satisfied that the provision in the section under consideration, for the benefit of one who appeals from the judgment of a trial justice, was only designed to apply where it was sought by the appeal simply to modify the judgment appealed from by correcting it in certain particulars wherein it is claimed to be erroneous, and that it was not designed to apply in a case where the object of the appeal is to reverse the judgment appealed from.

There may, possibly, be good reason for exempting a party from the hazard of costs who, while admitting the justice of the claim brought against him to a certain amount, only desires to protect himself from a judgment for more than he admits to be due, provided he succeeds in making good his claim to such protection; for, in such case, he is really the prevailing party so far as the real points of litigation are concerned; but there is no reason why an appellant should be en-

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titled to an exemption from \*costs by simply asserting in general terms that the judgment from which he appeals is wholly erroneous, and should, therefore, be reversed in toto. If he desires to litigate the whole case he must do so upon the same terms that are required of all other parties, and incur the hazard of costs like all other losing parties.

We think, therefore, that under a proper construction of this section of the code, one who appeals from a judgment recovered before a trial justice, must, in order to entitle himself to the benefits of the provisions of this section in respect to costs, state in his

notice of appeal the particular or particulars in which he claims that the judgment appealed from should have been more favorable to him, in such a manner as will enable his adversary to offer to have the judgment corrected in the particulars stated; and that a mere statement that the judgment appealed from is wholly erroneous and should be reversed, will not entitle the appellant to the benefits of this section in respect to costs. When the appeal seeks an entire reversal of the judgment appealed from, then "costs shall be allowed to the prevailing party," inasmuch as such an appeal does not fall within the exceptions and limitations provided for in section 373. The defendant, in his notice of appeal from the judgment recovered before the trial justice, having failed, as we have seen, to "state in what particular or particulars he claims the judgment should have been more favorable to him," could not, by the express provision of the section, recover costs, unless the judgment was wholly reversed, which was not done; and, therefore, by another provision of the section, the plaintiff was entitled to recover his costs.

The defendant in his argument here has also attempted to sustain the order appealed from, upon the ground that the Circuit judge had a right to exercise his discretion as to who should pay costs, and that, having done so, this court will not interfere. As to this position, it is quite sufficient to say that is very apparent that the order appealed from did not proceed from the exercise of any discretion on the part of the Circuit judge, but was manifestly based upon what we have seen to be an erroneous construction of the provisions of section 373 of the code of 1882. The question, therefore, whether, in a case

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like this, \*costs are in the discretion of the court, is not before us for decision and we do not propose to pass upon it now.

The judgment of this court is, that the order appealed from be reversed, and the case be remanded to the Circuit Court for such further proceedings as may be necessary.

19 S. C. 461

LAWRENCE v. GRAMBLING.

(April Term, 1883.)

[1. *Execution* ⚡326.]

The proceeds of a sale made under a junior judgment is satisfaction pro tanto of an execution then in the sheriff's office issued upon a senior judgment.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 966-973; Dec. Dig. ⚡326.]

[2. *Execution* ⚡353.]

Where property was sold under a junior execution for an amount sufficient to pay a senior execution, a subsequent payment on the senior execution by the judgment debtor does not raise a presumption that the debtor consented



to an application of the proceeds of the sale to the junior execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1075; Dec. Dig. ⚡353.]

[3. *Homestead* ⚡109.]

*Semble.* Money realized by the sheriff from a sale of defendant's property under an execution issued upon a judgment for the purchase-money should be applied to the oldest liens in the sheriff's office, although under them, by reason of the homestead laws, such property could not have been levied and sold.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 173; Dec. Dig. ⚡109.]

[4. *Execution* ⚡326.]

In the absence of testimony showing defendant's right to a homestead, it cannot be assumed that no application of money was made to an execution because of the homestead exemption laws.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 966-973; Dec. Dig. ⚡326.]

Before Pressley, J., Spartanburg, March, 1882.

This case, once before on appeal to this court, will be found reported 13 S. C. 120. The case is fully stated in the opinion of this court, but it should be added that the execution issued on the Means judgment had been returned to the clerk's office "at least six years prior to this trial," so that no execution upon that judgment was in the sheriff's office when he made the sale under the McMakin judgment in August, 1877.

Messrs. Duncan & Cleveland, Bobo & Carlisle, for appellant.

Mr. J. S. R. Thomson, contra.

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\*July 5th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. There were two judgments in the clerk's office for Spartanburg county against the plaintiff, Joseph Lawrence—one known as the "McMakin judgment," and the other as the "Means judgment." The first was for \$46.30, and was the senior judgment. It was entered and dated October 28th, 1859. The second was entered on May 9th, 1870. This last was upon a note for \$698.87, given to Means in August, 1859. Both of these claims antedated the constitution of 1868. The last was contracted in the purchase of a tract of land by Lawrence (the land now in controversy), and upon the judgment rendered on this note the judge certified that it was for the purchase-money for 551 acres of land, on which Lawrence then resided.

On September 8th, 1871, by virtue of an execution issued on this judgment, the sheriff of Spartanburg county levied upon this land, and on December 4th, 1871, sold the same to J. W. Carlisle for \$219, the highest amount bid. This bid was transferred by Carlisle to Lawrence, who paid the same to the sheriff, and Lawrence received titles. At the time of this sale the McMakin judgment, which

was older than the Means judgment, was standing open and unsatisfied, but no application of the proceeds of the sale was made to this judgment. Lawrence was in possession and still retained possession, being the purchaser under the transfer of the Carlisle bid to him. Afterwards, to wit, on September 1st, 1875, the sheriff levied on 300 acres of this land, by virtue of an execution issued on the McMakin judgment, and on August 6th, 1877, sold the same to Bobo and Cleveland for \$20, which sum was paid to the sheriff; upon which payment the sheriff executed titles to the said Bobo and Cleveland, who conveyed by deed of quitclaim to the defendant, Grambling. On November 5th, 1877, Lawrence paid off the McMakin judgment, the sheriff receipting to him for \$117.96, in full, of the balance in the case of McMakin v. Lawrence.

Shortly after this conveyance to Grambling, he began to cut timber from the premises, and this action was commenced by Lawrence for damages. By consent of the par-

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ties, however, the \*presiding judge, by order, embraced the question of title in the issue as well as damages.

At the trial, some request was made by defendant's attorney that the judge should charge as to certain alleged irregularities in the McMakin judgment, but no exception has been taken as to this matter, the judge having charged generally that the McMakin judgment had been sufficiently proved, with which defendant was satisfied. It will not be necessary, therefore, for this court to consider this question. The defendant further requested the judge to charge: "That the fact that Lawrence paid the balance due on the McMakin judgment after the sale of the land under the Means and junior judgment, raises the presumption that he (Lawrence) consented to the application of the proceeds of said sale in some other way than to the McMakin judgment." The judge, it seems, declined this request, and charged: "That the payment of his bid by Lawrence to the sheriff at the sale under the Means judgment was a satisfaction, in full, of the McMakin judgment, and that said judgment and execution were satisfied and could not afterwards support a sale of the land, and that the jury must find a verdict for the plaintiff for the land in dispute.

The jury found a verdict for the plaintiff, together with damages, in the sum of \$500. The defendant appealed upon the following grounds: 1. "Because his Honor erred in refusing to charge the jury: That the payment by the plaintiff of the balance due upon the judgment of Jas. McMakin against plaintiff was a satisfaction of the act of the sheriff, and validated the sale of plaintiff's land under said judgment and execution. 2. Because his Honor erred in charg-

ing the jury that the sale of plaintiff's land under the Means judgment and execution was a satisfaction in full of the McMakin judgment, and that said last judgment and execution were void and could not support a sale of plaintiff's land. 3. Because his Honor erred in charging the jury that from all the evidence it was their duty to render a verdict for the plaintiff."

It will be seen at once that the only question in the case is whether the judge erred in holding as matter of law under the facts, about which there was no dispute, that the

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sale of the land \*under the Means judgment satisfied the McMakin judgment. If there was no error in this, then it followed, as matter of law, that the plaintiff was entitled to the verdict, and the judge was right in directing the jury to render a verdict for the plaintiff. The defendant bought under and claimed through the McMakin judgment, and if, in law that had been already satisfied, the sale by the sheriff thereunder was a nullity, and, of-course, his deed conveyed no title.

Now, it will be conceded, as a general proposition, that where there are two or more judgments against a common debtor, of different dates, and his property, or any portion thereof, is sold by the sheriff under execution issued upon any of said judgments, that the proceeds of such sale amount to a satisfaction of the oldest judgment pro tanto, whatever may be the application by the sheriff. The authorities are abundant to this point. *Lynch v. Hanahan*, 9 Rich. 186; *Davis v. Barkley*, 1 Bailey 140; *Davis v. Hunt*, 2 Bailey 416; *Furman v. Christie*, 3 Rich. 1; *O'Neill v. Lusk*, 1 Bailey 220.

This general proposition is not contested by the appellant, but it is insisted that there are exceptions to this rule, and the appellant contends that while it is true that the senior judgment creditor has the legal right to have such proceeds applied to his judgment in preference to all others, yet that this right may be waived, and when this is done, either by word or act, the application may be made by the sheriff to junior judgments, leaving the senior open and still of force. And it is urged that such waiver was made here. As far as we can see from the brief, the question of waiver generally was not made below.

The defendant relied upon one fact, viz.: the payment by Lawrence of the McMakin judgment after the sale of the land under the Means judgment, as raising a presumption that he had consented to the application of the proceeds of that sale otherwise than to the McMakin judgment—in other words, that he thereby recognized that the McMakin judgment had not been satisfied by that sale, and he requested the judge to charge as law that such should be the legal inference. This fact relied on by the defendant was not contested; it was admitted, and, therefore, in

determining the question of law raised by

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the appel\*lant as springing from it, it was wholly unnecessary for the judge to submit it to the jury as a question of fact. The appellant claimed that, admitting the fact to be true, the judge should charge that in law it raised the presumption that Lawrence had consented to the postponement of the McMakin judgment, and therefore, that it was open and valid when the sale to Bobo and Cleveland took place. This the judge declined, and we see no error in this, as we know of no principle of law which would have authorized him thus to charge. So, the question comes back whether, under the facts as admitted, the judge erred in applying the general rule, viz.: that the proceeds of sale by the sheriff must go to the senior judgment.

It is urged that at the time of the sale under the Means judgment, the case of *In re Kennedy* [2 S. C. 216] had not been overruled, and inasmuch as in that case the Supreme Court of this State had held that the homestead exemption of the constitution of 1868 applied as well to debts antedating the constitution as to those subsequently contracted, and inasmuch as the debt to Means was a debt contracted in the purchase of the land, which in the constitution itself was excepted from the homestead provision, that the land could only have been sold under the Means judgment and the proceeds only have been applied thereto. It may be admitted, for the sake of the argument, that as long as *In re Kennedy* remained undisturbed, the McMakin judgment could not have been enforced by the sheriff against the homestead of Lawrence, and yet it would not follow that the proceeds of the sale arising from the enforcement of a judgment which could effect a sale would demand a different application than that required by the well-established principle referred to above, viz.: to the senior judgment first.

The homestead provisions do not undertake to extinguish the claim of creditors against their debtors, either in whole or in part, nor do they create any new estate in the debtor. They merely prevent a sale of a certain portion of the debtor's property by mesne or final process. They stay the hands of the sheriff or other officer of the law, but this is all. The lien of judgments is not disturbed, nor is any preference given to creditors

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beyond \*that which their own vigilance may secure. Whether a certain judgment can be enforced against the homestead of a debtor is a very different question from that arising upon the application of the proceeds of such homestead when brought into the office by a sale under an execution authorizing the sale.

But it is unnecessary to decide this question in this case, because it does not appear



that the homestead was involved. It is true it does appear that the note to Means, upon which his judgment was founded, was given for the land in controversy. But it does not appear that it was sold under that judgment because of that fact. There may have been other reasons, for aught that appears in the case, why Lawrence could not have claimed a homestead as to either of the judgments against him. We cannot assume that he was the head of a family and otherwise entitled under the constitution to the homestead exemption.

All that appears in the case is, that there were two judgments in the office against him, one junior to the other; upon which last the judge had certified that it was founded on a note given for the land then in the possession of Lawrence; but it does not appear, except by inference, that he had no other lands, or that he could otherwise claim a homestead out of this. It further appears, that the land was sold under the junior judgment, and that the proceeds were sufficient in amount to discharge the senior judgment. Under these facts we think the Circuit judge was correct in applying the general rule, and in holding that the McMakin judgment should be regarded as paid, and consequently that the subsequent sale thereunder was void.

It is the judgment of this court that the judgment of the Circuit court be affirmed.

### 19 S. C. 466

#### GREEN v. BOOKHART.

(April Term, 1883.)

#### [1. *Execution* ⚡420.]

Judgment was obtained against two defendants, one of whom resided in another county. Upon execution returned unsatisfied in the county of the judgment, the judge granted an order in supplementary proceedings for the appearance in that court of the absent debtor, who appeared without objection and was examined,

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and an order was then passed appointing a receiver. *Held*, that such debtor had thereby waived his right to an examination in his own county, nor could he afterwards object to the appointment of the receiver upon the ground that no execution had there issued.

[Ed. Note.—Cited in *Union Bank v. Northrop*, 19 S. C. 475.]

For other cases, see *Execution*, Cent. Dig. § 1205; Dec. Dig. ⚡420.]

#### [2. *Receivers* ⚡59.]

And in action by this receiver to recover from a third person property belonging to the judgment debtor, such defendant cannot interpose these irregularities as an objection to the appointment of the receiver.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 103; Dec. Dig. ⚡59.]

#### [3. *Execution* ⚡407.]

Although the application for the appointment of receiver was made under subdivision 1 of section 312 of the code, the order might be granted under subdivision 2 of that section,

if the facts appearing justified it, and under subdivision 2 the issue of execution is not a prerequisite to such appointment.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1160; Dec. Dig. ⚡407.]

Before Kershaw, J., Richland, November, 1882.

The opinion states the case.

Mr. A. J. Green, for plaintiff.

Mr. J. M. McMaster, contra.

July 5th, 1883. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action brought by the plaintiff, as receiver of the property of S. W. Bookhart, for the possession of a note for \$650, belonging, as alleged, to the said S. W. Bookhart, and in his possession or that of Cynthia W. Bookhart, having been executed to the said S. W. Bookhart by A. G. Bookman and Mrs. M. A. Holmes about October, 1880. The defendants are man and wife, and reside in Fairfield county, where the action was originally brought, but was transferred to Richland county. They answered separately, simply denying each and every allegation of the complaint.

It appeared that in May, 1879, Jones, Davis & Bouknight recovered in Richland county a judgment against the said S. W. Bookhart and one Thomas W. Entzminger, as signers of a joint and several note, the latter of whom was a resident of Richland county, and entered judgment and issued execution against both in that county. Upon the return of the execution unsatisfied the judgment creditor, in July, 1879, instituted supplementary proceedings against both the defendants in execution, who were served with an order to appear and answer concerning

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their property at Columbia, Richland county, where the judgment was entered and the execution returned. S. W. Bookhart appeared and was examined. He denied that he owned any property not exempt by law; but another witness (A. G. Bookman) testified that he, with M. A. Holmes, were indebted to the said S. W. Bookhart on the note for \$650, before referred to. Whereupon Judge Wallace appointed the plaintiff, Allen J. Green, receiver, and ordered S. W. Bookhart to turn over to him the said note. A copy of this order was served on Bookhart and he again appeared and made affidavit "that he is not owner of the note of A. G. Bookman and Mrs. Holmes, and has never been such; that all of his doings in reference to said note were had as agent of his wife, Cynthia E. Bookhart." There was no appeal from the order appointing the receiver in Richland county or proceedings instituted to set it aside.

At the argument here it was admitted that there was some evidence tending to show

that the said note was given to S. A. Bookhart but was in the possession of and claimed by Mrs. Cynthia E. Bookhart. At the close of plaintiff's testimony the defendant moved for a non-suit on the ground "that, inasmuch as it appeared from the record in the case of Jones, Davis & Bouknight v. S. W. Bookhart and Thomas W. Entzminger, that the execution had been issued to and returned, unsatisfied by the sheriff of Richland county while the defendant Bookhart lived in Fairfield county, Judge Wallace had no jurisdiction in supplementary proceedings against said Bookhart, and that the appointment of the plaintiff as receiver was void, and he, not being legally appointed receiver, or the real party in interest, could not maintain the action."

The Circuit judge granted the non-suit as to Cynthia E. Bookhart but refused it as to S. W. Bookhart. Both plaintiff and defendant S. W. Bookhart appeal to this court, the plaintiff upon the ground that the judge erred in granting the non-suit as to Cynthia E. Bookhart, and the defendant upon the ground that the non-suit should have been granted as to both defendants.

The judgment of Jones, Davis & Bouknight, under which the supplementary proceedings were instituted, was obtained and the execution issued regularly in Richland

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county against S. W. \*Bookhart as well as Entzminger, although the former lived in Fairfield. "If there be more than one defendant, then the action may be tried in any county in which one or more of the defendants reside." Code, § 146. In this view it was urged for the plaintiff that Richland county was the proper place for all proceedings which took place in the case; that the judgment and execution, properly entered in Richland, carried with them all proceedings based upon them, and there are cases in the New York practice, under a similar provision as to supplementary proceedings, which look that way. In Wait's Anno. Code, p. 573, note, it is said: "The issuing of an execution, the supplementary proceedings and the appointment of a receiver are proceedings in the action (not special proceedings), and where the court has authority to award an execution, jurisdiction to appoint a receiver in supplementary proceedings is also conferred." Wegman v. Childs, 41 N. Y. 159, and other authorities.

But subdivision 1 of section 312 of the code does not seem to make provision for such a case. The words are very explicit: "When an execution against property of the judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has his place of business, \* \* \* is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from the judge of the

Circuit Court, requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county in which the execution was issued," &c.

Here the execution was "issued" in Richland county, but we suppose that, under the above provision, the regular course would have been to issue an execution against S. W. Bookhart in Fairfield county and had it returned by the sheriff of that county. If so, S. W. Bookhart might have objected when the application was made in Richland that the execution should have issued to Fairfield county, and he could not be required to answer elsewhere. But, when summoned to Columbia, in Richland county, he made no objection. He appeared and was there examined, and upon such examination the judge appointed the plaintiff receiver, and from that order there was no appeal.

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\*It seems to us that it is now too late for him to object. The provision seems to have been intended for the protection of the defendant in execution, that he might not be required to answer out of his county, or until the creditor had exhausted his remedy by execution. It was a right personal to him, and when he chose to waive it and to appear and answer in another county, he could not afterwards make the objection. "When a judgment debtor appears before a referee and submits to an examination without objection, this will amount to a waiver of any irregularity, and an order for the appointment of a receiver founded on such voluntary appearance and waiver will be valid, and cannot be affected by an objection to the jurisdiction in an action brought by the receiver." *Viburt v. Frost*, 3 Abb. 119; *Bingham v. Disbrow*, 37 Barb. 24; S. C., 14 Abb. 251; Wait's Anno. Code, p. 575, and authorities in note; *Ridd. Sup. Pro.* (2d edit.) 25. We think there was no error on the part of the judge in refusing the motion for a non-suit as to S. W. Bookhart.

It is insisted, however, that the judge was also right in granting the non-suit as to Cynthia E. Bookhart; that she was no party either to the judgment or the supplementary proceedings, and the doctrine of waiver or estoppel could in no way be applied to her; and that when sued by the receiver for property of the debtor, she had the right to defend herself by showing that he had not been legally appointed receiver. It is true she was not a party to the proceedings in which the plaintiff was appointed receiver, and for that very reason she could not object to his title in an action brought by him as such. When the debtor has waived an irregularity, a third party cannot avail himself of it." *Riddle* 213. The plaintiff presented his commission as receiver appointed by a judge who had jurisdiction of the subject-matter and entitled to make the appointment. There



was a presumption that the appointment was rightly made, at least until the contrary appeared, and she had not the right to attack it for irregularities in a collateral manner. The proper way to make that question was upon motion to set aside the proceedings. "A third person, when sued, cannot object to the

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\*regularity of the receiver's appointment when the judgment debtor has waived the objection; nor can he object to an irregularity in the return of the execution." Supplement to Ridd. Sup. Pro. 138 and 193, and authorities; Wait's Anno. Code 563 and 575.

If the defendant Cynthia, in an action against her, had the right to show that the appointment of the receiver was without jurisdiction and absolutely void, we do not think that the omission to have an execution issued to the sheriff of Fairfield county and returned by him, especially after the waiver of that privilege by the defendant in execution himself, was a jurisdictional defect or amounted to more than a mere irregularity, if that. Riddle 33. In the case of Viburt v. Frost, supra, it was said by Mr. Justice Duer that, "If the original order for the debtor's appearance was a nullity, he was not bound to appear; nor was he bound, when he appeared, to submit to an examination. His appearance and submission to an examination must, therefore, be regarded as voluntary acts, and it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of a judgment debtor."

Besides, we see no good reason why the order of Judge Wallace appointing the receiver, may not be referred to sub-division 2 of section 312 of the code, which does not require as preliminary to the order that there should be any "return of the execution." It is in these words: "After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution." It cannot be doubted that the proceedings here referred to as "upon the return of an exe-

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cution," include, \*when necessary, the appointment of a receiver. It is well supported, both by reason and authority, that the remedies provided by the different sections of the code as to the appointment of receiver, are concurrent and cumulative.

"There is no incompatibility between the remedies afforded by the different sections of the code as to the appointment of receivers. They are granted on different states of fact." Heroy v. Gibson, 10 Bos. 591; Wait's Anno. Code 574.

It is true that the affidavit upon which the supplementary proceedings in this case were initiated, stated that "the execution had been issued and returned unsatisfied," indicating possibly that the application was made under subdivision 1 of section 312 of the code. Upon this affidavit, however, the judgment debtors were summoned to answer and witnesses to testify, and there appeared, as to S. W. Bookhart, the identical state of facts which authorize proceedings under subdivision 2 of said section of the code. It was shown that the execution had been "issued." There was at least prima facie "proof" that the judgment debtor had property (the note) which he unjustly refused to apply towards the satisfaction of this judgment, claiming that it belonged to his wife, which brought the case within the very terms of subdivision 2 aforesaid.

Under these circumstances, if it were necessary, we do not see why the fact that the proceedings were originally instituted under subdivision 1, should have excluded Judge Wallace from basing his order for the appointment of a receiver, upon the authority of subdivision 2, when the facts as proved authorized it. It seems that this very point has been decided in New York. "The second subdivision of section 292 (312 of our code) provides that the same proceedings may be had as for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution. This would authorize the appointment of a receiver if necessary; and I think sufficient appeared from the defendant's examination to warrant the order made." Union Bank of Troy v. Sargeant, 35 How. Pr. 87.

The judgment of this court is, that so much of the judgment of the Circuit Court as granted the non-suit as to the defendant

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\*Cynthia E. Bookhart, be reversed, and the cause remanded to the Circuit Court for a new trial.

Mr. Justice McIVER concurred. Mr. Chief Justice SIMPSON concurred in the result.

19 S. C. 473

UNION BANK v. NORTHROP.

(April Term, 1883.)

[1. Execution  420.]

A judgment debtor has the right in supplementary proceedings, under subdivision 1 of section 312 of the code, to have his examination

conducted in his own county, but this right he may waive, and does waive, by submitting, without protest, a written statement which is accepted by the plaintiff as a sufficient compliance with the order.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1205; Dec. Dig. ⚡420.]

[2. *Exemptions* ⚡3.]

Prior to the amendment of 1880, the constitution did not exempt money from seizure for the payment of debts.

[Ed. Note.—Cited in Norton v. Bradham, 21 S. C. 384; Gray, Sullivan & Gray v. Putnam, 51 S. C. 100, 28 S. E. 149; Ex parte Goldsmith, 68 S. C. 539, 47 S. E. 984.

For other cases, see Exemptions, Cent. Dig. §§ 2, 3; Dec. Dig. ⚡3.]

[3. *Exemptions* ⚡48.]

An order for examination of a judgment debtor was passed in supplementary proceedings eighteen months after the termination of a litigation in which such debtor was attorney, and while the amount of his fee was under reference. During the next month the amount of the fee was fixed by the court, and five months afterwards the order in the supplementary proceedings required such fee to be paid over to the judgment creditor. *Held*, that this fee was not an earning of the debtor within sixty days next preceding the order, and, therefore, exempt under section 317 of the code.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64, 72; Dec. Dig. ⚡48.]

[4. *Execution* ⚡367.]

This fee was due by a corporation which was in the hands of a receiver, who, upon obtaining his discharge, turned it over to the master of the court. *Held*, that this money might be reached under supplementary proceedings and ordered to be paid to the judgment creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1104; Dec. Dig. ⚡367.]

Before Wallace, J., Richland, May, 1882. The opinion states the case.

Mr. R. A. Lynch, for appellant.

Mr. W. S. Monteith, contra.

July 7th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. On June 28th, 1878, the plaintiff recovered a judgment against the defendants in Richland county

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for \$515.56. It does not appear in the "Case," but, from the argument in this court, we infer that the judgment was rendered on a cause of action older than the constitution; but, be that as it may, it is clear that the exemption of the fund here in question could not be claimed under the homestead law then of force, as it was not of that character of personal property which the constitution then exempted.

L. C. Northrop resides in Charleston, and an execution was issued against him in that county and returned unsatisfied. Whereupon, in November, 1881, the plaintiff instituted supplementary proceedings against him in Richland county. He was required by an order of Judge Cothran "to appear in Columbia before N. B. Barnwell, Esq., master of Richland county, on November 21st,

1881, and answer concerning any property he may have." Northrop did not make the objection that he could not be required to answer out of his own county, but proposed to answer by written statement, which was allowed. He filed his statement before the master of Richland county, who reported the facts as follows:

"During the year 1880, L. C. Northrop, as district attorney of the United States for the State of South Carolina, filed a petition In re Jas. S. Gilbes et al. v. Greenville & Columbia Railroad Company, for taxes due by the said company to the government of the United States. The receiver of that company resisted the claim, but it was compromised by paying to the government \$500, and whatever should be a proper fee for Mr. Northrop, as attorney. On April 9th, 1880, it was referred to the master to ascertain what would be a proper fee, who recommended \$200, and his report was confirmed and the money ordered to be paid to Mr. Northrop, December 15th, 1881. At the time Northrop answered in the supplementary proceedings he filed a petition setting forth that he was a citizen of the State and the head of a family, and claiming homestead; that he was not worth \$300 in personal property, and that he was very much dependent upon the said fee of \$200 for the support of a large and helpless family, and he prayed that it might be paid out to him."

The matter was heard by Judge Wallace,

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who disallowed the \*claim of homestead, and directed that the fee of \$200 in the hands of the master, belonging to the defendant, L. C. Northrop, should be applied towards the satisfaction of the judgment. From this order the appeal comes to this court upon the following exceptions: "1. Because his Honor, W. H. Wallace, had no jurisdiction of the person of the defendant, L. C. Northrop. 2. Because his Honor, W. H. Wallace, had no jurisdiction of the subject-matter in this action, it being a fund in the custody of the court, and otherwise exempt from process."

As to the first exception. There is no doubt that in supplementary proceedings, under subdivision 1 of section 312 of the code, the defendant in execution has the right to insist on being examined in the county where he resides or has an office. This right extends no further than the examination, and was given, probably, to relieve him from the inconvenience of being dragged to another county, possibly in a distant part of the State. But this is a personal privilege given to him, and, if he chooses, he may waive it. Green v. Bookhart, ante p. 466, lately decided by this court. In that case it is said that "The provision seems to have been intended for the protection of the defendant in execution, that he might not be required to answer out of his county. It is a right personal to



him alone, and when he chose to waive it, and to appear and answer in another county, he could not afterwards make the objection."

Mr. Riddle, in his late work on Supplementary Proceedings, lays down the rule as to what is a jurisdictional defect, and what a mere irregularity, in these terms: "An objection on the ground of irregularity in the proceedings, to be valid, must be taken at the earliest possible opportunity, that is, when the exercise of jurisdiction is first claimed by the officer. If not taken then it is deemed to be waived. The question upon this point in any of these proceedings is: Would the court or judge have had jurisdiction to grant the order or warrant, provided all the necessary existing facts had been properly brought before him at the time, or to proceed in the matter in controversy if it had duly come before him, as it could have come? and did the debtor or adverse party fail to object to the irregularity complained of in due season? If both questions are af-

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firmatively answered, the error is \*but an irregularity and has been waived, and the proceedings are regular." Riddle (2d edit.) 213. There is no doubt that both questions must be answered in the affirmative in this case, and, therefore, after the waiver the proceedings were regular.

Under the second exception several exceptions urged against applying the fee to the judgment: First, it is claimed that the defendant, Northrop, is entitled to the fee as homestead, or as within the exemption of \$500 of personal property, allowed by the constitution; but, as before indicated, the money fee did not come within the class of articles exempted by the constitution before the amendment of 1880, and, therefore, homestead or exemption against it cannot be allowed in this case.

Second, it is then insisted that if defendant is not entitled to have this fee exempted as technical homestead, he is entitled to the benefit of section 317 of the code, which gives authority to the judge to have applied towards satisfaction of judgments all property and money of the defendant in execution, "except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be applied where it is made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor." The showing was sufficient that the fee aforesaid was due for the personal services of the defendant in execution, and, also, that such earnings are necessary for the use of a large and helpless family; but we cannot hold that it was "earnings within sixty days next preceding the order."

Even if "the order" here referred to was the order for examination in supplementary

proceedings, granted by Judge Cothran, November 7th, 1881, we could not say that the fee was earned within the sixty days next preceding that time, for the reason that the court had already referred it to the master to report what fee should be allowed L. C. Northrop for his professional services as far back as April 9th, 1880. But, according to the New York construction of a provision identical with ours, the words "within sixty days next preceding" the order have reference to the order directing the money to be applied toward the satisfaction of the judgment. That order, in this case, was made by

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Judge Wallace on May 9th, 1882, more than four months after the final order of court allowing the fee, viz., December 15th, 1881. "Only such earnings are exempted as have been earned within sixty days previous to the date of the order requiring such earnings to be applied to the satisfaction of the judgment, and not those that may have been earned within sixty days previous to the service of the order for examination. *Bush v. White*, 12 Abb. 21; *Wait's Anno. Code* 571 and notes.

Third, it is said that the money, being in the hands of the master, is in the custody of the court itself, and could not be reached by these proceedings. This money was in the hands of James Conner, receiver of the Greenville and Columbia Railroad Company, who owed it to the defendant, Northrop, and in whose favor it had been adjudged. When the receiver was discharged, pending the litigation, the money was deposited with the master as matter of convenience, and, for the purposes of this case, must be considered as still in the hands of the receiver as a debtor of Northrop. There is no attachment here seeking a lien, but the question is simply as to the proper application of the money under supplementary proceedings. We think it a mistake to suppose that the money is in custodia legis in such sense as not to be subject to the order of the court.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 477

RICHARDSON v. MOUNCE.

(April Term, 1883.)

[1. Evidence ⚡230.]

The declarations of A., made after the sale of his property by the sheriff under execution, but while he continued in possession, may be given in evidence against his vendee for the purpose of showing fraud in the pretended sale. *McCord v. McCord*, 3 S. C. 577, recognized and followed.

[Ed. Note.—Cited in *Merck v. Merck*, 83 S. C. 339, 65 S. E. 347.

For other cases, see Evidence, Cent. Dig. § 839; Dec. Dig. ⚡230.]

[2. *Appeal and Error* ⇐1022.]

Findings of fact by master and Circuit judge sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

3. *Quære*: Is the effect of a retention of possession of the land aliened by a father-vendor different from that of a retention in other cases?

[4. *Execution* ⇐41; *Trusts* ⇐74.]

Where land sold by a sheriff is conveyed by deed to the highest bidder, but the judgment debtor furnishes the money which pays the bid, a trust results in the debtor's favor, and the land may be again subjected to the payment of his debts.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 93; Dec. Dig. ⇐41; *Trusts*, Cent. Dig. § 106; Dec. Dig. ⇐74.]

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[5. *Fraudulent Conveyances* ⇐248.]

\*Action to set aside a deed for fraud, commenced within six years after judgment obtained at law against the vendor, is not barred by the statute of limitations. *Suber v. Chandler*, 18 S. C. 526, approved.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 733; Dec. Dig. ⇐248.]

[6. *Limitation of Actions* ⇐100.]

The statute of limitations does not run in favor of a fraudulent conveyance until the discovery of the facts which constitute the fraud; and such knowledge being denied in the complaint the defendant must prove the knowledge.

[Ed. Note.—Cited in *Garvin v. Garvin*, 40 S. C. 443, 19 S. E. 79; *Smith v. Linder*, 77 S. C. 541, 58 S. E. 610.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⇐100.]

[7. *Fraudulent Conveyances* ⇐140.]

The retention of possession of land by a judgment debtor after sheriff's sale is not in itself sufficient notice of fraud in the sale.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 447; Dec. Dig. ⇐140.]

Before Wallace, J., Laurens, September, 1882.

The opinion makes a full statement of the case.

Messrs. Ball & Watts, for appellant.

The evidence is insufficient to sustain the conclusion of fact. 2 S. C. 59; 4 Id. 449; *Bump Fraud. Conv.* (2d edit.) 581–6, 38, 48, 120, 122, 160, 199, 172; 1 *Bailey* 575; 1 *N. & McC.* 334; 3 *Desaus.* 1; 2 *McC.* 362. *Motes'* declarations were inadmissible. 3 S. C. 577; 4 *Rich.* 422; 2 *Bailey* 123; 1 *Id.* 578; 2 *Hill Ch.* 636; 10 *Rich.* 72. The claim is stale and barred by the statute of limitations. *Kerr Fr.* 303–5; 2 *Strobb.* Eq. 27; 7 *Rich. Eq.* 430; *Bump Fraud. Conv.* 549; 1 *Hill* 387; 4 S. C. 249; *Bailey Eq.* 437; 10 *Rich. Eq.* 346; 1 *Strobb.* Eq. 79, 90; 3 *Rich. Eq.* 465; 11 *Geo.* 615; 24 *Pick.* 242

Messrs. Holmes & Simpson, contra.

*Motes'* declarations were admissible. 3 S. C. 577; *Bump Fraud. Conv.* 546, 549, 550; 3 *Phil. Ev.* 222; 1 *Id.* 197; 4 *John.* 230; 8 *Ala.* 650; 1 *McMull.* 373; 1 *Hill Ch.* 303; 5 *Rich. Eq.* 142; 2 *Hill Ch.* 108; 1 *Id.* 302. Action is not barred by the statute of limitations.

18 S. C. 526; 6 *Rich. Eq.* 101; 13 S. C. 384.

July 11th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff brings this action for the purpose of setting aside

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a certain deed upon the ground of \*fraud. The circumstances out of which the alleged fraud arises are as follows: In 1869, one A. C. Fuller, suing for the use of the plaintiff, commenced an action on a note against Hogan Motes, the father of the defendant, Sarah A. Mounce, in which judgment was not obtained until May 28th, 1875, when an execution was issued thereon and returned unsatisfied. Whilst said action was pending, to wit, on November 7th, 1870, a valuable tract of land belonging to Hogan Motes, containing 500 acres, was sold by the sheriff under an execution against said Motes, and bid off by the defendant S. A. Mounce, for the sum of \$700. The sheriff's deed to said S. A. Mounce for said land bears date November 7th, 1870, but it was not recorded until May 8th, 1879. On November 15th, 1879, S. A. Mounce executed a mortgage on said tract of land to the defendant E. H. Frost, to secure debts due to the firm of E. H. Frost & Co., as well by the said Hogan Motes as by the said S. A. Mounce.

On November 6th, 1880, the present action was commenced against S. A. Mounce and E. H. Frost & Co., by which the plaintiff seeks to have the alleged deed from the sheriff to the defendant S. A. Mounce, set aside upon the ground that the purchase-money was furnished by Hogan Motes, and the title taken in her name with a view to defeat the creditors of said Hogan Motes. The answer of S. A. Mounce denies all the allegations of fraud and also sets up the plea of the statute of limitations. The answer of E. H. Frost & Co. does not appear in the "Case," as they do not seem to have appealed from the judgment of the Circuit Court.

The issues of law and fact were referred to the master for trial, and he found as matter of fact that the money with which the bid of S. A. Mounce for the land in question was paid, was furnished by Hogan Motes, who said that this arrangement, which he characterized as "sham work," was made because he was largely involved as surety and desired to secure a home for himself and his daughter; and as matter of law the master found that the sheriff's deed to S. A. Mounce should be set aside as fraudulent and void, and that the land should be sold and the proceeds applied to the payment of the costs of this action, and to the judgment of this plaintiff against the said Hogan

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*Motes*, \*and any other judgments which may have become liens prior to the execution of



the bond and mortgage to E. H. Frost, if there be any such, and then to the payment of said mortgage debt to E. H. Frost. The master also found as matter of law that the statute of limitations was not a bar to the action because it did not appear that the alleged fraud had been discovered more than six years before the commencement of this action. To this report the defendants excepted, alleging errors both in the findings of fact and in the conclusions of law, and also upon the ground that the master erred in holding that the declarations of Hogan Motes, made after the date of the deed from the sheriff, though while he continued in possession of the land, were competent evidence against the defendants in this case. The Circuit judge overruled all the exceptions and confirmed the report of the master, and the defendant S. A. Mounce appealed upon the same grounds upon which the exceptions to the master's report were based.

This appeal, therefore, raises three questions: 1. As to the competency of the declarations of Hogan Motes; 2. As to the findings of fact on the question of fraud; 3. As to the statute of limitations.

Since the case of *McCord v. McCord*, 3 S. C. 577, supported as it is by the authorities cited in the argument of that case, as well as in the argument here, there cannot be any doubt as to the first question, and that there was no error in receiving the declarations of Hogan Motes, made while he continued in possession of the land, after the alleged sale to the defendant S. A. Mounce, for the purpose of showing fraud in the pretended sale. It is true that the appellant has, in the argument here, denied that the possession of Hogan Motes continued after the sale the same as before, and, on the contrary, contended that, according to the evidence, after the sale he was in possession only as the tenant of his daughter. But this is a question of fact, and it has been found otherwise by the master upon testimony which is certainly sufficient to support such a finding, and, having been concurred in by the Circuit judge, it is binding upon us.

Again, it will be observed that it is not declarations alone of Hogan Motes which are

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relied upon, but his acts accompanying \*such declarations, such as offering to sell a portion of the land, saying: "He could give as good titles as there was in the State," and his continuing in the use and control of the land after the sale just as before.

The fact that in this case the sale was not a voluntary private sale, as in *McCord v. McCord*, but was a public sale made by the sheriff, can make no difference as far as this point is concerned. As is said in *Bump Fraud. Conv.* 256: "If a debtor, for instance, at a public sale under a mortgage or execution, advances the money with which another purchases the property, there is no sale

against the creditors. \* \* \* In such cases there is no distinction between a conveyance directly from the debtor and one from the sheriff or other public officer. In reality, the conveyance is from the debtor through the sheriff or other public officer." The same rule applies to a purchaser at a sheriff's sale who allows the judgment debtor to remain in possession, as was applied in *McCord v. McCord*, where the vendee at a private sale allowed his vendor to retain possession, for, in the former case, the purchaser, in reality, buys from the judgment debtor through the agency of the sheriff.

If these declarations of Hogan Motes were, as we have seen, competent evidence in this case, then certainly there is no ground upon which we could, under the well-settled rule, disturb the findings of fact in the court below; for, there is not only testimony sufficient to support such findings, but we think the weight of the evidence is decidedly in favor of the conclusions reached by the master and by the Circuit judge.

It has been argued, however, by the counsel for appellant, with much force, that the effect of retention of possession by the vendor is not the same where the parties occupy the position of father and daughter, as it would be in ordinary cases. Some of the cases cited by counsel do seem to look that way, though all of them, except *Howard v. Williams*, 1 Bailey 575 [21 Am. Dec. 483], limit the proposition to cases where the child is an infant living with the parent; for there, as is said in *Kid v. Mitchell*, 1 N. & McC. 339 [9 Am. Dec. 702], the possession by the father is in accordance with the terms of the deed which purports to transfer the

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property, inasmuch \*as the father, as natural guardian of the child, would be regarded as holding the possession merely as the representative of the infant. These cases were, however, reviewed in the case of *Farr v. Sims*, Rich. Eq. Cas. 135 [24 Am. Dec. 396], and the doctrine which they announce was very much shaken, if not overthrown.

But this question is not really involved in the present case. Here, the allegation is that the property of the judgment debtor, though bid off at the sheriff's sale by the defendant S. A. Mounce, was actually paid for with the money of the debtor, Hogan Motes; and this allegation is fully sustained by the testimony, to say nothing of the very significant circumstance that although it is denied in her answer, it is not denied when she went upon the stand as a witness subject to cross-examination. There was, therefore, a resulting trust in favor of Hogan Motes, which his creditors have a right to subject to the payment of his debts. *Brown v. McDonald*, 1 Hill Eq. 305-6.

The only remaining question is whether the action was barred by the statute of limitations. Since the decision in *Suber v.*

Chandler, 18 S. C. 526, there can be no doubt upon this question, as the action was commenced within six years after the judgment at law was obtained. Aside from this, however, the statute, according to code of 1882, section 112, did not commence to run until "the discovery \* \* \* of the facts constituting the fraud." In the complaint the plaintiff alleges that the knowledge of the fraud came to him within six years next preceding the commencement of the action, and there is no testimony showing that the plaintiff had any knowledge of the facts constituting the fraud, or that he was in possession of any clue which, if properly pursued, would have led to a knowledge of such facts, more than six years before this action was commenced, and in the absence of such testimony the plea of the statute cannot be sustained. *Shannon v. White*, 6 Rich. Eq. 101 [60 Am. Dec. 115]; *Beattie v. Pool*, 13 S. C. 384. The plaintiff, doubtless, knew of the sale, and of the continued possession by the judgment debtor, but that was not information of the facts constituting the fraud. The furnishing the money by Hogan Motes, with which the appellant made the purchase, was the important fact constituting the fraud,

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and when that fact first came to the \*knowledge of the plaintiff does not appear, and the burden of showing it was upon the appellant.

The sale having been a public sale, the retention of possession by the real vendor, Hogan Motes, was not a circumstance as well calculated to arrest attention and excite suspicion, as if it had been a voluntary private sale, (*Guignard v. Aldrich & Harley*, 10 Rich. Eq. 262,) and there does not appear to be any other fact tending to show fraud except the fact that the means of making the purchase were furnished by Hogan Motes for the avowed purpose of securing a home for himself and his daughter which would be exempt from the claims of his creditors, and as we have said, it does not appear when this fact first came to the knowledge of the plaintiff, or when he first acquired such information as, if properly pursued, would have led to the discovery of such fact. It is plain, therefore, that the plea of the statute could not be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 19 S. C. 483

## HENDRIX v. HARMAN.

(April Term, 1883.)

[1. *Appeal and Error* ⚡987.]

In cases at law tried by a judge with the aid of a referee, the facts found on Circuit must be accepted by this court as true.

[Ed. Note.—Cited in *Kennedy v. Adickes*, 37 S. C. 179, 15 S. E. 922.]

For other cases, see *Appeal and Error*, Cent. Dig. § 3894; Dec. Dig. ⚡987.]

[2. *Pledges* ⚡26, 29.]

Personal property delivered and pledged for the payment of a debt is subject to the lien thereby imposed until the debt is paid, and the pawner cannot maintain action for its recovery while this lien exists.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. § 64; Dec. Dig. ⚡26, 29.]

Before Witherspoon, J., Lexington, June, 1882.

This was an action by Enoch Hendrix against M. D. Harman for the recovery of a watch, commenced February 9th, 1876. The defendant denied that he had plaintiff's watch, but said he did hold a watch, which plaintiff claimed, for the benefit and as the property of defendant's son, to whom it had been given by Reuben Harman, the grandfather, prior to his death. The referee's finding was, "that R. Harman claimed and own-

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ed \*the watch, and before his death gave it to Charlie, an infant son of this defendant." The Circuit judge says the watch was delivered by Hendrix to R. Harman, "as a pawn to secure the amount, \* \* \* to be paid in sixty days, with interest at the rate of one and one-half per cent. a month, and if not then paid the watch was to become the property of Reuben Harman." Other facts are stated in the opinion.

Messrs. Boozer & Graham, for appellant.  
Mr. H. A. Meetze, contra.

July 3d, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The complaint in this case alleges that the defendant had become possessed of, and wrongfully detained from the plaintiff, appellant, a gold watch of the value of \$125, and plaintiff demands judgment for the recovery of the watch, and damages to the amount of \$200 for its detention. The case was referred to a referee to take the testimony, and report his conclusions of law and fact. After a final report by the referee the case came to a hearing before Judge Witherspoon, who, on August 15th, 1882, pronounced judgment, dismissing the complaint with costs. From this judgment this appeal has been taken upon several grounds, which will be considered below as far as may be necessary.

The facts of the case, as found by the Circuit judge and the referee, are as follows: "1. That on December 15th, 1872, one Reuben Harman, since deceased, paid for the plaintiff, at his instance and request, \$45.25, and plaintiff consented to the transfer of the watch in question to Harman, to be held by him to secure the payment of said sum and interest from December 15th, 1872; that said sum and interest still remains due and owing by plaintiff. 2. That Reuben Harman died intestate during the summer of 1874, and held the watch at the time of his death, subject to the payments by plaintiff of the in-



debtedness aforesaid: that there is no legal representative of Reuben Harman, deceased."

The conclusions of law were: "1. That

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Reuben Harman at the time of his death held the watch in controversy under a lien, with plaintiff's knowledge and consent, to secure the payment of \$45.25, with interest from December 15th, 1872; that said lien still exists and that plaintiff is not entitled to recover the possession of said watch in this action." Upon this finding he ordered and adjudged that plaintiff's complaint be dismissed with costs.

The plaintiff has appealed upon fourteen exceptions, the greater number of which assign error to the findings of fact by the Circuit judge. As to these, without considering them seriatim, it is only necessary to say that this case is a case at law, although tried by a judge with the aid of a referee; and being a case at law, the facts are beyond our jurisdiction. It is only in chancery cases that we can take cognizance of the facts, and it is only in such cases that the rule referred to by appellant's counsel applies. In cases at law our jurisdiction is confined to errors of law applicable to the facts as found by the jury or the judge, as the case may be. The facts thus found we must take as absolute verity. This is a provision of the constitution itself and is controlling.

Assuming the facts, then, as found by the Circuit judge to be true, was there error in his holding as matter of law that the lien of Reuben Harman, imposed by the plaintiff, still existed, and that plaintiff was not entitled to recover possession in this action? We see no error in this. Assuredly, if the watch was placed in the possession of Harman, as a pledge or pawn, as found by the judge, to secure the payment of plaintiff's indebtedness to Harman, this created a lien in favor of Harman, and if, by contract, this state of things was to continue until Harman was refunded the amount advanced by him for the plaintiff, the lien, as matter of law, would continue to exist also.

This being so, it would follow, also, as matter of law, that so long as the lien existed plaintiff had no cause of action entitling him to recover the possession. He had parted with the watch with the express understanding and condition that he was not to retake it until he paid the amount due Harman. This was not illegal, nor is there any allegation that he was seduced into this agreement, or that any fraudulent devise was practiced

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upon him in any way. It was a plain voluntary contract entered into and executed by him upon a sufficient consideration, and we can see no reason whatever why he should be released from it without complying with the terms agreed upon.

We do not find that the Circuit judge ruled that plaintiff could not recover upon payment

of the amount for which the watch was pledged. The plaintiff seems to have contended that he had paid Harman. This was, however, a question of fact, and the judge found the other way, and there being no tender or offer of payment during the trial, the judge made no ruling as to the rights of the parties in that event. The exception involving a question as to such facts is, therefore, inapplicable.

Nor do we see that the Circuit judge allowed any counterclaim of the defendant; on the contrary, the complaint was simply dismissed because the plaintiff failed to make out his case.

Neither is there anything found in the argument as to the exception involving the admission of incompetent testimony. We suppose, therefore, that this exception was abandoned, but whether this be so or not, there was no sufficient reason to have the testimony of the two Harmans ruled out on the ground of irrelevancy or upon any other ground, so far as we have been able to discover.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

19 S. C. 486

KILGORE v. HAIR.

(April Term, 1883.)

[1. *Receivers* ⇨29.]

A receiver may be appointed at chambers. [Ed. Note.—Cited in *Pelzer, Rodgers & Co. v. Hughes*, 27 S. C. 415, 416, 3 S. E. 781; *Regenstein v. Pearlstein*, 30 S. C. 202, 8 S. E. 850; *Ex parte O'Bannon*, *In re Buist v. Merchants' & Planters' Bank*, 65 S. C. 489, 43 S. E. 958.

For other cases, see *Receivers*, Cent. Dig. §§ 38-42, 409; Dec. Dig. ⇨29; *Judges*, Cent. Dig. § 126.]

[2. *Receivers* ⇨48.]

The master of the court should not be appointed a receiver in any case.

[Ed. Note.—Cited in *Allen v. Cooley*, 60 S. C. 372, 38 S. E. 622.

For other cases, see *Receivers*, Cent. Dig. § 73; Dec. Dig. ⇨48.]

Before Witherspoon, J., Newberry, February, 1883.

Action by A. J. Kilgore against J. S. Hair, commenced in February, 1883. The opinion states the case.

Mr. Y. J. Pope, for appellant.

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\*Messrs. Moorman & Simkins, contra.

July 3d, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was an action to recover possession of a tract of land situate in Newberry county, as well as damages for its detention. A judgment enjoining the defendant from any further use

or occupancy of the land, and for the appointment of a receiver, is also demanded.

The trial of the cause upon its merit has not been had, but an order has been obtained at chambers from Judge Witherspoon, after notice that an application would be made to him "for the appointment of a receiver to take possession of the property described, and to manage the same according to law," directing Silas Johnstone, the master for Newberry county, to rent the land for the present year to the highest bidder for cash, and in case that the matters in dispute shall not be finally adjudicated by the end of this year, then to rent the land for the year 1884 upon the same terms; and further, that the defendant, J. S. Hair, or any other person that may be in possession at the time of renting, be required to vacate said premises and deliver the possession thereof to whomsoever may rent them from the master, as provided therein.

The appeal arises upon this order, the defendant having excepted as follows: 1. "Because said order was granted at chambers without the consent and against the protest of the said John S. Hair. 2. Because the said order was granted at chambers upon a notice to show cause why a receiver should not be appointed to take charge of the property in controversy. 3. Because said order was contrary to law. 4. Because the plaintiff was not entitled to said order from the presiding judge under the pleadings in this action."

We do not propose to inquire into or express any opinion as to the merits of the controversy, or as to rights of the parties respectively to the land in dispute. The order of the Circuit judge appointing the receiver is the only matter before us, and the questions raised are, first, whether such motion could be heard at chambers; and, second, whether the master should have been appointed.

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\*The first may be dismissed by a simple reference to section 265 of the code, which provides that a receiver "may be appointed by a judge of the Circuit Court either in or out of court;" so that if there was nothing else in the way except this objection, the order below should be affirmed without delay.

The more serious matter, however, is the fact that the master has been appointed. We must assume that the purpose of the order was to appoint the master a receiver. The order was based on a notice that an application would be made for the appointment of a receiver, and it was issued in response to that application. Assuming, then, this to be the true interpretation of the order, we desire to take this occasion to say, that we cannot sanction the appointment of masters as receivers in such cases as this, nor in fact should a master be appointed in any case.

As to the one appointed here, the gentle-

man who so worthily fills the office of master for Newberry county, there certainly could be no objection in respect to his qualification. He is well known to the court, and we have no doubt that he would discharge the duties incident to the office of receiver faithfully and to the entire satisfaction of all parties interested; but in our judgment it is contrary to the policy of the law, that a master should occupy such a position. His official duties as master are more or less in conflict or may become so with his duties as receiver; certainly in the special case in which he may be appointed he could not act as master, if, in the progress of the case it became necessary for the court to have the aid of a master in adjusting his accounts, &c., &c.

We appreciate fully what was said in *Ex parte Fletcher*, 6 Ves. 427, on the subject. The court said: "Nor will a man be appointed receiver whose position may cause difficulty in administering justice. A master in chancery accordingly was disqualified from being appointed a receiver, because, being an officer whose duty it might be to pass upon the accounts and check the conduct of the receiver, his appointment was open to objection on very obvious grounds." So, too, in *Ex parte Pincke*, 2 Mer. 452, it was said: "The same reason which disqualifies a master applies with equal force to one who acts as solicitor under a commission of lunacy." See also *Kerr Rec.* 130.

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\*The master is an officer of the court, whose duties require his constant attendance thereon. He is frequently called upon to prepare cases for the consideration of the court, and his presence at all times is necessary. To permit him to assume the duties of receiver, might not only call him from his office, but in many cases would deprive the court of that aid and assistance which sometimes is so necessary in ascertaining the facts of a case, and which, on account of his experience and knowledge of parties and witnesses, he is so well qualified to give. If he can be appointed in one case, why not in every case? and, if so, this would in effect destroy the office of master.

We think the practice is a bad one, and we avail ourselves of this case to express our disapprobation of such appointments. Besides, it is by no means certain that the bond of the master, as master, would cover his liabilities, if any, as receiver. It is true we have found no direct authority in this State forbidding the appointment of a master as receiver, but our judgment is supported by analogy derived from the action of the court in other matters. In *Ex parte Hunter*, Rice Ch. 293, the court declined to sanction the appointment of a husband as trustee of the wife's property. The position taken there will apply to some extent to the question now under consideration.

As we have already said, we do not wish



to be understood as passing any judgment upon the merits of this case, nor of indicating any opinion that this is not a proper case for the appointment of a receiver. This is left open so that the respondent may adopt such course as he may be advised.

It is the judgment of this court that the order of the Circuit Court be reversed.

### 19 S. C. 489

THOMPSON v. LEE.

(April Term, 1883.)

#### [1. *New Trial* ⚡66.]

The jury are bound to take the law of the case from the court, and whenever they disregard their instructions as to the law, their verdict should be promptly set aside and a new trial granted. *Dent v. Bryce*, 16 S. C. 14, affirmed.

[Ed. Note.—Cited in *Summer v. Kelly*, 38 S. C. 512, 17 S. E. 364; *Going v. Mutual Ben. Life Ins. Co.*, 58 S. C. 213, 36 S. E. 556; *Virginia-Carolina Chemical Co. v. Kirven*, 65 S. C. 205, 43 S. E. 658.

For other cases, see *New Trial*, Cent. Dig. § 132; Dec. Dig. ⚡66.]

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#### [2. *Replevin* ⚡93.]

\*In action for the recovery of personal property, the verdict must be in the alternative—for the possession of the property or for its value in case such possession cannot be had.

[Ed. Note.—Cited in *Lockhart v. Little*, 30 S. C. 328, 9 S. E. 511; *Archer v. Long*, 32 S. C. 185, 11 S. E. 86; *Finley v. Cudd*, 42 S. C. 127, 20 S. E. 32.

For other cases, see *Replevin*, Cent. Dig. § 366; Dec. Dig. ⚡93.]

#### [3. *Replevin* ⚡93.]

The jury having been instructed that they must find for the plaintiff the personal property in dispute, and must disregard the counter-claim, a verdict for defendant for one dollar damages cannot be cured by defendant's release of the property claimed.

[Ed. Note.—Cited in *McCord v. Blackwell*, 31 S. C. 138, 9 S. E. 777; *Archer v. Long*, 32 S. C. 186, 11 S. E. 86.

For other cases, see *Replevin*, Cent. Dig. § 375; Dec. Dig. ⚡93.]

[This case is also cited in *Summer v. Kelly*, 38 S. C. 508, 17 S. E. 364, and distinguished therefrom.]

Before Wallace, J., Spartanburg, October, 1882.

Action by W. W. Thompson against C. Lee, commenced December 26th, 1881.

The opinion states the case.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, contra.

July 4th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover possession of personal property (a horse), and the plaintiff, having given the undertaking required by the code, the sheriff seized the horse and delivered him to the plaintiff. The defendant, in his an-

swer, admitted that the plaintiff was the owner of the horse, but denied plaintiff's right to possession or value of the horse, alleging that the horse was found trespassing on the lands of defendant, and had been taken up by him and retained in his possession until taken from him by the sheriff, under the proceedings in this action. The defendant also pleaded, as a counter-claim, the damages which he had sustained (\$5) by reason of said trespass, and demanded a return of the horse, \$25 for the taking thereof, and \$5, the damages as aforesaid. The plaintiff, in his reply, denied the allegations upon which the counter-claim was based.

At the trial the Circuit judge charged the jury "that plaintiff was entitled to a verdict for a retention of the horse in his hands for actual damages so suffered, and that the counter-claim of defendant could not be considered in this action." The jury, however, seem to have taken a different view of the

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law, and \*returned the following verdict: "We find for the defendant one dollar." A motion was thereupon made to set aside the verdict and for a new trial. After hearing argument the Circuit judge refused the motion upon condition that the defendant release his claim to the possession of the horse, and held that the counter-claim would be sustained in this action. The defendant then entered on the record a release to the possession of the horse. A motion was thereupon made that the plaintiff have judgment for costs, or at least that the defendant be not allowed to have them. His Honor overruled the motion and held the defendant entitled to costs.

The defendant having entered judgment against the plaintiff for the amount of the verdict, together with costs, the plaintiff took this appeal, alleging that the Circuit judge erred: "1. In refusing the motion for a new trial. 2. In holding that the new trial should not be granted, although the verdict was directly contrary to his charge and to the testimony in the case. 3. In allowing the defendant to enter a release of claim to the horse and thereafter to enter up judgment against the plaintiff for damages on counter-claim and for costs. 4. In not giving judgment for the plaintiff, notwithstanding the verdict. 5. In holding that, upon the verdict, the defendant was entitled to costs."

We think that there was error in refusing the motion for a new trial, as is conclusively shown by the case of *Dent v. Bryce*, 16 S. C. 14. The jury are bound to take the law of the case from the court, and whenever they undertake to disregard the instructions of the court as to the law, their verdict should be promptly set aside and a new trial ordered. We need not undertake to add anything to what is so well said in the case cited, upon this point, as it must be

manifest that any other course would be utterly at variance with the principles governing a trial by jury, and would tend to undermine the authority of the court.

In this case the Circuit judge had clearly and explicitly instructed the jury that the plaintiff was entitled to a verdict, and that the counter-claim could not be allowed in this action, and yet in the face of such instructions, the jury, usurping the province of the court, have undertaken to render a

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verdict directly in violation of such instructions. The jury were correctly charged that the plaintiff was entitled to a verdict, whether the counter-claim could be pleaded in this action or not—a question upon which we are not now called upon to express any opinion—for the plaintiff was unquestionably entitled to judgment for the retention of the possession of the horse, which was admitted to be his. Upon this ground, if there were no other, the plaintiff was entitled to a new trial, even if it be conceded that the counter-claim could be set up in an action like this.

But even if the defendant had been entitled to a verdict, the form of the one rendered is not sufficient, as it should have been in the alternative. *Robbins v. Slatterly*, Mss. Dec. No. 712, filed April 15th, 1879, recognized and followed in the recent case of *Eason v. Miller & Kelly*, 18 S. C. 381. The subsequent action of the defendant in releasing his claim to the possession of the horse cannot have the effect of supplying the deficiency in the verdict, and certainly cannot be allowed to have the effect of throwing the costs upon the plaintiff. If the jury had found their verdict as they were directed to find, and as the law required them to find, that the plaintiff was entitled to retain possession of the horse, then no question as to costs could have arisen, as the plaintiff would undoubtedly have been entitled to recover the costs which he had incurred in an action to recover possession of a horse admitted to be his.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

19 S. C. 492

Ex parte JOHNSON.

GIBBES v. RAILROAD COMPANY.

STATE, ex relatione ATTORNEY-GENERAL,  
v. SAME.

(April Term, 1883.)

[1. *Appeal and Error* ⇨1022.]

Findings of fact by master and Circuit judge sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⇨1022.]

[2. *Master and Servant* ⇨101, 102.]

In action against the receiver of a railroad company for damages for the death of a fireman caused by the explosion of an engine, the

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Circuit judge \*correctly ruled that "the measure of the receiver's duty was the exercise of ordinary care in the selection of machinery." &c.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 173; Dec. Dig. ⇨101, 102.]

3. The decision in *Gunter v. Graniteville Manufacturing Company*, 18 S. C. 262 [44 Am. Rep. 573], stated.

Before Witherspoon, J., Richland, July, 1882.

The case is thus stated in the Circuit decree:

On November 17th, 1879, a locomotive engine of the Greenville and Columbia Railroad Company, called No. 21 or Chatooga, attached to a material train, exploded, so severely injuring the engineer, William E. Milligan, William Johnson, the fireman, and Henry Toliver, a train hand, that they each died very soon thereafter from the effects of said injuries. At the time of the explosion the Greenville and Columbia Railroad was in the custody and control of James Conner, who had been appointed by the court receiver of said road. The deceased parties were employes of the said James Conner as receiver.

Mary Johnson, as administratrix of William Johnson, the deceased fireman, by leave of the court filed her petition in this cause, alleging that her intestate came to his death as an employe of James Conner, receiver, through the carelessness, negligence and fault of the said James Conner, receiver, and that she, as administratrix aforesaid, is entitled to recover \$5,000 damages. The petition was amended so as to allege the incompetence of William E. Milligan, the engineer.

It was referred to N. B. Barnwell, master, "to hear and determine all issues of law and fact arising upon the pleadings." On May 4th, 1882, the master filed his report, in which he concludes and finds as matter of law and fact, that the petition herein should be dismissed. Mary Johnson, administratrix, excepts to the report of the master, and the cause has been heard by me on said exceptions.

The relation of master and servant having existed, it is proper to consider some of the duties, obligations and liabilities that are incident to this relation. The master is bound to the exercise of reasonable care in reference to all the appliances of his business and to protect his servant from injuries by reason of latent or unseen defects, so far as human care and foresight can rea-

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sonably \*accomplish that result. He is bound to the exercise of ordinary care in the selection of competent servants, to see that they



continue to be competent during their retention in service, and to see that the machinery originally suitable for the work is kept in proper repair. The measure of the master's duty and liability to his servant is ordinary reasonable care, having reference to the business in which his servants are employed. The master cannot be held liable unless the injury is the result of his fault or negligence.

In an employment where dangerous machinery is used, the servant knows, or is bound to know, that there may be latent defects in such machinery that ordinary care upon the part of the master would not detect, and from such latent defects injuries may occur to him which are to be regarded in law as unavoidable and as risks assumed by the servant as incident to the employment. Before the servant can recover for injuries occasioned by defective or unsuitable machinery, it must appear that the machinery was in fact defective, that the injury was occasioned by such defect, and that the master had notice of the defect, or would have known of it if he had exercised ordinary care. *Wood M. & S. 743*. The burden of proving negligence is on the servant, as the master is presumed to have discharged his duty and obligations to the servant. Did the master err in concluding that Milligan was a competent engineer? [Here follows a statement of the evidence.] From the testimony I must concur with the master, as a matter of fact, that Milligan was a competent engineer.

Was the explosion the result of a defect in the engine, or was it occasioned by the tying down of the safety valve? [Here follows a further statement of the evidence.] From the testimony I conclude that the explosion resulted from the carelessness of the engineer in tying down the safety valve, and not from the defective or unsafe condition of the engine. The employé assumes the risks incident to his employment, one of which is the negligence of his fellow-servant. This is implied in the contract between the parties. Such has been the law in this State from *Murray v. South Carolina Railroad, 1 McMull. 385* [36 Am. Dec. 268], to the recent case of *Gunter v. Graniteville Man-*

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\*ufacturing Company, 15 S. C. 444. It does not satisfactorily appear from the evidence that at the time of the explosion the engine was unsafe or defective. On the contrary, it appears from the testimony that the engine had but recently been overhauled, repaired and put in good order by competent machinists. The engine had been personally tested by the master mechanic before being put to service after repairing; with a view to safety the balances were adjusted so that the engine would relieve herself at the pressure to which she was limited by instructions.

Whilst it appears from the testimony that before being overhauled and repaired there was some apprehension among the employés as to the safety of the engine in consequence of her age, and from the fact that an engine of the same make had, several years before, exploded on the road, yet there is no evidence of any objection to the engine after she was overhauled and repaired, or of any notice thereof to the receiver, nor could he reasonably know of any defect. It does not appear to me, from the evidence, that the receiver failed to exercise ordinary care in the selection and superintendence of his operatives and machinery. I cannot conclude, from the testimony, that the petitioner's intestate came to his death in consequence of the carelessness or negligence of James Conner, receiver, and must, therefore, concur in the conclusions reached by the master.

I conclude as matter of fact: 1. That petitioner's intestate, William Johnson, was a fellow-servant with William E. Milligan in the employ of James Conner, receiver; 2. That William E. Milligan was a competent engineer; 3. That James Connor, receiver, exercised ordinary care in the selection and repairs of the engine, No. 21 (Chatooga), as well as in the selection and superintendence of competent employés to operate and repair said engine; 4. That the explosion of the engine No. 21 (Chatooga) was not the result of carelessness or negligence on the part of James Conner, receiver.

I conclude as matter of law: That the petitioner is not entitled to recover damages against James Conner, receiver, on account of the death of her intestate, William Johnson. It is, therefore, ordered and adjudged that the petition of Mary Johnson, administratrix, be dismissed with costs.

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\*From this decree the petitioner appealed to this court.

Messrs. J. T. Sloan, Jr., and W. H. Lyles, for appellant.

Messrs. Conner & Cheves, contra.

July 4th, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. This is a petition in the causes above stated, asking leave to bring an action against the receiver of the Greenville and Columbia Railroad Company to recover damages for the killing of petitioner's intestate, by the explosion of a boiler on one of the locomotives used on said road, which was alleged to be due to the negligence of the receiver in supplying suitable machinery, &c., and in employing an incompetent engineer. The receiver filed an answer denying the allegations of the petition, pleading contributory negligence on the part of the intestate, and resisting the prayer of the petition. The Circuit Court refused to grant leave to sue the receiver in a sep-

arate action, but referred it to the master "to hear and determine all issues of law and fact arising upon the pleadings." To this action of the court there was no exception, and no appeal has been taken therefrom. On the contrary, the hearing before the master was proceeded with without objection, and he made his report, in which he finds, substantially, as matter of fact, that the death of intestate was not due to any negligence on the part of the receiver, and, as matter of law, that the petition be dismissed.

To this report the petitioner filed sundry exceptions, and the case came before the Circuit judge upon this report and the exceptions thereto, and he, concurring in the views of the master, rendered judgment dismissing the petition. From this judgment the petitioner appeals upon several grounds, all of which, except the seventh (not to mention the eighth, which is of too general a character to require notice,) raise simply questions of fact. As to these questions it is sufficient for us to say that we are not only unable to discover any ground which, under the well-settled rule of this court, would warrant us in disturbing the finding of fact by the mas-

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ter, concurred in by the Circuit \*judge, but, on the contrary, a careful examination of the testimony incorporated in the "Case" satisfies us that such findings are well supported by the evidence.

The seventh ground of appeal, which is the only one raising a question of law, is in the following words: "Because he (the Circuit judge) concluded, as matter of law, that the measure of the receiver's duty was the exercise of ordinary care in the selection of machinery, &c." We see no error in this. The receiver was not bound to exercise extraordinary care, and we do not know what terms the Circuit judge could have employed that would have more appropriately indicated the degree of care required of the receiver. The basis of the claim is the negligence of the receiver, and the definition of that term, as given by Wharton and approved by this court in *Gunter v. Graniteville Manufacturing Company*, 15 S. C. 450, necessarily implies that ordinary care is all that is required. Wharton, § 1, p. 1, says: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under existing circumstances, would not have done, the essence of the fault being either in omission or commission." This is no more than saying that negligence is the want of ordinary care.

The appellant's counsel, in his argument, seems to contend that the true measure of liability is the want of "all reasonable and proper care," but we confess that the difference between those terms and the terms "or-

inary care" appears to us inappreciable. Self-interest usually prompts those engaged in any enterprise to bestow upon it all reasonable and proper care, and hence the words "ordinary care" imply reasonable and proper care, inasmuch as that is the degree of care which we find that persons ordinarily bestow upon their affairs. The citation of the second decision in *Gunter v. Graniteville Manufacturing Company*, 18 S. C. 262 [44 Am. Rep. 573], to sustain the view contended for by appellant betrays a misconception of that case. There the doctrine was distinctly recognized, that an employer was not bound to furnish the best and most approved machinery, but only such as a reasonable and prudent person would ordinarily have used

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under similar \*circumstances; that is, he must use ordinary care in the selection of his machinery, &c.

This doctrine is fully sustained by the authorities. As is said in 2 *Thomp. Negl.* 982, without citing others, in speaking of the duty of the employer in selecting and maintaining safe machinery and competent servants: "He is not an insurer of the safety of his servants in this respect. He does not warrant the competency of his servants or the sufficiency of his machinery. His duty to them is discharged by the exercise of reasonable or ordinary care."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

19 S. C. 498

CLARK v. MELTON.

(April Term, 1883.)

## [1. Evidence ⇨451.]

Under the plea of nul tiel record the existence of the judgment sued on is denied, and, being thus denied, its existence can be determined alone by an inspection of the record itself; and, if such inspection shows an omission in the record of any essential feature, it is fatally defective, and no testimony deors the record can supply the omission or cure the defect.

[Ed. Note.—Cited in *Turner v. Malone*, 24 S. C. 402; *Adams v. Richardson*, 30 S. C. 217, 9 S. E. 95; *Woods v. Bryan*, 41 S. C. 80, 19 S. E. 218, 44 Am. St. Rep. 688.

For other cases, see *Evidence*, Cent. Dig. § 2092; Dec. Dig. ⇨451.]

## [2. Judgment ⇨282.]

A judgment regularly obtained in open court, and prepared by the plaintiff's attorney in proper form for entry, and lodged in the clerk's office, and by such clerk regularly entered on his journal and in his abstract of judgments, but not tested, and the date of signing and entry not written on the margin, and the time of filing not endorsed, is a valid judgment, and has lien from its entry in the abstract of judgments.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 556; Dec. Dig. ⇨282.]


## [3. Judgment ⇨282.]

The judgment is the judicial determination of the rights of the parties, and that being had)



the omission by the clerk to sign and date it, and to mark it filed, was a mere irregularity, and may be corrected at any time.

[Ed. Note.—Cited in *Genobles v. West*, 23 S. C. 160; *Clark v. Wright*, 24 S. C. 532; *Cromer v. Boineast*, 27 S. C. 445, 3 S. E. 849; *Hardin v. Melton*, 28 S. C. 46, 4 S. E. 805, 9 S. E. 423; *King v. Belcher*, 30 S. C. 382, 384, 9 S. E. 359; *Gowan v. Gentry*, 32 S. C. 377, 11 S. E. 82; *Mason & Risch Co. v. Music Co.*, 45 S. C. 14, 22 S. E. 755; *Archer v. Long*, 46 S. C. 295, 24 S. E. 83; *Burwell & Dunn Co. v. Chapman*, 59 S. C. 586, 38 S. E. 222; *Blohme v. Schmancke*, 81 S. C. 87, 61 S. E. 1060; *Connor v. McCoy*, 83 S. C. 172, 65 S. E. 257.

For other cases, see *Judgment, Cent. Dig.* §§ 554-556; *Dec. Dig.*  282.]

Before Witherspoon, J., Richland, July, 1882.

The facts are stated in the opinion of this court.

The Circuit decree, omitting its statement, was as follows:

The sole issue before the master was a contest between these two creditors as to priority in the distribution of assets. The master finds and reports as matter of law that the Ann E. Wright judgment is entitled to rank

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first in the distribution of the assets \*of C. D. Melton, deceased. Mary B. Melton, a judgment creditor, excepts to the findings and the report of the master, giving priority to the alleged judgment of Ann E. Wright, and the case came on to be heard, upon said exceptions, at July Term of the court for Richland county. The exceptions are based upon the invalidity of the alleged judgment of Ann E. Wright to rank as a final judgment in the distribution of assets, inasmuch as the writ in debt offered was neither signed nor sealed by clerk, and that the judgment formula offered was not officially signed by clerk, with statement of time when signed and entered, as provided by law.

When the existence of a judgment is put in issue by the plea of nul tiel record, it must be proved by the record itself, which is inspected by the court wherein it is, if it be a record of the same court. 2 Tidd 942. It has been decided in this State that the act of 1789 does not apply to interlocutory, but only to final judgments, and that reference must be had to the period of the death of intestate to ascertain the rights of conflicting creditors. Does the record offered by Ann E. Wright establish a final judgment according to law, against C. D. Melton at the time of his death?

In *Miller & Leckie v. Jones*, 2 Speers 315, speaking of the clerk's assessment, as making plaintiff's chose in action res judicata, or a debt of record, ascertained and adjudged, the court say: "Nothing remained but to enter up the written formula of such judgment." This was done within the time required by law, and accordingly the entry by a fiction of law related back to the first day of the term, when the judgment debtor was alive, although dead at the time of the entry. This

entry at common law could be made at any time during the next vacation, after the assessment term, and still relate back to the term, except in respect to purchasers. *Dibble v. Taylor*, 2 Speers 308 [42 Am. Dec. 368]. In *McIntosh v. Wright*, Rich. Eq. Cas. 385, the judgment on assessment of clerk was not entered up until nearly two years after the assessment, and it was held to constitute only an interlocutory judgment. The judgment had been in its nature final, for, until the expiration of the time limited, nothing remained but the final entry, after which scire

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facias became necessary, be\*fore entry, which rendered the judgment, upon assessment, only interlocutory.

It would appear from these cases, that besides interlocutory judgments as such (quod computet) and final judgments as such, when finally and properly entered up, there is an intermediate class—final orders for judgment—which may become final as such or be relegated back to the condition of interlocutory judgments, accordingly as the judgment creditor enters up or fails to enter up final judgment, according to law. In *Dibble v. Taylor* it is held in presumption of law, that every entry of judgment is then the regular and formal registry and enrollment of what was adjudged by the court. Referring to the assessment by clerk, it is stated that the final consideration of the court has been had, and nothing remains but the final entry. Our rule of court which prohibits the entry of judgment during term time, does not at all affect its relation back when entered in proper time. In *Mills v. Jones*, 2 Rich. 394, it is held that, under act of 1789, judgments take rank from date of entry, and the entry is the evidence and authentication of the judgment.

It will be remembered that this is a trial by the record itself, in which legal rights are to be determined by rules of evidence, and legal assets are to be distributed according to the character of the demands established. Under the former practice, applicable to this issue, the record of the judgment was in the judgment-roll. The judgment formula offered by Ann E. Wright as part of the record of a judgment, is a paper signed by an attorney, without the official signature of clerk, and does not show the time when signed and entered, as provided by law. See Act of 1839. It does not furnish evidence of filing or recording, nor does it state amount of costs or show the taxation of costs by clerk. The formula shows no evidence of authentication as a record of the court. The "abstract of judgments," under act of 1839, contains entries in cases "wherein judgment may be signed." It is but a summary of original entries; and, as secondary evidence, cannot be resorted to when the original record is produced before the master, and fails to furnish the evidence of its validity.

I concur with the master, that the accept-

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ance of service by (C. \*D). Melton, on the writ in debt, cures the defect arising from the omission of clerk to sign and seal the writ. I cannot, however, agree and concur in the master's conclusion, giving construction to the act of 1839, the effect of the revival of judgment against W. A. Clark, administrator, or the authority of the court to amend the record so as to give validity to the alleged judgment of Ann E. Wright. At common law, final judgments were signed by the master or prothonotaries. 2 Tidd's Pr. 930. Under the act of 1712, 2 Stat. 528, the day of the month and year was required to be entered on the margin of the roll by the officer signing judgments.

I must, therefore, conclude that the signing of judgment officially by clerk, under act of 1839, is declaratory of the common law, and that the official signing and entry are essential to the validity of a final judgment according to law; that reference must be had to the period of C. D. Melton's death to ascertain the character or rank of the claims of creditors, which cannot be affected by the subsequent revival of judgment against the administrator, or the amending of the record. The case of Farrar, Adm'r, v. Carmichael, 1 Brev. 392, cited by the master, does not appear to be decisive of this issue. In that case the judgment was regularly entered, and the error was as to date of judgment. The record, in this case, does not show the entry or date of judgment according to law.

I conclude, as matter of law, first, that the record of the alleged judgment of Ann E. Wright, as offered before the master, does not entitle the said Ann E. Wright to rank as a judgment creditor in the distribution of the assets of C. D. Melton, deceased, as said judgment has not been signed and entered up according to law, and as said record does not furnish evidence of the final rendition of judgment by the court. Second, that the claim of Ann E. Wright can only rank as a sealed note demand in the administration of the estate of C. D. Melton.

It is, therefore, ordered, adjudged and decreed that the master's report, allowing the claim of Ann E. Wright, executrix, to rank first in the administration of the assets of C. D. Melton, deceased, be overruled and set aside, and that said claim take rank as a sealed note demand against said estate.

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\*Mrs. Ann E. Wright appealed to this court upon the following exceptions (omitting two not considered):

1. "Because of error in holding that the judgment offered by Ann E. Wright, executrix, as obtained against C. D. Melton, does not entitle the said Ann E. Wright to rank as a judgment creditor in the distribution of the assets of the estate of said C. D. Mel-

ton, because the judgment formula was not signed on margin by the clerk.

2. "Because of error in holding that the record of the judgment of 'Ann E. Wright, executrix, v. C. D. Melton' does not furnish evidence of its rendition by the court, and is thereby invalid as a judgment.

3. "Because of error in holding that the claim of Ann E. Wright against C. D. Melton can only rank as a sealed note in the administration of the assets of his estate.

4. "Because of error in holding that the revival of the judgment in 1877, by summons against the administrator of the judgment debtor, did not cure any defects or irregularities in the original record.

5. "Because of error in not holding that (the cause having been matured by regular proceedings in 1867—entered on inquiry docket at a regular term of the court—referred to the clerk, by the presiding judge, to assess damages—the assessment made and entered on minutes—judgment formula regularly made out and filed with the clerk—judgment entered in the book called 'abstract of judgments'—execution issued—and judgment revived in 1877) the misprision of the clerk, in failing to write his name on the judgment formula at time of original entry, has been cured, if it ever was a fatal irregularity.

7. "Because of error in holding that the 'abstract of judgments' furnished only secondary evidence of the entry of judgments."

[For subsequent opinion, see Hardin v. Clark, 32 S. C. 480, 11 S. E. 304.]

Messrs. Hart & Hart, for appellants.

The Wright judgment was a final judgment and not interlocutory. Freem. Judg., §§ 2, 38; 1 Bay 451; 3 Rich. 195; Cheves 29; Rich. Eq. Cas. 385; 2 Speers 314, 315;

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2 Rich. 394; 8 \*Id. 171. The judgment here was regularly entered. 2 Tidd's Pr. 931; 11 Stat. 72, § 5; Freem. Judg. 37, 38; 6 Hill (N. Y.) 646; 8 N. Y. 67. The clerk's omissions were mere irregularities. 1 Brev. 392; 25 N. Y. 489; 14 Minn. 542; 50 Geo. 378; 20 How. 102; 1 Bailey 619; 10 S. C. 297. These have been cured by the proceedings reviving the judgment. 10 S. C. 207, 298; 13 Id. 361; 14 Id. 223. The judgment should, in this proceeding, be regarded as amended of course. 4 Rich. Eq. 152; 11 How. 480; 18 Id. 404; 11 Otto 557.

Mr. J. D. Pope, contra.

Was this such a judgment as could take rank under the executors' act of 1789? It was not. 2 Rich. 393. The record must stand or fall by itself. 9 Bac. Abr. 556; Steph. Pl. 130; Freem. Judg. 407. No other evidence can be introduced on an issue of nuli tiel record, until it is shown that there was once a duly authenticated record in existence which has been lost. 1 Greenl. Evid., § 509; 4 Rich. Eq. 152. The record itself is here



produced, and on inspection proves to be no valid judgment, not having been authenticated. 2 Arch. Pl. 206; 2 Speers 308; 2 Barb. Ch. 165. And the claim can rank only as a simple contract debt. 3 Phil. Ev. 368. [After citing and commenting on the cases relied upon by appellant and the acts of 1789 and 1839, counsel cited contra.] 2 Brev. 183; 4 McCord 291; Mill. Comp. 136; 2 Hill 438; 3 Id. 4; 2 Strobh. 218; 1 McMull. 490; 5 Rich. 372; 10 Id. 400.

July 4th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. C. D. Melton, late of Richland county and State aforesaid, died intestate in December, 1875. The respondent, W. A. Clark, administered upon his estate, and immediately possessed himself of the personal assets, from which he realized the sum of \$5,788.44. In the life-time of Mr. Melton many judgments were recovered against him in the Court of Common Pleas for Chester county, where he at one time resided. These judgments, with the exception perhaps of the one now attempted to be set

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up by the appellant, Mrs. Ann \*E. Wright, were purchased after the death of the intestate by and assigned to Mrs. Mary B. Melton, the widow of the deceased.

Mr. Clark, shortly after obtaining letters of administration, advertised in the Columbia papers for creditors, and supposing that all claims had been presented, proceeded to administer the estate, and with the consent of Mrs. Melton paid off many claims which were junior to her judgments, until he has now exhausted the personal estate. Recently he has received notice of the claim of Mrs. Wright, now presented as a senior judgment. Under these circumstances this action was commenced by the administrator on which the above facts were stated, the administrator complaining that, having in hand no assets or other personal estate, he cannot proceed further with the administration without the intervention and protection of the court, and giving information to the court that the intestate died seized and possessed of a lot of land with improvements thereon in the city of Columbia, containing about one acre, and demanding judgment, that he be permitted to account before the court, that creditors be called in, and that the real estate be sold and the proceeds be applied to the payment of such debts as might be established, and to that end that Mrs. Mary B. Melton be required to elect whether she will claim dower out of said real estate.

Under a call for creditors by the master, Mr. Barnwell, to whom the case was referred, various claims were presented. No objection, however, was made to any except to that of Mrs. Wright, the appellant here. This claim was resisted by Mrs. Melton, the owner of the junior judgments, on the ground that no

legal judgment had ever been entered in favor of Mrs. Wright, and the sole question in the case is in reference to this judgment. Is it entitled to take rank in the settlement of the estate as a senior judgment, having priority over those held by Mrs. Melton?

The facts are as follows: At the fall term of the Court of Common Pleas for Chester county, 1869, there stood upon the inquiry docket, an action in debt of Ann E. Wright, executrix, v. C. D. Melton. The declaration had been filed October 28th, 1867, and interlocutory judgment endorsed thereon by the

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clerk \*on same day with assessment of the amount due. During term time it was regularly referred to the clerk by the presiding judge and damages assessed and entered on the journal according to the then existing practice. After the term, to wit, November 2d, 1867, the judgment formula was made out by the attorney of the plaintiff and delivered to the clerk and fi. fa. lodged. The clerk filed this formula, recorded it, entered it in the "abstract of judgments," signed and tested the fi. fa., but omitted to endorse on the formula the date of the filing and also to sign it officially.

It remained in this condition for ten years, when, at the October Term of the court, 1877, by regular summons to the administrator, Mr. Clark, it was revived without objection "in accordance with the force and effect of the original recovery, with leave to issue execution." It appears also that the original writ in this case had not been signed or sealed by the clerk, but Melton had accepted service by an endorsement in his handwriting and signed by himself.

The record in the case of Ann E. Wright, executrix, v. C. D. Melton, with the defects referred to above appearing on its face, was introduced before the master and relied on by Mrs. Wright as evidence of a valid judgment in her favor, which, being senior to all other judgments, she claimed should be entitled to priority in the application of the assets of the deceased. Mrs. Melton, holding the junior judgments about which there was no dispute, objected to all testimony outside the record and pleaded nul tiel record as to the judgment of Mrs. Wright, claiming that the absence of the clerk's official signature from the judgment formula and of the date of the filing was fatal to that paper as a judgment. The master overruled the objection of Mrs. Melton, and, finding as matter of law that Mrs. Wright had a valid judgment against the deceased which was senior to that held by Mrs. Melton, he reported that Mrs. Wright's judgment was entitled to priority in the distribution of the assets of the deceased.

Upon exceptions this report was overruled by Judge Witherspoon, who held as matter of law: First, "that the alleged record of the judgment in question did not entitle the said

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Ann E. \*Wright to rank as a judgment creditor in the distribution of the assets of C. D. Melton, deceased, as said judgment had not been signed and entered up according to law, and as said record did not furnish evidence of the final rendition of judgment by the court; and second, that the claim of Ann E. Wright could only rank as a sealed note in the administration of the estate of C. D. Melton."

Some objection was made below to the record because the writ had not been signed or sealed by the clerk, but Mr. Melton having accepted the legal service thereof, this was held by the master—which conclusion was sustained by the Circuit judge—to be sufficient. This ruling has not been assailed seriously here, so that, as already stated, the only question before us is whether the omission by the clerk to do his duty in signing and dating the judgment prepared by the attorney of Mrs. Wright prevents the paper from having the rank and character of a judgment of record, notwithstanding the fact that it was regularly filed and entered in the abstract of judgments with all the required formalities.

The argument of the respondent is: First. That under the plea of nul tiel record, the existence of the judgment is denied, and that that fact can be determined alone, when thus denied, by an inspection of the record itself; and if such inspection shows an omission in said record of any essential feature it is fatal, and that no outside testimony dehors the record can supply the omission or cure the defect. In other words, the judgment must stand or fall upon the record. Second. That an inspection of the record in this case shows the omissions stated above, which respondent contends are fatal.

The first proposition is doubtless correct, but the second is open to examination and is really the question in this case. Was it absolutely essential to the validity of the Wright judgment, that the formula prepared and lodged in the clerk's office by the attorney should have the date of filing and the official signature of the clerk endorsed thereon? And did the omission by the clerk to do his duty in these respects, although he entered it properly in the "abstract book,"

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deprive the paper of the \*character of a judgment in a contest over the application of the assets of a deceased debtor?

We think the Circuit judge was in error in holding these omissions by the clerk as fatal. A judgment is the application of the law to the facts found in a case, and it has been defined to be the legal determination of the rights of the parties before the court. Ordinarily it is pronounced upon a verdict ascertaining the facts, but, under the former practice, when a party was sued upon a note or other contract where the amount in-

volved was capable of being ascertained by a mere computation, and the defendant interposed no defense, judgment was supposed to be pronounced by the court by ordering a reference to the clerk for assessment, the order of reference being in substance and fact the judgment of the court for whatever sum might be assessed by the clerk.

To give force and effect, however, to this judgment, it is true that a formula was required to be prepared and filed in the clerk's office, and to be entered in the book entitled "abstract of judgments," and, under an act of the general assembly, the clerk in whose office this formula was filed was required to date it and endorse his official signature. It will be observed, however, that this formula, &c., did not constitute the judgment of the court, nor did the dating or signing by the clerk with his official signature add anything to its intrinsic character. The judgment issues from the court, not from the attorneys or the clerk; it precedes the formula, and is authority upon which the formula is prepared, but the formula constitutes no part of the judgment. It is only the evidence of the existence of the judgment, and entitles the plaintiff to have it enforced.

The judgment, as we have said, is the judicial determination of the rights of the parties, but it is not self-operative; it cannot enforce itself; it becomes necessary, therefore, that some machinery should be adopted to secure to the successful party the fruits of his recovery. Hence, it was provided by act, that a supposed copy of the judgment pronounced by the court should be filed in the clerk's office, which, being done, gave a lien on the property of the debtor, and authorized the issuing of a *fi. fa.* for its enforcement, and the object of the act in re-

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quiring that \*this paper should be dated and signed officially by the clerk no doubt was that all parties should have the means of knowing of the lien, so that all persons dealing with the debtor might be put upon their guard.

So far as the parties themselves were concerned, the dating and signing amounted to nothing. And even as to third parties, while the date and the official signature of the clerk would best authenticate the judgment and put it beyond dispute, yet as to its effect as a notice, the filing is the main matter. When entered and filed in the proper office its existence could be as well ascertained without the date and signature as with them. The entry and filing are the essential facts, and whether this had taken place at a particular time could be discovered by an examination of the office as certainly where the formula had not been signed and dated by the clerk as if these things had been done.

The first step in the proceeding is the lodgment and filing of the formula. The date and signature of the clerk follow, but it is



the existence of the paper in the office which gives notice to third parties, and the absence of the date and signature cannot be discovered without disclosing the existence of the paper itself, because before these can be affixed the paper must be in existence and in the proper office. Before a party can safely deal with a debtor, or, in fact, with any one, he should examine the clerk's and sheriff's office and see his condition, and where a judgment has been entered and filed against him this fact can be as well ascertained, though it may not be dated and signed, as if it had been, and especially would this be so where the judgment had been entered in the "book of abstracts," as was done in this case, with all the required formalities.

To hold, then, that the failure of the clerk in the matter suggested here destroyed the judgment, would, in our opinion, be sacrificing substance to a shadow, and would overthrow established and adjudicated rights upon the merest technicality. There is no pretense that this debt is not due or that it has ever been paid, nor is it denied that it was sued upon and prosecuted to judgment, nor is it claimed that the failure on the part of the clerk to date and sign the formula mis-

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led any one. It is claimed \*that because of this failure simply, not of Mrs. Wright, but of the clerk, she would lose her debt.

The recording acts are much more stringent in their provisions requiring record of certain instruments, deeds and mortgages, &c., than the act of 1839 as to this matter. The failure to record such papers within the time prescribed renders them, in the language of the acts, absolutely void, and yet the courts have always construed these acts liberally, and have uniformly held that where the object of the recording, to wit, notice, has been accomplished or could have been accomplished by proper inquiry, the instruments in question should be declared valid. The act of 1839 does not declare that judgments not dated and signed shall be void; it simply directs the clerk to date and sign. If the failure to do this had a tendency to shut the door upon the judgment and to conceal it from the public, or if a third party could show that because this was not done he was misled to his injury, then there might be reason in holding that such omission would be fatal: but when no such effect has followed, and the judgment has been lodged and filed, it would be a most stringent construction to hold that because of such failure the whole proceeding is void.

This we cannot suppose was the object of the act. On the contrary, we are of the opinion that the omission here was a mere irregularity in a matter not vital to the judgment, but simply directory to the clerk, and may be corrected at any time. *Farrar v. Carmichael*, 1 Brev. 392; *Harrison v. Manufac-*

turing Company, 10 S. C. 297. The record shows that the judgment was filed, recorded and entered in the "abstract book" on November 2d, 1867, and we think it should take rank from that date, and being the senior judgment should have priority in the settlement of the estate of the intestate.

The view which we have taken of the question already discussed renders it unnecessary to consider the other points raised in the argument.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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19 S. C. \*510

\*SANDERS v. ETIWAN PHOSPHATE COMPANY.

(April Term, 1883.)

[1. *Trial* ⇨139, 159.]

Whether there is any evidence to support the allegations of the complaint is always a question of law for the court, and if there is a total lack of evidence to sustain its material allegations, a non-suit is not only proper but is demanded.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 339, 360; Dec. Dig. ⇨139, 159.]

[2. *Master and Servant* ⇨101, 102.]

In action by a laborer for damages sustained in the course of his employment as a result of defendant's failure to supply the necessary material and to employ careful and competent workmen, the evidence showed that defendant had not failed in its duty in these respects. *Heid*, that a non-suit was properly granted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 173; Dec. Dig. ⇨101, 102.]

[3. *Master and Servant* ⇨264.]

Negligence of any other character committed by the defendant through a representative was not alleged in the complaint, and, therefore, was not an issue in the cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. ⇨264.]

Before Fraser, J., Charleston, March, 1882.

Action by R. B. S. Sanders against the Etiwan Phosphate Company, commenced December 20th, 1881. The opinion states the case.

Messrs. Lee & Bowen, for appellant.

Mr. A. T. Smythe, contra.

July 5th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, appellant, while in the employment of the defendant, respondent, as carpenter, received an injury by the falling of a building which was undergoing repairs, and upon which the appellant with others was employed, and he seeks to recover damages for this injury, claiming in his complaint \$10,000 damages.

As a cause of action against the defendants, he alleges that he was, on or about

September 27th, 1881, in the employment of the defendants as a carpenter upon a building of the defendants; "that it was the duty of the defendants to provide good, safe and secure braces and stays in the repairing of said building; that the defendants, not regarding their duty, employed careless, negligent and unskillful workmen in propping

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said building \*with braces and stays in an unsafe, defective and insecure manner, of which they had notice; that for want of due care and attention to their duty in that behalf on the day and at the place aforesaid, and while said building was undergoing repairs aforesaid, for the use and service of the said defendants, and the plaintiff was on the same in the capacity aforesaid for the defendants, the said building by reason of unsafeness, defectiveness and insecurity thereof fell with the plaintiff," thereby causing the injury complained of.

At the hearing, upon the close of the plaintiff's testimony, the defendant moved for a non-suit, which was granted, Judge Fraser presiding. The plaintiff has appealed upon exceptions as follows: 1. "Because there was ample evidence to sustain the complaint of the plaintiff. 2. Because his Honor erred in ruling that there was no proof of the defendants' negligence, and that Whaley was only an employé, when there was evidence showing said Whaley to be a managing agent of the defendants, and also showing that there was negligence on the part of both the said Whaley and the said defendants, all of which were questions of fact and should have been referred to the jury. 3. Because there was evidence going to sustain every material allegation of plaintiff's complaint, and the plaintiff was entitled to the verdict of the jury upon it, and his Honor erred in not so ruling."

The only question before us is, whether the presiding judge committed error of law in granting the non-suit. A plaintiff's cause of action is found in the allegations of his complaint. Whether there is any evidence to support these allegations is always a question of law for the court. Whether the testimony, if any, when submitted, sustains their truth is for the jury. If, therefore, there is a total lack of evidence as to such of the allegations as are material—one or all—there is nothing to be submitted to the jury, and a non-suit in such case is not only proper but demanded. Hence, when the point is made whether a non-suit has been properly granted, the questions to be considered, are, first, what are the material allegations? and, secondly, whether there is a total failure of testimony as to these allegations.

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\*The plaintiff in this case has brought his action to recover damages for an injury resulting, as alleged, from the conduct of careless, negligent and unskillful workmen in the employment of the defendant; and the de-

fendant is sought to be made liable because such careless, negligent and unskillful workmen were employed. In other words, the cause of action relied on is that defendants employed such workmen with knowledge of their character. To have entitled the case, then, to go to the jury, there should have been some testimony that the workmen were careless, negligent and unskillful; that this was known to the defendants, or by proper attention might have been known, and that notwithstanding this they were employed by the defendants either directly or by an authorized agent.

Was there any testimony to these facts? The witnesses were Sanders, the plaintiff; T. L. Judson, Thornal and J. C. Judson. We have examined the reported testimony of these witnesses, and we fail to find a particle of positive evidence directed to the point of carelessness, negligence or unskillfulness on the part of the employés. These witnesses were all employed and seem to have been the leading carpenters. They claim to be mechanics of some experience. A number of others were engaged in the work, and the plaintiff himself says of them, that, taken as "a rule, they were pretty well fitted to the work." He does say, at another stage of the examination, that some of them were not fair hands, and he says that he complained to Mr. Whaley and had told him that he had better get rid of them.

This latter is the only statement in the entire examination which approaches the point of carelessness or negligence in the employés. This amounts to nothing more than that, in the opinion of the witnesses, those that he complained of could not be embraced in the category of "fair hands." This might be so in the sense that some were inferior to others and yet no responsibility attach to the employer on that account. There is no evidence that these were engaged in any part of the work for which they were unfitted. No doubt the character of the work required laborers and servants of different degrees of skill and experience, and that some were better than others is what is found in all work where a number is employed. The testimony

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\*here appears to us to amount to nothing more than this, and it entirely fails to bear upon the precise question which the case required.

The indirect testimony as to this point is found in the description given by these witnesses of the manner in which the building was propped, braced and stayed, and manner in which it fell. These witnesses were the carpenters who were engaged in this work. They do not say that the failure to brace the building properly was because those employed were careless, negligent or unskillful, and but for this carelessness the bracing would have been better done; but it appears that all was done that was thought neces-



sary, and that the building afterwards fell was not such a fact as by itself should have carried the case to the jury in an action against the employers for having employed careless and unskillful servants, knowing them to be so.

In *Gunter v. Graniteville Manufacturing Company*, 18 S. C. 262 [44 Am. Rep. 573], this court held that in cases like this the employer was responsible for his own negligent acts, or those of his representatives, and that he was under obligation to use due care in the employment of his underservants, co-laborers, &c., and also in furnishing proper material and machinery and implements, according to the nature of the work, and that due care should be observed as to these matters while the work was continued, and that negligence, or the want of due care in these respects, would render him liable for injuries resulting therefrom.

The appellant in his complaint here relied upon but one of these causes of action or grounds of responsibility, viz., the employment of careless and negligent workmen. This we have discussed, and, finding no reason to reverse the order of the Circuit judge upon the case as made in the pleadings, we might close without further remark; but the second ground of appeal assigns error to the presiding judge in that he ruled that there was no proof of the defendants' negligence and that Whaley was only an employé, when there was evidence showing said Whaley to be a managing agent of the defendants, and also showing that there was negligence on

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the part of both the said Whaley and the said defendants, all of which were questions of fact and should have been referred to the jury.

So far as the question of defendant's negligence was embraced in the complaint as to employing careless and negligent workmen, that has been disposed of. As to negligence of any other character committed through Whaley, as the representative of the defendant, occupying a higher position than a common workman or co-laborer with the others, there was no such question embraced in the pleadings, nor does it appear in the "Case" that the presiding judge made any ruling upon the subject. We suppose that the non-suit was granted because of the absence of all testimony to support the allegations in the complaint, and when we look to the complaint, the ground assigned was negligence by the defendant in employing the workmen. This did not involve the relation of Whaley to the company, except so far as Whaley may have been the agent through whom the workmen were employed, and whether this was so or not, still there was no testimony showing negligence in that respect on the part of either. Under the pleadings the general conduct of Whaley, even though he may have

been a representative of the defendant, was not involved, nor, so far as we can see, did the judge consider that question.

We do not, therefore, regard the second ground of appeal as before us. Nor is the question of liability of the defendant for negligence in not providing proper braces and stays, or for propping the building with braces and stays in an unsafe manner, properly involved, though it was discussed in the argument of counsel, yet there was no evidence implicating the defendant in this respect. On the contrary, the material for these things was abundant and there was no restraint upon the workmen as to its use.

It is the judgment of this court that the order below be affirmed.

19 S. C. \*515

\*CLAUSSEN & CO. v. EASTERLING.

(April Term, 1883.)

[1. *Attachment* ⇨258.]

Where an attachment has been levied, the defendant may attack it upon the ground that the allegations upon which it issued are untrue. In doubtful cases, an issue should be made for the jury, but this case having been heard and determined by the Circuit judge, on motion, without objection, this court did not interfere.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 916-921; Dec. Dig. ⇨258.]

[2. *Appeal and Error* ⇨993.]

The findings of fact by the Circuit judge from the affidavits submitted at such hearing, reviewed and approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3900; Dec. Dig. ⇨993.]

[3. *Attachment* ⇨238.]

A defendant to the action may take the proper steps to vacate an attachment issued against him upon allegations of a fraudulent transfer of his property, although not the owner of such property at the time the attachment was levied thereon.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 816; Dec. Dig. ⇨238.]

4. This case distinguished from *Metts v. Piedmont & Arlington Life Insurance Company*, 17 S. C. 120.

[5. *Appeal and Error* ⇨1012.]

[Cited in *Kerchner & Calder Bros. v. McCormac*, 25 S. C. 467, and *Tabb, etc., Co. v. Gelzer*, 43 S. C. 348, 21 S. E. 261, to the point that unless the decided preponderance of the testimony is against the finding of the circuit court its judgment must be sustained.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3990-3992; Dec. Dig. ⇨1012.]

Before Pressley, J., Barnwell, April, 1883.

This is an appeal from an order dissolving an attachment in the case of *J. C. H. Claussen & Co. against J. R. Easterling*. The action was commenced in February, 1883, and the motion to dissolve was noticed March 27th, and heard April 2d, 1883. The attachment had been issued upon an affidavit of one of the plaintiffs, setting forth the indebtedness, and charging a fraudu-

lent sale of goods and mortgage of chattels by the defendant to his mother, made to defeat this claim, no delivery having been made and the defendant continuing in possession. The motion to dissolve was based upon affidavits in which a bona fide indebtedness by the defendant to his mother was shown, and a fair and open sale of the goods and chattels made, and no retention of possession by the defendant. There were also affidavits in reply.

On April 6th, 1883, Judge Pressley filed the following order:

The motion before me in this case is to dissolve plaintiffs' attachment. It is founded on allegations of fraud by defendant in conveying to his mother a portion of his stock in trade and his other personal property, and yet retaining possession of it. The testimony is very clear that before said conveyance the mother had a bona fide, valid, re-

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corded mortgage on said prop\*erty, and that the debt secured by it had not been paid. In December last she took a second mortgage of the same property to secure the same debt. That may or may not have been necessary, but it was certainly a wise precaution in view of the fact that the stock in trade had been changed after the first mortgage.

But the mortgage not being disputed by plaintiff, he still claims and alleges that the release of defendant's equity of redemption to his mother was pretensive, and that he is still in possession. He does not attempt to prove that said release was for an amount less than the full value of the property, and he filed an affidavit of Mr. Dowling which directly corroborated the affidavit of defendant. He decided to sell out and quit that kind of business; besides, the sale of the stock offered to Mr. Dowling was not for cash, which could be concealed from defendant's creditors, but on credit for good security, which could easily be reached by defendant's creditors if his mother's claim was not superior to theirs. Failing to make the proposed sale, a portion of defendant's stock and fixtures were bona fide sold on like credit to Vogel & Co., and the remainder was sold to his mother for the consideration of her assuming a portion of defendant's debts, as principal, for which before she was only a surety.

But plaintiffs file an affidavit of Mr. Christie to the effect that defendant had expressed a willingness to use the Vogel notes in payment of his debts to plaintiff, if defendant had been so requested before the attachment against him. Knowing nothing of his character, and judging him solely by the statement and said affidavit, the only legitimate inference which I can possibly draw from it is that, to satisfy plaintiffs, defendant was willing to presume still further on the affections and indulgence of his mother and obtain her consent to his paying the plaintiffs

out of assets already pledged to her on a bona fide debt.

As to his having traded away one of the mortgaged horses, I think that a fair construction of the mortgage allowed such changes by him.

But it is alleged that he is still in possession of the stock in the trade. The affidavits of the nearest neighbors to the store

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\*say otherwise. Plaintiffs' attorney swears that once since the transfer of the merchandise the defendant conducted sales to said attorney as previously, when defendant was owner of the store. It would be very strange if, after having involved his mother as surety for his debts, defendant should fail to do everything in his power to save her from loss on his account. If he were to assist her clerk to sell said goods, even a dozen times, that would be even less than the duty he owed for having involved her in his wild venture. As to the statement that her alleged clerk offered to insure the mere stock in the name of defendant, that is only competent in so far as it impeached his affidavit, and I disregard that in making up this judgment. The whole testimony fails to impress my mind that there is even the shadow of a proof of fraud in the testimony between the defendant and his mother.

It is therefore ordered and adjudged, that said attachment be set aside and the attached articles be forthwith released; further ordered that plaintiffs pay the costs of this motion.

From this order plaintiffs appealed.

Mr. James E. Davis, for appellant.  
Mr. Robert Aldrich contra.

July 5th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, appellants, brought action against the defendant upon an open account, and at the same time, upon an affidavit of J. H. Clausen, alleging a fraudulent bill of sale by the defendant to his mother, L. C. Easterling, of all of his stock of goods, and a mortgage also to his mother of all of his other personal property, of which he, defendant, still retained possession, issued an attachment, serving the summons and complaint as well as the attachment, on the same day, viz.: February 12th, 1883. The defendant put in a general denial to the complaint and moved, upon affidavits which will be found in the brief, for a dissolution of the attachment in advance of the trial of the cause.

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\*This motion was heard by Judge Pressley, who ordered and adjudged that said attachment be set aside, and that the articles attached be forthwith released, and further, that plaintiffs pay the costs. This order was based on the finding of the Circuit judge that the allegation of fraudulent acts



by defendant upon which the attachment had issued, was unsupported by the testimony. The plaintiffs appealed on exceptions assigning error in this finding of the judge, and especially, because "the defendant having alleged that he held no interest in the property at the time of the issuing of the attachment, that he was not even in possession, his Honor committed error of law in not holding, as earnestly requested by counsel of plaintiffs, that defendant could not come in and have the right of third parties adjudicated, but that Mrs. Easterling was the only party affected according to defendant's own showing, and hence was the proper party to make said motion."

Attachments may be assailed either because they have been improvidently issued, or because of some irregularity in the proceeding. The distinction between the two grounds is, that in the latter case the defect appears on the face of the proceedings, and may be taken advantage of by motion to quash or dissolve. In the former, all the preliminary steps may be regular, and yet the attachment has been improvidently granted because the allegations on which it issued are untrue. Drake Att. (3d edit.), § 397. In this case the attachment is attacked on the latter ground, to wit: Because the allegations on which it issued are untrue.

Mr. Drake says, there can hardly be room for doubt that, without the aid even of express statutory provision, a defendant may, in one form or another, contest the truth of the grounds alleged by the plaintiffs for obtaining the attachment. The mode of doing this is different in the different States, but the right to do so is conceded in most of the States. In some of the States it is held, that a statutory provision is necessary, and where so held the mode prescribed in the statute must be followed. In our State no statutory provision has been made, but the right of the defendant to contest the allegations in the affidavit has been acknowledged, and if successful in disproving them the attachment will be dissolved.

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\*The mode of accomplishing this has not been definitely adjudicated. In some cases it has been done on motion; in others an issue has been made for a jury, and this, it seems, would be the better practice, at least in doubtful cases. *Havis v. Trapp*, 2 Nott. & M. 130; *Wheeler v. Degnan*, 2 Id. 323; *Shrewsbury v. Pearson*, 1 McC. 331. But the appellant has raised no question of this kind. He did not demand an issue to be submitted to a jury. On the contrary, he acquiesced in the trial by the judge, and he has not in his grounds of appeal questioned the right of the judge to hear the case. It is unnecessary, therefore, to pursue this branch of the subject further.

As to the findings of fact by the Circuit judge, the rule which governs in other cases where the judge passes upon the facts, must

apply here. Under this rule, unless the decided preponderance of the testimony is against the finding, it must be sustained. We do not find such preponderance. On the contrary the evident weight of the affidavits is in support of the conclusion of the judge. It is very clear that defendant's mother had become involved for the defendant, and that he had given her a lien upon his property by mortgage, which was duly recorded before the debt of plaintiff was contracted, and the badges of fraud relied on by the plaintiff were sufficiently explained. The defendant had the right to prefer his mother. A debtor has the right to give preference, if the transaction is founded upon a sufficient consideration, and is otherwise bona fide. But in this case there were no other creditors in the way when the original transaction between the defendant and his mother took place, and the fact that she took a second mortgage of the same property for the same debt, has no significance, except that she was anxious to be secured; the subsequent sale to the mother of a portion of the goods appears to have been made upon a sufficient consideration. The finding of the Circuit judge upon this branch of the case must be sustained.

As to the ground most strongly urged by appellant, that defendant having admitted that the property attached did not belong to him, he could not move to dissolve the attachment; we do not see its application here. The motion below was not made on the ground that the property in question did not

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\*belong to defendant. The title to the property was not in issue. The attachment was issued on an allegation of fraud by the defendant, and the only question involved below was the truth of that allegation. If, because that allegation being found untrue, the attachment is vacated and incidentally thereby the property is released, that is a result which does not concern the defendant. He certainly should not be compelled to submit to the charge of fraud, when he has the means of overthrowing it, simply because if he should do so, some one else may be benefited.

In the case of *Metts v. Piedmont & Arlington Life Insurance Company*, 17 S. C. 120, a third party who claimed the property attached, attempted to intervene and to raise the question of title on motion to dissolve the attachment; and this court held that he could not be permitted to intervene. He did not propose to assail the attachment, because it was issued either improvidently or irregularly; in fact, being a third party he could not have been allowed to do so, if he had desired, but he proposed to come in simply to contest the title. The court held that he had other means of redressing himself, if he had received an injury, more effectual than the mode he suggested.

And so here, if Mrs. Easterling had made

the motion below to permit her to intervene so that she might raise the question of title, the case of *Metts v. Piedmont Life Insurance Company*, supra, would be in point. But Mrs. Easterling is not before the court. The defendant in the attachment, brought into court by the plaintiff, makes the motion on the ground that plaintiff had no legal right to issue such a proceeding against him. The attack goes back behind the execution of the process to the original issue, and raises a question which he above all others is warranted in raising, to wit: the truth of the allegations upon which it had its inception.

It is the judgment of this court that the order of the Circuit judge be affirmed.

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19 S. C. \*521

\*WARD v. CHARLESTON CITY RAILWAY COMPANY.

(April Term, 1883.)

[1. *Jury* ¶110.]

Plaintiff having announced that she had no challenges to make, and the defendant then having challenged two jurors, the plaintiff could not afterwards demand a right of challenge; therefore, the denial of such right by the Circuit judge was not error of law.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 517; Dec. Dig. ¶110.]

[2. *Evidence* ¶491.]

Witnesses who saw a lady thrown down by a street car after she had alighted, can state in evidence their opinion as to whether she had time to get clear of the car before it moved off.

[Ed. Note.—Cited in *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 561; *Bridger v. Asheville & S. R. Co.*, 25 S. C. 26; *Easler v. Southern Railway Co.*, 59 S. C. 315, 37 S. E. 938; *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 94, 54 S. E. 244; *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 129, 54 S. E. 255; *State v. Stockman*, 82 S. C. 395, 64 S. E. 595, 129 Am. St. Rep. 888.

For other cases, see *Evidence*, Cent. Dig. § 2269; Dec. Dig. ¶491.]

Before Hudson, J., Charleston, November, 1881.

This was an action by Harriet Ward against the Charleston City Railway Company, a street horse car corporation, commenced July 27th, 1881. The complainant alleged serious injury to herself caused by the carelessness, negligence, &c., of the driver of the car in not giving her proper time to free herself and get out of the way of the car, and she demanded judgment for \$10,000, her damages. The opinion sufficiently states the facts and points involved in the impaneling of the jury, and the evidence of the witnesses.

In dismissing the motion for a new trial, the Circuit judge, in addition to what is quoted in the opinion here, said:

But even under the plaintiff's counsel's understanding of the facts, I do not see that an error was committed. \* \* \* Could the plaintiff at this juncture then have challeng-

ed peremptorily any one of the nine of the original panel after they had been solemnly accepted? We think not, and base this opinion upon the language of the present jury law, and the aforesaid interpretations of an exactly similar law of 1841. It is too well established in practice to bear questioning, that when a party has accepted a juror and he is sworn in the cause, it is too late then to object to him peremptorily. The plaintiff so accepted eleven of this jury, and the defendant and plaintiff united in accepting nine of the twelve.

Besides, it would be perhaps in many cases greatly prejudicial to the rights and interest of a defendant, were a plaintiff allowed to accept a certain number of jurors, and, after

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the defendant \*rejects his quota, and the panel is filled anew, then to allow the plaintiff to step forward and exercise the right to challenge peremptorily any of those to whom he declared he had no objection. If such a course were allowed to either party, the other might be trifled with. It is possible that were such a rule to prevail, a wary litigant might purposely avoid challenging in the first instance experimentally, in order to take advantage of his opponent's challenges, and the drawing of the supernumeraries. In fact, it is very probable that each side would struggle to gain this vantage ground.

So that, not even from the view of the facts of the case as set forth by plaintiff, do we think she lost any right under the action and ruling of the court. Had the plaintiff, after the defendant had challenged, but before the drawing of supernumeraries had begun, asked the court to allow her to reconsider the matter, and challenge peremptorily, the court would have granted the indulgence, notwithstanding that she had in the first instance deliberately accepted eleven; but after the filling up of the jury it was too late to recommence the peremptory challenge of jurors.

As to the plaintiff's second ground, I cannot see the force of it. The defendant's counsel asked a witness on the stand, who saw the accident to the plaintiff, whether, in his opinion, she had time after alighting from the car to get clear of it before it moved on. This was objected to by plaintiff's counsel. I directed the question to be put thus, viz., whether, as a matter of fact, she did have time to get clear of the car. This was objected to by plaintiff's counsel. The witness answered in the affirmative. I regard the question as tending not to extract a mere opinion, but a fact, to wit: the witness' estimate of the length of time which an occurrence under his observation consumed.

Messrs. Campbell & Whaley, for appellant.  
Messrs. Buist & Buist, contra.

July 7th, 1883. The opinion of the court was delivered by



Mr. Chief Justice SIMPSON. The appellant, Harriet Ward, brought action against the defendant, respondent, to recover damages for injuries alleged to have been caused

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by the negligence of defendant's agents and servants. The accident occurred while appellant was leaving the car of defendant, and is alleged to have taken place because she was not allowed sufficient time to free herself from the car.

When the case was called for trial, the plaintiff, being first called upon by the court to know if she had any objection to the jury, replied that she had none, except that if there was any stockholder of the company on the jury he should retire, whereupon one person retired. The plaintiff interposed no other objection. The defendant then peremptorily challenged two jurors. At this juncture, and while the clerk was preparing to fill the panel from the supernumeraries, the plaintiff claimed her right to challenge. The court understood this to be an intimation on the part of the plaintiff, that she would claim the right to challenge the jurors thus drawn to fill the panel, which he ruled could not be done. The understanding, however, of the plaintiff, as afterwards stated by her counsel, was, not that she should have the right to challenge the jurors drawn to fill the places vacated on account of defendant's challenge, but that her right to challenge generally revived after the defendant's challenge.

No objection was made to the charge of the judge, but during the progress of the trial several witnesses who were present and saw what occurred were asked by defendant's counsel, as follows, to wit: To John McPherson, "Whether the lady was or was not far enough from the car to allow it to go on without throwing her down?" To W. E. Vincent, "Was she a sufficient distance from the car to avoid the accident?" And to Philip Fogarty, "You think she was given plenty of time to get off and move away except for the drays?" These questions were objected to as calling for the opinion of the witnesses. The presiding judge directed the question to be put in this form, "Whether as matter of fact she had time to get clear of the car?" This was objected to.

The verdict was for the defendant. The counsel of plaintiff then moved the court for a new trial on the grounds: 1. "Because the plaintiff made no peremptory challenge, only requesting that if there be a stockholder

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he should retire; that a \*juror did retire, whereupon the defendant made two peremptory challenges, and the plaintiff then claimed that her right to challenge reverted, and it was disallowed. 2. Because at the close of defendant's case, the defendant asked of a witness, whether in his opinion the plain-

tiff had sufficient time to clear herself of defendant's car, and the plaintiff objected to the question and the objection was overruled." There was also a third exception upon another ground (as to the financial condition of the company), but this seems to have been abandoned, and, therefore, not necessary to be noticed further. These grounds were overruled by the Circuit judge, and the appellant now appeals, renewing her motion for a new trial on substantially the same grounds relied on in the motion below.

As to the first ground, it is conceded by both parties that, under the facts as understood by the Circuit judge, his ruling was strictly in accordance with the law, as expounded in several cases from our own court, where the precise question was made and adjudged. See cases Kleinback ads. State, 2 Speers 418; Huff v. Watkins, 15 S. C. 83 [40 Am. Rep. 680]; Gunter v. Graniteville Manufacturing Company, 15 S. C. 448, and Burckhalter v. Coward, 16 S. C. 435.

The appellant insists, however, that there was a misunderstanding as stated above. Admit this and can it help the appellant? The judge ruled that it could not. True, in Kleinback ads. State, Judge Butler, in delivering the opinion of the court, did say, that the act of 1841 did not in terms require either party to be the first actor in making the challenge. On this subject he further says: "Both parties are independent and either may make the challenge without regard to the position of the other. When the plaintiff forbears to make the move in the first instance, it should not be in the power of the defendant to compel him to do so, or otherwise lose it altogether, and if the defendant should think proper to exercise his right it will not then deprive the plaintiff in turn from claiming his. Either has the option to claim the privilege before the jury shall be charged in the case."

In the case now under consideration, however, the plaintiff did not simply forbear to exercise her right in the first instance,

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\*holding it in reserve to be exercised afterwards, but the judge states that when called upon to speak, her counsel, after surveying the jury, answered that she had no challenge to make except as to stockholders, if any; after a stockholder had retired the counsel then stated that there was no further objection by the plaintiff to the remaining jurors. The defendant was then called upon to challenge if he desired to do so. This was something more than a mere forbearance on the part of the plaintiff; it was an announcement that she waived the privilege of exercising her right. There was no denial on the part of the court; on the contrary the right was tendered to her at the proper time, and having waived the exercise of it then, for the reasons given by the Circuit judge we think it was too late to

demand it after the defendant had exercised his right.

There must be system and uniformity in the mode of conducting trials, and in this respect much must be left to the discretion of the presiding judge. It is the general practice, as we understand, in the matter of challenges in civil cases, that the right shall first be tendered to the plaintiff and then to the defendant, and if either declines when tendered and announces the fact that he does not intend to challenge, there is an end of it, unless under peculiar circumstances the judge might allow it revived as to either. In this case we do not think that there was any error of law on the part of the judge in refusing appellant's claim, and, therefore, we cannot disturb it.

The other question raised is as to the competency of certain questions propounded to the witnesses, which were objected to by appellant on the ground that they called for opinions merely, and not facts. It is a general rule of evidence that opinions of witnesses are not competent, but to this there are several exceptions; for instance, experts may give opinions, and even ordinary witnesses, after stating the facts upon which their opinions are founded, may also state their opinions resting on the facts. *Seibles v. Blackwell*, 1 McMull. 56. And, then, there are many matters in reference to which opinion is the only testimony of which they are susceptible. See the recent case of *Jones v. Fuller*, ante p. 66 [45 Am. Rep. 761], in which McIver, A. J., fully discusses such cases.

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\*Time, distance, velocity, form, size, age, strength, heat, cold, &c., are subjects of this character. *Whart. Ev.*, § 612, note, p. 490. The ground upon which opinions are admitted in such cases, says Mr. Wharton, is that, from the nature of the subject, it cannot be stated in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. In *Hackett v. Boston, Concord and Montreal R. R. Co.*, 35 N. H. 390, the court said: "That in most cases, when a witness is examined as to distances, dimensions, weight, or any quality of matter in question, he cannot testify except by the use of language which necessarily implies his opinion." See, also, the case of *Commonwealth v. Sturtivant*, 117 Mass. 133. Under the principle upon which these cases were decided, we think the question propounded here was competent, especially as the witnesses were present when the accident occurred, and were speaking from the facts as they occurred within their sight and under their immediate observation.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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DARBY & CO. v. SHANNON.

(April Term, 1883.)

[1. *Judgment* ⇨494.]

A. issued an attachment against C., an absent defendant, obtained order of publication and commenced publication, but, upon personal service being made on the defendant in North Carolina, the publication was discontinued, and judgment was taken by default more than twenty days after such personal service, but only forty-two days after order for publication. Under this judgment, the land attached was sold by the sheriff. Before this judgment was obtained, B., having issued a junior attachment upon this land as the property of C., moved to set aside the attachment for insufficiency in the affidavit. The judge ruled that a junior attaching creditor could not make such an objection, and refused the motion. After the sale, B. obtained judgment by default, and then instituted this action to have the sale set aside and the land resold. *Held*, that the action would not lie.

[Ed. Note.—Cited in *Eason v. Witcofskey*, 29 S. C. 246, 7 S. E. 291.]

For other cases, see *Judgment*, Cent. Dig. § 932; Dec. Dig. ⇨494.]

[2. *Attachment* ⇨291.]

C. was the only person who could take advantage of the alleged insufficient service of the summons.

[Ed. Note.—Cited in *Turner v. Malone*, 24 S. C. 404; *Eason v. Witcofskey*, 29 S. C. 247, 7 S. E. 291; *Martin v. Bowie*, 37 S. C. 113, 15 S. E. 736; *Hunter v. Ruff*, 47 S. C. 550, 25 S. E. 65, 58 Am. St. Rep. 907; *Marine Wharf & Storage Co. v. Parsons*, 49 S. C. 156, 26 S. E. 956.]

For other cases, see *Attachment*, Cent. Dig. § 1027; Dec. Dig. ⇨291.]

[3. *Judgment* ⇨423.]

[Cited in *Crocker v. Allen*, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831, to the point that a court of equity will not set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law.]

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 797-801; Dec. Dig. ⇨423.]

Before Witherspoon, J., Kershaw, June, 1882.

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\*The opinion states the case.

Mr. Ernest Moore, for appellant.

Messrs. R. E. Allison and Ira B. Jones, contra.

July 16th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to set aside a sale to the defendant Ira B. Jones, of a certain tract of land in Kershaw county, alleged to have been made under a judgment of Lewis H. Cole & Co. against the defendant Shannon. The Circuit judge stated the facts as follows:

The defendants Lewis H. Cole & Co., sued the defendant Shannon, in Lancaster county, January 17th, 1881, for \$146.87, and, on the same day, upon affidavit alleging "that the said William Shannon departed from this State on the 10th instant with intent to defraud his creditors, among them the plain-



tiffs: that the said William Shannon is about to dispose of his property to Stevens, English & Bro., of Monroe, N. C. with intent to defraud his creditors." the clerk of the court of Lancaster county issued a warrant of attachment to the sheriff of Kershaw county, which was levied on defendant's land in Kershaw county, referred to in the plaintiffs' complaint, on January 17th, 1881. An order of publication was made January 27th, 1881, but, the defendant having been personally served with copy of summons at Charlotte, N. C., February 10th, 1881, the publication was discontinued, and an order for judgment by default was made at March Term, 1881. A transcript of this judgment was filed in the clerk's office of Kershaw county on — day of —, 1881, upon which execution was issued, under which the sheriff of Kershaw, on May 2d, 1881, sold the land of William Shannon, attached as aforesaid. At that sale Ira B. Jones purchased the land for \$195, took sheriff's title and went into possession.

On February 18th, 1881, the plaintiffs also sued Shannon in Lancaster, and procured a warrant of attachment from the clerk of the court directed to the sheriff of Kershaw county. The affidavit alleged that "the de-

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fendant, William Shannon, is not a \*resident of this State, but resides in the city of Charlotte, in the State of North Carolina." This attachment was also levied upon the same land of Shannon on February 23d, 1881. Judgment by default against Shannon was rendered at Lancaster on June 23d, 1881, and transcript docketed in the clerk's office of Kershaw county on July 16th, 1881.

Prior to both attachments, Shannon had executed a mortgage to Stevens Brothers & English to secure a note for \$319.72 and interest. The defendant Ira B. Jones admitted in his answer that he purchased the land subject to the prior lien of this mortgage.

At February Term, 1881, the plaintiffs moved on the attachment papers, to vacate the attachment issued in the case first mentioned of Lewis H. Cole & Co. v. William Shannon, which motion was dismissed by his Honor Judge Fraser, then presiding. They then commenced this action to set aside all the proceedings, attachment, judgment and sale of the land under the judgment, so as to make the said land liable under their attachment and judgment. The defendants Cole & Co. insisted that their attachment and judgment were regular, and the sale of the land thereunder valid, subject to the mortgage debt aforesaid; that, even if the attachment proceedings were irregular, the motion of plaintiffs to vacate them having been dismissed and no appeal taken, the matter is now res adjudicata, so far as the attachment is concerned.

The case came on for hearing before Judge Witherspoon, who held that neither the at-

tachment proceedings in the case of Lewis H. Cole & Co. v. Shannon, nor the judgment and sale under it to Ira B. Jones, were void, and dismissed the complaint. From this judgment the plaintiffs appealed upon the following exceptions:

1. "Because the court erred, it is respectfully submitted, in holding that a paper purporting to be a warrant of attachment issued by the clerk of a Circuit Court under the authority of section 252 of the code of procedure, was valid as such, although none of the facts specified in said section were made to appear by the affidavit upon which said paper was issued.

2. "Because the court erred it is respect-

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fully submitted, in \*holding that by a levy under a paper purporting to be a warrant of attachment issued by the clerk of a Circuit Court on January 17th, 1881, at the suit of the defendants Lewis H. Cole & Co., against the defendant William Shannon, upon an affidavit, 'that the said William Shannon departed from this State on the 10th instant with intent to defraud his creditors, among them the said Lewis H. Cole & Co., and that the said William Shannon is about to dispose of his property to Stevens, English & Bro., of Monroe, N. C., with intent to defraud his creditors;' the said Lewis H. Cole & Co. obtained a valid lien upon the land of the said Shannon described in the complaint, and one superior to that obtained by these plaintiffs, by a levy upon the said land under a warrant of attachment regularly issued by the said clerk on February 18th, 1881, upon an affidavit alleging 'that the defendant William Shannon is not a resident of this State, but resides in the city of Charlotte, in the State of North Carolina,' and regular in all other respects.

3. "Because the court erred in holding that on March 10th, 1881, the Circuit Court of Common Pleas for the county of Lancaster, in said State, had jurisdiction in the case, Lewis H. Cole & Co. against William Shannon, by virtue of an order for the publication of the summons in said action made by the clerk of the said court on January 27th, 1881, publication thereof commenced on February 20th, 1881, and personal service thereof upon the said Shannon in the State of North Carolina, on February 2d, 1881, and that a judgment rendered in the said cause upon the day first aforesaid in favor of the said plaintiffs and against the said defendant therein was so far regular as to authorize the issuance of an execution thereon and the sale of the land described in the complaint herein thereunder.

4. "Because the court erred in holding that these plaintiffs were not entitled to have the land described in the complaint herein, sold and the proceeds applied, first, to the payment of the mortgage debt due to the defendants Stevens Brothers & English, and

next to the satisfaction of the amount due these plaintiffs on the judgment obtained by them against the said defendant William Shannon, set forth in the complaint, which

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judgment debt \*became a lien upon the said land at the date of the attachment aforesaid.

5. "Because the court erred in holding that these plaintiffs were not entitled to have the land described in the complaint sold and the proceeds applied, first, to the payment of the senior liens held thereon by the defendants, Lewis H. Cole & Co. and Stevens Brothers & English, and, next, to the lien of these plaintiffs.

6. "Because the said court erred in dismissing the complaint."

These same plaintiffs, at the February Term of the court (1881) for Lancaster, after regular notice, made a motion to discharge the senior attachment of Cole & Co., upon the ground that the affidavit on which the attachment was issued was not sufficient, in that it averred the removal from the State and the purpose to dispose of his property by the defendant "with the intent to defraud his creditors," without stating any of the facts from which such inference was drawn, so as to enable the court to judge of the correctness of the conclusion. Judge Fraser heard the motion, and rendered judgment as follows: "The affidavit should have stated the facts on which the inference of the fraudulent intent was based. See 2 Wait Pr. 145, 146, and Smith & Melton v. Walker, 6 S. C. 174, 175, and [Brown v. Morris] 10 S. C. 467. The code, section 265, provides that in all cases a defendant may move to discharge an attachment as in other cases of provisional remedies. This, however, does not give the right to third parties. 'This privilege is not so extended as to allow a subsequent attachment creditor to move to vacate the prior attachment on the ground that it was irregularly issued. The only exception is where the attachment is founded on fraud, or what amounts to fraud.' See 2 Wait Pr. 184, and the cases there cited. It is, therefore, ordered that the motion be dismissed." From this judgment there was no appeal.

But now, ignoring that judgment, the plaintiffs are seeking to accomplish the same result in another way by this action, in which Judge Witherspoon held that the matter submitted to Judge Fraser was adjudged; and there is no specific exception to that part of his judgment. Whilst it was admitted in the argument here, that the ruling of Judge

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Fraser was right, and, not \*appealed from, was binding on the plaintiffs, yet it was contended that that ruling did not affect the question made in this action, as the plaintiffs here are not seeking to have the senior attachment set aside, but only "a determina-

tion of the question as to whether the lien acquired by them is not superior to any rights of Cole & Co." We confess we do not see the difference suggested. The new expression only states the same matter in a different manner. The "superiority" of the liens is unalterably fixed by their respective dates, unless that of Cole & Co. is set aside as void, which was the real question in the motion, and, so far as the attachment is concerned, is the question here. The form of this proceeding, being an action, is somewhat different from that on the motion; but, with reference to the distinction between direct and collateral assaults, this does not differ from that. The actors in both proceedings are the same persons, and both involve the same question as to whether strangers to the attachment could make the point.

There was no possible need of further testimony in the action, for the point was purely legal, and heard "upon the papers." We regard the question raised here, as to the invalidity of the attachment lien, as identically the same as that made in the application to Judge Fraser, and decided by him without appeal. The truth is, as to form, the proceeding by motion was the proper one, and in accordance with the universal practice upon the subject. It is clear that no other form of proceeding was contemplated by the code. See latter part of section 263, which declares that "in all cases the defendant, or any person who establishes a right to the property attached, may move to discharge the attachment as in cases of other provisional remedies." It has been decided that this provision includes a motion to discharge the attachment on the ground of invalidity or irregularity. Cureton v. Dargan, 12 S. C. 122. And, in the following cases, the question was made by motion of the defendant or his representative, and appealed to this court. Smith & Melton v. Walker, 6 S. C. 169; Brown v. Morris, 10 S. C. 468; Claussen v. Fultz, 13 S. C. 476. "Defenses and causes of action once presented and considered cannot

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be again asserted in another \*suit without a violation of the principles of res adjudicata." Freem. Judg., § 284.

It is true, that the doctrine of res adjudicata does not apply to mere interlocutory orders made in the ordinary progress of the case. In such orders, granted or refused upon summary application, it has been held that they are not so far conclusive as to prevent the same matter being drawn in question again in the regular form of a suit. But the reason of that rule does not apply where the matter, conclusive and final in its character, is gravely discussed and the decision is appealable. Dwight v. St. John, 25 N. Y. 203. In that case, the plaintiff gave in evidence the papers upon a motion by the defendant in the Supreme Court to have the judgment canceled. Upon the coming in of



the referee's report, the court denied the motion. The party brought an action to have the judgment canceled, and the court sustained the plea. The court said: "Upon this point it is to be observed that some decisions (made before the existence of the code), especially that of *Simpson v. Hart*, 14 Johns, 63, are chiefly based upon the ground that such summary proceedings as they passed upon, were heard without full proof, and were not reviewable; whereas, in the case before us, the hearing was upon full proofs, and the code has entirely taken away the other ground by making the proceedings liable to review. Since, then, a full hearing, with the right of appeal, was open to the defendant on that motion, how is he to avoid the binding effect of that decision, so far as it covers what was actually and necessarily tried?" *Freem. Judg.*, § 325. So far as concerns the right claimed by the plaintiffs to question the validity of the attachment lien of Cole & Co., for alleged irregularity in the proceedings, the matter is *res adjudicata*. *Exrs. of Tate v. Hunter*, 3 Strobb. Eq. 145.

But, conceding this, it is insisted that the decision of Judge Fraser related only to the attachment, and did not undertake to decide the validity of the judgment obtained by Cole & Co. against Shannon, and the sale of the land thereunder to Ira B. Jones; that if the attachment itself is beyond their reach, they may still impeach the judgment, and set aside the sale upon another and distinct

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ground, viz.: On account of an alleged jurisdictional defect in the rendition of said judgment. It seems that the defendants Cole & Co. sued Shannon, and on the same day had the attachment above spoken of issued against him; that, as Shannon was absent from the State, they procured an order for publication against him January 27th, 1881, and publication was actually commenced on February 2d, but the summons having been personally served on the defendant in North Carolina, on that day the publication was discontinued, and on March 10th following, forty-two days after the order of publication, and more than twenty days after the actual service of the summons, the order for judgment was entered.

The defendant Shannon makes no objection to the judgment, and the plaintiffs, subsequent judgment creditors of Shannon, claim that they have the right to set aside said judgment, for the reason that it was rendered prematurely before sixty days from the order of publication had expired.

It will be observed that the plaintiffs were not parties to the action of Cole & Co., and had no possible connection with the judgment rendered in that case, except that they also were creditors of Shannon, and had attached the land in controversy when the judgment was pronounced.

This must, therefore, be regarded as a pro-

ceeding on the equity side of the court, for, as a new action at law, it could not be maintained even by the defendant Shannon, himself. His only remedy for alleged irregularity, or illegality in the proceeding which resulted in the judgment, was to move in the action itself to set it aside. "For the mere fact of its existence destroys the basis of right on which such subsequent action would have to rest. If the confession (judgment) is insufficient in form, or by any reason void, advantage must be taken of such fact by a motion in which the judgment was rendered, having for its direct object the vacation or modification of the judgment, and by appeal from the decision of the court on such motions. If no such direct proceeding is taken, the validity of the judgment cannot be collaterally called in question in any subsequent action at law." *Southern Porcelain Manufacturing Company v. Thew*, 5 S. C. 8.

Can third parties ask equitable relief to

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set aside a judgment \*at law upon the ground of illegality or irregularity in the proceedings in which the judgment was obtained? It is certain by the general rule, that none but the parties to a judgment can have it set aside. As Mr. Freeman says: "Every litigant, if an adult, is presumed to understand his own interests, and to be fully competent to protect them in the courts. He has the right to waive all irregularities in proceedings by which he is affected and is entitled to exclusively decide upon the propriety of such waiver. To allow disinterested third persons to interfere in his behalf, and to undertake the management of his business, according to their judgment, would create intolerable confusion and annoyance, and produce no desirable result. To permit third persons to become interested after judgment, and overturn adjudications to which the original parties made no objections, would encourage litigation and disturb the repose beneficial to society." And again, at section 512: "No person will be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights. If the parties to an adjudication are satisfied with it, no outside persons will be permitted to intermeddle with it at law or in equity." "The court is not bound to set aside a judgment on any ground of error or irregularity, except at the instance of the defendant; judgment is not void because it is erroneous. If it be rendered by a court of competent jurisdiction, it must stand until arrested or reversed." *Camberford v. Hall*, 3 McC. 345.

To this rule there are some well-recognized exceptions, limited, as we think, to those strangers to whom the judgment, if given full credit and effect, would be prejudicial in regard to some pre-existing right; and to the assertion of such rights as are known as

equities, and administered in chancery. As, for instance, a junior judgment creditor may have an action to set aside a senior judgment obtained by imposition or fraud. It will be observed that this complaint does not allege matters either directly importing a fraud implicating the defendants Cole & Co., nor does it appear that any equity exists arising out of accident or mistake or any of the ordinary grounds of equity jurisdiction.

The question, then, arises, Have the plain-

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tiffs an equity to set aside the judgment of Cole & Co. against Shannon upon the ground of irregularity in the proceedings at law? A judgment in its nature is final and conclusive. It is well settled that there must always be "some special grounds for relief other than error of law. All errors of decision and proceeding must be settled in the tribunal in which they originated, or by appeal to some appellate tribunal; and in no case will the Court of Equity take upon itself a revisory jurisdiction. A court of equity will not set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law." *McDowall v. McDowall*, Bailey Eq. 330; [Attorney General v. Baker] 9 Rich. Eq. 531; *Freem. Judg.*, § 487, and authorities.

It is earnestly insisted, however, that reference is here made only to "mere irregularities," that the principle does not apply where the defect involves the jurisdiction of the tribunal which pronounced the judgment; but that in such case the judgment is absolutely void, and all persons whose interests are affected injuriously thereby possess the right, in the nature of an equity, to have it declared a nullity at any time or in any court. This seems to us a new question. We remember no case like it in the books, except perhaps that of the Southern P. M. Company v. Thew, *supra*, in which the right was distinctly denied. We have not been referred to any case which goes to the extent here demanded.

The distinction between jurisdictional defects and mere irregularities, void and voidable, is well understood, but it is not so well settled what imperfections are mere irregularities or what are jurisdictional and make the judgment absolutely void. It would contribute much to certainty in the administration of the law, if some infallible test of the question in all cases could be found, but in the multitude of opinions upon the subject, we have not been able to find such principle. This difficulty is greatly increased when the question is made by third parties as an equity, in a jurisdiction other than that in which the judgment was rendered. In the case of *Walker & Bradford v. Roberts*, 4 Rich. 561, the court ventured to give a definition of irregularity, as follows: "Irregularity consists in omitting to do something necessary to the orderly progress of the action, or

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\*doing it at an improper time. It does not affect the plaintiff's right of action."

But the question still recurs, What does and what does not affect the plaintiff's cause of action? The judgment of Cole & Co. was pronounced by the Court of Common Pleas, which had general jurisdiction. It certainly had jurisdiction of the subject-matter, and made more than ordinary efforts to obtain jurisdiction of the person of the defendant Shannon. For the purpose of making him a party before the court, the land in controversy was attached, then an order of publication was made against him, which only stopped short of the "six weeks" required, for the reason that in the meantime Shannon had been personally served with summons in North Carolina. The defendant made no objection after actual notice, and now makes none. So far as the plaintiffs are concerned, no wrong was done them, and the point is purely technical.

Under these circumstances, can it be said that the court was so entirely without jurisdiction of the person of Shannon as to require us, at the instance of strangers and in another jurisdiction, to declare the judgment utterly void? We think not. It is not quite clear that the court did not have regular jurisdiction of the person of Shannon when the judgment was pronounced. It was rendered after the very land in controversy had been attached as the property of Shannon, after publication had been made against him, and more than twenty days after he had been personally served with summons in North Carolina. It is expressly declared in the code that the object of publication is notice. "When publication is ordered, personal service of the summons out of the State is equivalent to publication and deposit in the post office." And again, "From the time of service in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." Code, §§ 156 and 160. In New York, under similar provisions, there seems to be some difference of opinion as to when, in the case of personal service out of the State after publication, the service is complete. See 4 How. Pr. 246; 5 Id. 238; 7 Id. 313. But there seems to be no doubt that when an attachment has been

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issued, and no summons served, the court has jurisdiction and control of the proceedings for certain purposes. 6 How. Pr. 47.

But it is enough to say that the judgment was formally pronounced by a competent tribunal, and as against third parties all presumptions must be allowed in favor of judicial proceedings. Granting all that appears in the record, the defendant Shannon may have waived service. In *Freem. Judg.*, at § 126, it is said: "There is a difference between a want of jurisdiction, and a defect



in obtaining jurisdiction. At common law the defendant was brought within the power of the court by service of the brevin or writ. In this country the same object is accomplished by service of summons, actual or constructive, or some other process issued in the suit, or by the voluntary appearance of the defendant in person or by his attorney. From the moment of the service of process the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that the defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, although erroneous, are not void. When, in a proceeding by attachment, the ground required by the statute for the issuing of the process has been laid, and the process has been issued and executed, the jurisdiction of the court is complete. Where there has been an insufficient publication, or an entire failure to publish, the proceedings are not so invalidated as to be made void." And many authorities in note.

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\*It is well settled that the purchaser under an execution not void, but voidable only, will be protected in his title; and that the objection cannot be made by third persons. In *Henry v. Ferguson*, 1 Bailey 512, which was an action of trespass to try title, the plaintiff claimed under an execution issued on a judgment in sci. fa. It was objected that the sci. fa. was irregular. Colcock, J., said: "It was unnecessary to consider whether the judgment produced was irregular or not, for it has been repeatedly decided that third persons cannot inquire into the matter. It was an authority, so long as it stood unreversed, to issue the execution." See *Ingram v. Belk*, 2 Strobb. 207 [47 Am. Dec. 591]; *Lawrence v. Grambling*, 13 S. C. 127.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred in the result.

Mr. Justice McIVER. I concur in the result. It seems to me that the judgment in favor of Cole & Co. was not open to the attack of the plaintiffs, inasmuch as the only person who could take advantage of the alleged insufficient service of the summons was the defendant Shannon. In the absence of any objection from him, the court will presume that everything necessary to perfect the service was done, or that he, by voluntary appearance or otherwise, waived the necessity for service. So that, even if the first attachment should be regarded as void, yet the sale under the judgment might be supported as a sale under a junior lien; and as all that is asked for in the complaint, so far as we can learn from the case, is to have the sale set aside and the land resold, I concur in the result reached in the within opinion. Who may be entitled to the proceeds of the sale, is a question of much more difficulty, and, as we are not now called upon to decide it, I prefer to reserve my opinion.

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\*ALSOBROOK v. WATTS.

(April Term, 1883.)

[1. *Appeal and Error* ⇨273.]

An exception, in the nature of argument, is not in proper form.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. ⇨273.]

[2. *Receivers* ⇨173.]

In the absence of any showing to the contrary, it will be assumed that the receiver of an estate has been authorized to institute proceedings to have a judgment made a lien.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 329; Dec. Dig. ⇨173.]

[3. *Execution* ⇨357; *Judgment* ⇨898.]

The validity of an entry of satisfaction endorsed on an execution issued in 1872 on a judgment of that date, may be adjudicated under a summons to show cause (under the act of 1873, 15 Stat. 498,) why the judgment should not be made a lien and a new execution issued thereon, and, the return being found insufficient, the court may grant the prayer of the summons.

[Ed. Note.—Cited in *Adams v. Richardson*, 30 S. C. 217, 9 S. E. 95; *Leitner v. Metz*, 32 S. C. 387, 16 S. E. 1082; *Lawton v. Perry*, 40 S. C. 271, 18 S. E. 861.

For other cases, see *Execution*, Cent. Dig. § 1089; Dec. Dig. ⇨357; *Judgment*, Cent. Dig. § 1717; Dec. Dig. ⇨898.]

[4. *Judgment* ⇨898.]

The statute having prescribed no time within which such summons may be issued, the courts cannot fix any limit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1714-1717; Dec. Dig. ⇨898.]

[5. *Limitation of Actions* ⇨57.]

The unauthorized entry by the sheriff upon an execution to the effect that it had been satisfied by a release given by the plaintiff to a co-surety of defendant, does not give currency to the statute of limitations in defendant's favor.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 312; Dec. Dig. ⇨57.]

[*G. Judgment* ⇐S98.]

It cannot affect this proceeding that the defendant here was not a party to an action in which the pretended release was set aside.

[*Ed. Note.*—For other cases, see *Judgment*, *Cent. Dig.* §§ 1714-1717; *Dec. Dig.* ⇐S98.]

Mr. Justice McIver dissenting.

Before Wallace, J., Chesterfield, September, 1881.

The opinion makes a full statement of the brief, excepting the Circuit decree, which was as follows:

As to the first ground of objection by defendant, the case of *Moore v. Edwards*, 1 Bailey 25, seems to be decisive. In that case the court held that it was competent for the court, under a sci. fa. to renew execution, to hear testimony in explanation of an entry of satisfaction on the fi. fa., and to vacate the entry if satisfied it ought not to be there. Under our present practice, a summons is substituted for the sci. fa., and under the summons the court would exercise the same jurisdiction as under a sci. fa. *Lawrence v. Grambling*, 13 S. C. 127.

Was the issuing of the summons in this case delayed until the plaintiff lost the right under the statutes to renew his judgment? In *Lawrence v. Grambling*, 13 S. C. 126, the court says: "Neither the provisions of sections 306 and 307 of the code, nor those of

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\*section 15 of the act of 1873, prescribe any limit to the time within which a motion for leave to issue an original execution, or to revive one whose active energy has expired, must be made, and it must be concluded that any party having a judgment at the adoption of the code, or at any time since, can, on motion for leave, issue an execution, whatever might be the lapse of time since the entry of the judgment, provided it is not satisfied of record, or by lapse of time." The right to proceed under the act of 1873 to constitute a judgment obtained in 1872, a lien, before such judgment has been levied, seems to be equally unlimited in point of time as the right to issue executions. The proviso of section 14 of the act of 1873 relates to judgments that constitute liens. The judgment here has never been made a lien by levy or otherwise.

The defendant insists that the entry of satisfaction on the execution was a transaction in a public office that gave currency to the statute of limitations, and that the plaintiff is barred. It appears that the entry was made by the sheriff; that in point of fact there was no satisfaction. There is no evidence that either plaintiff or defendant had actual notice of the entry, or that the sheriff had any authority to make it. This state of facts will not give currency to the statute of limitations. As to the principle involved, see *Miller v. Alexander*, 1 Hill Ch. 25.

The administrator, F. L. Alsobrook, having

been displaced by order of the court, and W. A. Evans having been appointed receiver of the estate, has by leave of the court, the legal right to control this judgment, and, therefore, it is competent for him to institute these proceedings. Whoever has control of a judgment by transfer, either actual or by operation of law, has the right of the original plaintiff.

It is ordered that the judgment entitled F. L. Alsobrook, administrator, against Thomas H. Watts, do constitute a lien upon such real estate as is of the estate of Thomas H. Watts, deceased, and that it be revived, and that plaintiff have leave to issue and renew execution thereon.

Mr. R. E. Allison, for appellant.

Mr. M. J. Hough, contra.

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\*July 25th, 1883. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. F. L. Alsobrook, administrator of the estate of Willis W. Alsobrook, deceased, obtained separate judgments against Elizabeth P. Alsobrook, the widow of the intestate, Townley Redfearn and Thomas H. Watts, on a note given by said Elizabeth for purchases at the sale of the estate, with the other parties named, and one Bevins, as her sureties. The judgments were for \$10,466.87 each, besides costs, and were obtained in September, 1872. A short time after these judgments were rendered, Townley Redfearn obtained a release under seal of the judgment against himself from the administrator, and the sheriff endorsed satisfaction on the execution issued thereon, appending a copy of the release thereto, and on the execution against Watts he endorsed the following statement: "Returned to the clerk's office satisfied, except the costs. See release attached to execution in favor of same plaintiff v. Townley Redfearn for same cause of action, 7th of March, 1873."

The execution, however, was never returned to the clerk's office but was retained in the sheriff's office.

On August 15th, 1874, proceedings were instituted by summons, and complaint to open the entry of satisfaction on the Townley Redfearn judgment, and to set up the same against Redfearn. To these proceedings F. L. Alsobrook, Elizabeth Alsobrook, Townley Redfearn and Thomas H. Watts were made parties defendant, but before the cause was heard by the Circuit Court, Watts died, and his administratrix was never made a party until after the adjudication. The complaint demanded that the entry on the Redfearn execution should be adjudged fraudulent and void, but no reference was made to entry on the Watts fi. fa. This proceeding was successful as to Redfearn. Subsequently an order has been obtained to make the personal representatives of Thomas H. Watts par-



ties, and it is stated that the cause has not yet ended, but to what extent it is still open and for what purpose does not appear. See *Alsobrook v. Alsobrook*, 14 S. C. 170.

W. A. Evans having been appointed receiver of the estate of Willis W. Alsobrook, instituted the present proceeding in 1881, by summons served upon Rose J. Watts, as ad-

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ministratrix of \*Thomas H. Watts, to show cause why the said judgment against Thomas H. Watts should not be made a lien on the estate of said Watts, and a new execution issued to enforce the same. The judgment was obtained in 1872, when, under the law then existing, judgments had no lien, and this proceeding was instituted under the act to provide a lien in such cases. The summons required the administratrix to show cause at the next ensuing term of the court for Chesterfield county.

The administratrix appeared and resisted the motion upon the following grounds: 1. "That the entry of satisfaction in the case could not be annulled under a proceeding by summons or upon motion. 2. And if it can, the time within which it must be done had elapsed before notice of the motion was served. 3. That the motion to renew is barred by the statute of limitations, the entry of satisfaction having been made more than six years before service of summons. 4. That W. A. Evans, the receiver of the estate, cannot proceed under the statute to renew, he not being the plaintiff in the execution."

Judge Wallace, who heard the motion, overruled the objections of the respondent to the summons, and ordered "that the judgment in question do constitute a lien upon such real estate as is of the estate of Thomas Watts, deceased; that it be revived, and that plaintiff have leave to issue and renew execution thereon."

From this order Rose J. Watts, administratrix has appealed.

1. "Because, in the proceedings instituted in the Circuit Court to open the entry of satisfaction made on the judgment of Townley Redfearn, neither Thomas H. Watts nor his administratrix were parties.

2. "Because the entry of satisfaction on the judgment against Thomas H. Watts cannot be annulled under a proceeding by summons to show cause, or upon a mere motion as in this case.

3. "Because, if such right exists, the time in which to do so under the statute had passed, and it was too late to start the proceeding when the notice of the motion was given in this case.

4. "Because the right to open or annul the entry and endorsement of satisfaction on this judgment was barred by the statute of limitations more than six years after the entry

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of satisfaction \*thereon, and before legal notice of these proceedings having expired.

5. "Because W. A. Evans, the receiver, has no right in this informal way to annul the entry of satisfaction, he not being the plaintiff in the judgment, and more especially as the plaintiff, F. L. Alsobrook, and Thomas H. Watts, the defendant, have not been made parties.

6. "Because the Circuit judge has erred in finding, as matter of fact, that there is no evidence that either plaintiff or defendant had actual notice of the entry of satisfaction, or that the sheriff had any authority to make it, for this question of fact could only be determined after said persons had been properly made parties.

7. "Because the fact is, that this entry of satisfaction having been made in a public office and placed on the judgment, and suffered to remain there on record for more than six years, and until after the death of Thomas H. Watts, the evidence may be said to be conclusive that plaintiff and defendant, and the sheriff, had the knowledge that the Circuit judge, in the order aforesaid, held they did not have."

It may not be improper to state that this last ground is more in the nature of argument than exception. The object of exceptions is to present distinct propositions of law or fact, as the case may be, in which error is claimed, and which it is desired that this court shall review, and unless this is done the exception amounts to nothing.

The questions raised and principally discussed in the argument of appellant's counsel are: First, as to the form of proceeding, and, second, as to the bar of the statute of limitations. The right of W. A. Evans, as receiver, to institute the proceeding, though made a ground of appeal, is not questioned in the argument, and we suppose, therefore, that it has been abandoned. But whether this be so or not, we can see no legal objection to the receiver's right in this respect. As receiver, he no doubt was authorized to collect the assets of the estate, and was invested with all the power necessary to that end; at least, in the absence of all showing to the contrary, we must assume this to be the fact, and, therefore, must hold that there was no error in the ruling of the Circuit Judge as to this point.

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\*The matter as to the form of the proceeding presents a more serious question, and is really the question in the case. Under the code, as originally adopted, final judgments did not of themselves constitute a lien on either the real or personal estate of the judgment debtor. This remained the law until the act of 1873 (15 Stat. 498), which amended the previous act so as to give liens to such judgments, and with the view to place judgments which had been obtained before this last act upon the same footing with those obtained afterwards, this act further provided that in cases where judgments had

been obtained after the 1st day of March, 1870, (the day of the approval of the code,) a like lien may be obtained by the service of a summons upon the judgment debtor, or, if he be dead, upon his executors or administrators, to show cause, if any he or they may have, why said judgment should not be and become a lien in accordance with the provisions of this act, and if no sufficient cause be shown to the contrary, such judgment shall be and become a lien on all the real property of the judgment debtor. Lynch Code 313.

Here seems to be express authority for the proceeding below. By this act, a summons to show cause is the statutory mode, and the only mode known to the law to effect the end desired by the plaintiff. This act seems to anticipate that the debtor might be able to show some cause why the judgment should not have the lien, and the object of the summons is to allow him an opportunity to present it. But why permit this, if, the moment his cause is presented, the judge is ousted of jurisdiction? The language of the act is "that if no sufficient cause be shown to the contrary," of course, in response to the rule, "such judgment shall be and become a lien." \* \* \* Who is to determine as to the sufficiency of the showing, but the judge before whom the summons may be returnable?

The act does not confine the debtor in his response to the summons to any special cause which alone may be considered and adjudged by the court, but leaves the cause open, only limited by the term "sufficient." The debtor may return payment, release, or any legal objection to the judgment accruing after the original determination. If this be not the proper construction of the act, what

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could have been its purpose and \*intent? If the court, under the summons, is not authorized to judge and determine the sufficiency of the cause, and must stop whenever any cause is seriously urged, and remit the parties to an action by regular summons and complaint, the act would be useless, and the remedy provided therein an idle ceremony, barren and fruitless.

Independent of the analogy suggested by the Circuit judge arising from the old proceeding by sci. fa. to revive judgments as found in the case cited by him, (Moore v. Edwards, 1 Bailey 24,) we think that by the express terms of the act providing a remedy in cases of this kind—a remedy to meet an evil which, without this act, was remediless—the form of proceeding adopted here was the proper and only mode within the reach of the plaintiff. This judgment had no lien. The act under which he proceeded was the only law by which he could obtain lien, and the mode prescribed was the only mode which he could have adopted. There was no error, therefore, in the Circuit judge overruling the objection of appellant.

We do not see the pertinency of plaintiff's exceptions as to the time within which the motion to have the lien of the judgment established should be made under the statute, nor to the fact that neither Thomas H. Watts, nor his administratrix, Rose J. Watts, were parties to the action against Townley Redfearn. The act of the general assembly, under which the plaintiff was proceeding, fixes no limit to the privilege therein provided, and for this court to assume to do so would be judicial legislation. As to the second objection, even if it be true that these persons were not made parties, how does that fact affect this proceeding? It may or may not have been necessary to have the Watts estate represented in the action against Redfearn, and that question might probably have been well raised in that action, but this is a proceeding independent of that, and has no necessary dependence upon the question of parties there.

The appellant interposes, lastly, the statute of limitations, insisting that the entry of satisfaction on the fi. fa. became a part of the record, and having remained in a public office from September 21st, 1872, until

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the spring of 1881, that this gave \*currency to the statute, and that the plaintiff was barred. In reply to this, Judge Wallace said: "That it appears that the entry was made by the sheriff when, in point of fact, there was not satisfaction. There is no evidence that either the plaintiff or defendant had actual notice of the entry, or that the sheriff had any authority to make it. This state of facts will not give currency to the statute of limitations. As to the principles involved, see *Miller v. Alexander*, 1 Hill Eq. 25."

We have seen nothing in the brief to conflict with the facts as found above by Judge Wallace, and we concur in the legal principle which he applied to these facts. The entry by the sheriff on the Watts execution seems to have been an entry of his legal conclusion drawn from the transaction between F. L. Alsobrook and Redfearn and endorsed on the Watts execution of his own motion, without any authority, as far as we can see, from any of the parties. It was, therefore, the sheriff's unauthorized act, and wholly outside of his duty or powers. It was, in fact, the act of a stranger, and could not give currency to the statute of limitations as to the parties interested.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN. I concur. An entry of satisfaction without authority is a nullity, and may be entirely disregarded. The plaintiff may proceed as if there was no such entry, taking the risk of showing that



such entry was without authority. If that does not appear, the proceeding may be dismissed as premature; but if it does so appear, the matter must be considered precisely as if no such entry had ever been made.

Mr. Justice McIVER. I dissent. To constitute a sufficient foundation for a proceeding like this there must be a judgment apparently open and unsatisfied. In response to a summons to show cause why such a judgment should not be made a lien, the defendant may show for cause that although the judgment appears upon its face to be open and unsatisfied, yet, in fact, it has been paid or otherwise extinguished. But when the so-called judgment, which it is attempted

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to make a lien, shows upon its \*face that it is satisfied, it can no longer be regarded as a judgment, for payment or satisfaction extinguishes a judgment. When, therefore, as in this case, a summons is issued to make an alleged judgment a lien, which bears upon its face an entry of satisfaction—is satisfied of record—there is no foundation for the proceeding, as the very record which the plaintiff brings before the court as a judgment shows upon its face that it is no longer a judgment, but it has been extinguished by satisfaction. The plaintiff shows himself out of court. It seems to me, therefore, that before the plaintiff was entitled to have the so-called judgment in this case made a lien, it was necessary for him, by proper proceedings, to have the entry of satisfaction vacated, so that the record, which he brought before the court as a judgment, asking to have it made a lien, should not bear upon its face the evidence that it was no longer a judgment.

It is true that the Circuit judge says, in his decree, that this proceeding was taken to vacate the entry of satisfaction as well as to renew the execution and make the judgment a lien; but this is obviously a mistake, for, in the agreed statement of facts contained in the "Case," all that is said is, that it was "a summons to show cause why the said judgment should not be made a lien on the estate of Thomas H. Watts, deceased, and a new execution issued to enforce the same;" and the correctness of this statement is fully borne out by an inspection of a copy of the summons furnished us at the argument here (as it was agreed might be done), from which it appears that the defendant was not called upon to show cause why the entry of satisfaction should not be vacated. For aught that appears, the respondent below, who is appellant here, may have been taken by surprise when, at the hearing in the Circuit Court, the proceedings in the case of Alsobrook v. Redfearn, which were clearly incompetent as res inter alios acta, were introduced to

show that the entry of satisfaction ought to be vacated.

Judgment affirmed.

A petition was filed for a rehearing of this case, but the court, by its order filed December 8th, 1883, refused the petition, stating that the alleged errors had already been

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gravely and \*earnestly considered by the court; and, further, that the issue before the court being the right of the plaintiff to revive the execution in the manner proposed, nothing had been adjudged upon the subject of payments and compromises which, in the petition, were alleged to have been made.

## 19 S. C. 548

REED v. REED.

(April Term, 1883.)

[1. *Attorney and Client* ⚡90.]

The written admission of service of summons by a duly authorized attorney would probably be binding upon the defendant, but acceptance of service by an attorney having no authority so to do, does not constitute a legal service.

[Ed. Note.—Cited in *Sullivan v. Susong*, 40 S. C. 158, 165, 18 S. E. 268.

For other cases, see *Attorney and Client*, Cent. Dig. § 165; Dec. Dig. ⚡90.]

[2. *Process* ⚡67.]

Where a defendant expressly refused to authorize his attorney to accept service of summons for him, the court could not imply such authority, except perhaps upon a principle of estoppel in proper cases.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 54, 161; Dec. Dig. ⚡67.]

[3. *Attorney and Client* ⚡90.]

Where the plaintiff's attorney is referred by defendant to his solicitor for negotiations before suit, and afterwards such attorney is informed that "the case must take the usual course," the solicitor in the negotiations has no implied authority from defendant to accept service of summons.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 165; Dec. Dig. ⚡90.]

[4. *Process* ⚡67.]

The acceptance of service in this case was made under a misapprehension, and efforts were promptly made by defendant's attorneys to have the mistake corrected without disadvantage to plaintiff; there is, therefore, nothing here to affect the faith and confidence of members of the profession towards each other, and no ground of estoppel.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 54, 161; Dec. Dig. ⚡67.]

Before Aldrich, J., Beaufort, October, 1882.

This was an action by Florence A. D. Reed against Joseph S. Reed. The opinion states the case.

[For subsequent opinion, see *Ex parte Reed*, 19 S. C. 604.]

Messrs. Wm. Elliott and Simonton & Barker, for appellant, cited Code, §§ 155, 159, 408-418; 1 O'Neill's Bench and Bar, Introductory, p. xxxii.

Mr. A. G. Magrath, contra, cited Wait's Ann. Code, 180; 1 N. & McC. 458; Rules of Circuit Court, No. XVII; 42 N. Y. 27; 3 Edw. Ch. 173; 6 Johns. 36, 296; 37 N. Y. 502.

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\*July 31st, 1883. The opinion of the court was delivered by

Mr. Justice McIVER. The only question raised by this appeal is as to the validity of the service of the summons and complaint. The facts as gathered from the "Case" are substantially as follows: On August 8th, 1883, Mr. Magrath, as attorney for the plaintiff, addressed a note to the defendant, stating that he had been instructed by her to institute proceedings which would materially affect the relations thereafter to exist between them as husband and wife, but he expressed a hope that a conclusion might be reached by consent of all parties, which would avoid the necessity of a public trial, and to this end he expressed a willingness to coöperate with any professional gentleman who might be designated by the defendant as his representative. To this letter defendant replied, saying: "I beg leave to refer you to Wm. Elliott, Esq., of Beaufort, as my solicitor in the matter to which you have referred." Accordingly, these gentlemen seemed to have had a conference upon the subject referred to in the correspondence, and as a result thereof certain propositions were submitted by Mr. Elliott to the defendant, who declined to accede to them. Mr. Elliott informed Mr. Magrath of this result, stating that the instructions of defendant were, "that the case must take the usual course."

After the negotiations had failed, Mr. Elliott asked the defendant whether he should accept service of the papers for him, and was instructed not to do so. Mr. Magrath, upon receiving notice that the case must take the usual course, prepared the summons and complaint, and sent them to Mr. White, his associate counsel, at Beaufort, to be served. On September 22d, 1882, Mr. White called at the office of Messrs. Elliott & Fowles, and asked for Mr. Elliott, and being informed that he was absent, asked for an acceptance of service of the summons and complaint in this case, as it was regarded as important that the service should be made on that day, so that the case could be docketed for trial at the next succeeding term. Mr. Fowles, being ignorant of defendant's instructions not to accept service for him, and with the understanding, as he supposed, that what he did was subject to the ap-

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proval of Mr. Elliott upon his \*return, signed the acceptance of service in the name of "Elliott & Fowles, attorneys for J. S. Reed."

Immediately upon the return of Mr. Elliott, he was informed by Mr. Fowles of what he had done, when the latter was notified of defendant's positive instructions not to accept service for him, and was requested to let Mr. White know at once of these instructions, which was accordingly done. Mr. White then went to the office of Messrs. Elliott & Fowles, where he was informed by Mr. Elliott of Reed's instructions; that Mr. Fowles had signed the acceptance of service in ignorance of such instructions and that it would be necessary to serve Reed personally. Mr. White objected that unless the service was made by the twenty-second of that month, it would be too late to docket the case for trial at the approaching term of the court. Upon being assured by Mr. Elliott, that if he would have Reed served at once, no question would be raised as to his right to docket the case for trial at the approaching term, Mr. White took all the papers and gave the copies to the sheriff to be served on the defendant. The deputy sheriff went to the defendant's usual place of residence, and finding that he had gone to a summer resort a few miles distant in the same county, returned the papers to Mr. White without serving them, and he returned them to Mr. Elliott, who, as soon as he received them, sent them back to Mr. White with a letter informing him that the acceptance of service could not be recognized.

Soon after this Mr. Elliott received notice from Mr. Magrath that "in the interest of his client he would have to consider the papers as served." Whereupon the motion was made for an order "setting aside the alleged service of the summons and complaint herein, and for such other relief as may be just." The Circuit judge refused the motion, and thereupon this appeal was taken, by which the real question made is, whether the acceptance of service by Messrs. Elliott & Fowles, as attorneys for defendant, was a valid service upon the defendant.

In the code of 1882, section 155, the manner in which a summons must be served is prescribed, while section 159 prescribes the different modes by which such service shall be proved, one of which is by the written ad-

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mission of the defendant, and \*section 160 declares that "a voluntary appearance of a defendant is equivalent to personal service of the summons upon him." It is quite clear that the summons in this case was not served in any one of the modes prescribed by section 155, and, therefore, the practical inquiry is, whether there has been any written admission of service by the defendant, or whether he has made voluntary appearance in the action. It is not pretended that there



was any written admission of service by the defendant in person, nor that he has made voluntary appearance to the action.

The question, therefore, is narrowed down to the inquiry whether the admission of service by the attorneys of defendant amounts to the same thing as a written admission of service by himself in propria persona. For while the code does not, in terms, provide that the written admission of service by the defendant may be made by one duly authorized so to do by the defendant, yet we suppose that, upon well settled principles, an admission so made would be binding upon the defendant. Hence it will be necessary for us to determine in this case whether the act of the attorneys in signing the acceptance of service was duly authorized by the defendant.

There is no evidence whatever that any express authority was ever given by the defendant to attorneys to accept service for him, but, on the contrary, it distinctly appears that he had explicitly refused to confer such authority upon his attorneys, and this would seem to be conclusive of the question. The court could not obtain jurisdiction of the person of the defendant until he had been made a party in some one of the modes prescribed for that purpose. He had a perfect legal right to require that he should be legally served with process, and he alone could waive this legal right, and when he expressly refused so to do, certainly no one could lawfully assume to waive this right for him. It is manifest, therefore, that there was no legal service of the summons in this case and no waiver of such service by any one authorized so to do.

The respondent, however, contends that although there was no express authority given by the defendant to his attorneys to acknowledge service, yet such authority could and must be implied from the letter of the de-

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fendant to the senior counsel for plaintiff, in which he refers that counsel "to Wm. Elliott, Esq., as my solicitor in the matter to which you have referred." In the first place, it would be going very far to imply an authority in the face of the undisputed fact that the defendant had expressly refused to confer such authority, and a court would scarcely ever resort to such an implication, except, perhaps, upon the principle of estoppel to prevent manifest wrong or injustice, which, as we shall presently see, does not apply in this case.

But in addition to this it is, to say the least of it, very doubtful whether the terms of that letter would authorize such an implication. That letter was in reply to one which manifestly looked to the very commendable purpose of adjusting the matters in dispute by private negotiation rather than by a suit at law, and the letter of defendant may well be regarded as referring to Mr. El-

liott as the counsel who was authorized to represent him in such negotiation, and this Mr. Elliott did. But when the negotiations failed and Mr. Elliott communicated the result to Mr. Magrath, with the statement that "his instructions are that the case must take the usual course," the parties were placed at arms'-length, and the plaintiff, if desirous of bringing an action, could only do so in the usual way, by service of a summons in some one of the modes prescribed by law, without regard to what had previously passed between the parties while engaged in the abortive attempt to arrange the matter by negotiation. We do not think, therefore, that the letter of the defendant to Mr. Magrath should be regarded as containing even an implied authority to Mr. Elliott to accept service for the defendant.

It has been earnestly urged upon us that this view will tend to impair, if not destroy, "all faith and confidence in the acts and conduct of the members of the profession" in their dealings with each other; but we do not apprehend that any such result is likely to ensue; if we did we would, indeed, hesitate long before announcing a conclusion which would lead to such unfortunate consequences, for we yield to none in our high appreciation of the importance of preserving that high tone which has always characterized the profession; but in this case we are unable to see anything calculated to excite such an apprehension. The defendant is here insisting upon a plain legal right

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which we are bound to accord to him; and there is absolutely nothing in the conduct of his attorneys which can properly be regarded as in anywise a departure from the strict line of courtesy and fair dealing which should always characterize the members of a high-minded liberal profession.

The utmost that can be said is, that the junior member of the firm, under a misapprehension of the facts, undertook to accept service for the defendant, with the understanding, as he supposed, that he did so subject to the approval of his senior when he returned; but as soon as he learned that he had acted not only without authority, but contrary to the positive instructions of his client, which had not previously been communicated to him, doubtless because his senior, who alone had been consulted in the matter, was absent on professional business, immediately informed the counsel for the plaintiff of his unintentional error, so that he might, by having the defendant properly served, repair the defect; and counsel for plaintiff was given the assurance that if the defendant were then properly served, as it appears might have been done, no obstacle should be thrown in the way of docketing the case for trial at the approaching term.

What more could they have been expected to do? They had no power to make the ac-

ceptance of service valid or to waive the necessity for service; but they proposed to the counsel for the plaintiff that if the defendant should then be served, so as to make him a party in court, subject to its jurisdiction, they would then waive all such notices as might be necessary to secure the docketing of the case for trial, which they would have had the legal right to do under the provisions of title 12, chapter 11, part II., of the code of procedure. If this had been done, as it might have been but for the failure of the counsel for plaintiff to act upon this offer, then the object of plaintiff's counsel would have been accomplished, and the case would have been ready for a hearing at the then approaching term of the court. But the counsel for the plaintiff having failed to avail themselves of this offer, and having elected to stand upon the acceptance of service by the attorneys for the defendant, as a legal service, cannot be said to

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have been misled to their preju\*dice, and, therefore, there is no room for the application of the doctrine of estoppel.

The judgment of this court is that the order appealed from be reversed, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary.

## 19 S. C. 554

## LE CONTE v. IRWIN.

(April Term, 1883.)

## [1. Appeal and Error ⇨957: Judgment ⇨139.]

An order vacating a judgment by default, under section 195 of the code, is within the discretion of the Circuit judge, and there is no appeal to this court, unless he commit some error of law.

[Ed. Note.—Cited in Wolfe v. Port Royal & A. R. Co., 25 S. C. 381; Hubbard v. Camperdown Mills, 26 S. C. 589, 2 S. E. 576; Wagener & Co. v. Swygert, 30 S. C. 301, 9 S. E. 107; Odom v. Burch, 52 S. C. 308, 29 S. E. 726; McMahon v. Pugh, 62 S. C. 511, 40 S. E. 961; In re Bugg's Estate, 71 S. C. 444, 51 S. E. 263.

For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⇨957; Judgment, Cent. Dig. §§ 265-268; Dec. Dig. ⇨139.]

## [2. Judgment ⇨139.]

In an action for foreclosure, a judgment by default was rendered and sale ordered, which was made, the property being bid off by plaintiff's attorney, who transferred his bid to a stranger, and such stranger complied and received titles. Afterwards, motion was made by defendant to open the default upon the ground of excusable neglect, and the motion was granted and the sale and title-deed annulled. Held that the Circuit judge erred in directing the sale and deed to be set aside.

[Ed. Note.—Cited in Le Conte v. Irwin, 23 S. C. 109; Ruff v. Doty, 26 S. C. 176, 1 S. E. 707, 4 Am. St. Rep. 709; Eason v. Witcofskey, 29 S. C. 344, 7 S. E. 291; Bank of Columbia v. Havard Co., 99 S. C. 114, 82 S. E. 1007.

For other cases, see Judgment, Cent. Dig. § 265; Dec. Dig. ⇨139.]

## [3. Attorney and Client ⇨125: Mortgages ⇨516.]

Plaintiff's attorney may be a bona fide bidder at a judicial sale, and the defendant has no ground of complaint if such attorney become the purchaser.

[Ed. Note.—Cited in Wilson v. Cantrell, 40 S. C. 129, 18 S. E. 517.

For other cases, see Attorney and Client, Cent. Dig. § 250; Dec. Dig. ⇨125; Mortgages, Cent. Dig. § 1518; Dec. Dig. ⇨516.]

Before Hudson, J., Richland, April, 1883.

Action by Harriet Le Conte against Margaret Irwin. The opinion states the case.

In granting the motion, Judge Hudson said:

This case came on to be heard before me upon a report of sale by the master and a motion to confirm the same, and upon a motion by the defendant to set aside the judgment and vacate all proceedings thereunder. The last motion was supported by affidavits, and counter-affidavits were read in opposition thereto. \* \* \*

It is in the discretion of the Circuit judge, upon such a motion as this, to vacate a judgment obtained against a party by his mistake, inadvertence, surprise or excusable neglect. The only ground upon which I can va-

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cate this judgment is that \*of excusable neglect, and the irregular, if not illegal, mode of entering and enforcing the judgment for money and foreclosure and sale. This operated as a surprise and hardship upon the mortgagor, entitling her to ask relief.

If it would result in irreparable injury to the purchaser at the sale, I would not disturb vested rights under the decree, or set aside the sale; but this property having been bid in by the plaintiff's attorney, which is the same thing as the plaintiff himself, and William H. Monckton, being the assignee of the plaintiff's bid, steps into the plaintiff's shoes, and can be fully protected by subrogating him to the plaintiff's rights under the bond and mortgage for the amount paid by him, together with the expenses in connection with the transaction and the examination of the title, and interest thereon.

It is therefore ordered that the decree in said cause, and the sale made thereunder by the master of the premises set forth in the complaint, be and the same are hereby vacated, set aside and annulled, and that the defendant, Margaret Irwin, have leave to file an answer to the complaint herein within twenty days from the date of this order. \* \* \*

[For subsequent opinion, see 23 S. C. 106.]

Mr. W. H. Lyles, for appellant, cited 7 S. C. 76; 10 Id. 268; 16 Id. 362; 18 Id. 602; 7 Id. 381; 16 Id. 504, 282; Ror. Jud. Sale, §§ 138, 139; Rich. Eq. Cas. 228.

Mr. R. A. Lynch, contra, relied on Truett v. Rains, 17 S. C. 451.



July 31st, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff held a bond of the defendant, secured by mortgage of a house and lot, for \$849, with interest from date, October 7th, 1880, (with the privilege of paying twenty dollars per month until the whole should be paid,) payable in four equal annual installments. Neither the bond nor the mortgage contained a stipulation that in default of payment of one installment the whole was to become due. So that \$212.25, besides interest, became due on October 7th, 1881, and a like sum on the same days in 1882, 1883 and 1884.

On October 13th, 1881, the plaintiff instituted proceedings to \*foreclose the mortgage. The defendant was served with summons, but made no defense. The case was referred to the master, and on July 25th, 1882, he filed his report, stating correctly that there was due the first installment and interest, \$319.17, and the further sum of \$636.75 was not due, whereupon Judge Witherspoon, July 28th, 1882, ordered that the defendant, Margaret Irwin, should, on or before the 1st day of September, 1882, pay to the plaintiff the whole bond, \$955.92, and in default thereof the house and lot should be sold. Under this judgment, the master, N. B. Barnwell, Esq., offered the house and lot for sale on sales-day in November, 1882, and it was bid off by Mr. Marshall, plaintiff's attorney, for \$750, and the bid was entered to "J. Q. Marshall, attorney." The bid was afterwards transferred by J. Q. Marshall to W. H. Monckton, and on February 7th, 1883, John T. Seibles, Esq., master of Richland county, and successor of N. B. Barnwell, Esq., who had made the sale, executed and delivered to W. H. Monckton a deed for the premises, he having complied with terms of sale.

On February 8th, 1883, the day after the titles were executed as above stated, the defendant, Mrs. Irwin, through Mr. Lynch, her attorney, gave notice of a motion to set aside the judgment and all proceedings thereunder, upon two grounds: "First, that if certain money paid by the defendant to the plaintiff or her agents had been properly credited upon said bond, no right of action would have accrued to the plaintiff; and, second for surprise in this that the defendant was not aware until judgment had been obtained against her, that the payments referred to had not been credited upon the bond, and for such other relief as may be just, &c." Judge Hudson heard the matter upon affidavits in connection with the master's report on the sale, and granted an order setting aside the judgment, on the ground of "excusable neglect," on the part of the defendant, Mrs. Irwin, when the judgment and the order of sale were entered against her, and gave her permission to answer. He also set aside the sale made under that decree, and the title

executed to Monckton, who had been served with notice of the proceedings.

From this order both Mrs. Le Conte and

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Monckton appeal \*to this court upon the following exceptions: "1. Because his Honor refused the motion of plaintiff to confirm the master's report of sale. 2. Because his Honor considered as evidence of the value of the property, the statements of defendant's counsel in argument. 3. Because his Honor concluded that there was error in the decree of Hon. I. D. Witherspoon, Circuit judge, filed in said case. 4. Because his Honor vacated the decree and the judgment in said cause upon the ground of error therein. 5. Because his Honor decreed that the sale to W. H. Monckton should be set aside and annulled, and that the deed executed by the master to said Monckton should be delivered up to be canceled."

Section 195 of the code, among other things, provides that "The court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding," &c. An application for relief under this provision is addressed to the discretion of the Circuit judge, and, unless he commit some error of law, there is practically no appeal to this court. If the application is decided entirely upon the facts submitted, this court is shut out from reviewing them by the limit to its jurisdiction. *Gibbes v. Elliott*, 8 S. C. 63. If the "discretion" given to the Circuit judge is not to be considered as "a mental discretion to be exercised ex gratia, but a legal discretion to be exercised in conformity to law," still, the provision allowing the relief is remedial in its character, and this court will not undertake to reverse an order vacating a judgment rendered by default, except in cases of "gross abuse of the discretion of the court." *Freem. Judg.*, § 106. It is true, the application in this case was greatly delayed, and confusion has resulted therefrom, but it was made within the year allowed, and was granted by the Circuit judge. The showing upon which it was granted is not before us, and we cannot say that the judge abused the discretion allowed him in setting aside the judgment and giving the defendant an opportunity to be heard. To that extent, the order must stand.

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\*But the more difficult question still remains—whether it was error on the part of the judge to set aside the sale made under the judgment, and the titles executed by the master to Monckton. The decree by default for the sale of the house and lot, regular in form, but excessive in the amount of money required to be paid, was entered July 28th, 1882. The house and lot were sold in No-

vember, after titles were executed to Monckton on February 7th, 1883, and the day after (February 8th, 1883,) the proceeding was instituted which resulted in setting aside the judgment as above stated. Under these circumstances was it error in the judge, upon a mere motion, to set aside the sale and titles made to Monckton by the officer of the court, before the regularity of the order of sale or judgment was assailed? If Monckton himself had been the purchaser at the master's sale, we suppose there could be little doubt upon the subject. There are some cases to the contrary, but we believe it settled by the great preponderance of authority, that property acquired by a bona fide purchaser at a judicial sale under orders regular in form and voidable only, shall not be affected by a future reversal or vacation of the judgment.

We cannot state the principle in clearer terms than those employed by Mr. Freeman: "Courts have always construed the law so as to impart confidence to judicial sales by protecting purchasers thereat from those ill consequences which the latter might suffer if the title acquired by them depended upon the freedom of prior proceedings from all errors of law. It was thought to be unjust to require purchasers to suffer for errors committed by the judges of the subordinate courts, and impolitic by making such a requirement to discourage bidders at such sales, and thereby to expose large amounts of property to the hazard of being sacrificed at nominal prices. Therefore, it is a rule nowhere disputed, that third persons purchasing at a sale made under the authority of a judgment or decree, not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair." *Freem. Judg.*, § 484 and notes.

But conceding this, it is urged that in this case Monckton is not a bona fide purchaser;

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that he only took the bid of Marshall, \*who bid off the property "as attorney for Mrs. LeConte," the plaintiff, and the matter must be considered precisely as if she, Mrs. LeConte, were making the question. It does not strike us in that way. If Mrs. LeConte had purchased the property, and were now before the court defending her title to it, probably it might be opposed that she was not a bona fide purchaser for the reason that she paid for it with her own judgment, which had been set aside; but that cannot be said as to Marshall or Monckton. The ground on which the judgment was opened was not the error in the amount to be paid, of which the attorney of plaintiff might be supposed to be cognizant, but that it was taken by default under circumstances which authorized the court afterwards to open it. The application for that purpose was not made until after the sale, transfer and execution of titles to Monckton. Up to that time, the secret vice in

the judgment had not appeared, and was as entirely unknown to the attorney of the plaintiff as to a stranger.

We do not see why the attorney of the plaintiff, after judgment rendered and entered, may not be a bona fide bidder at a judicial sale fairly conducted, as well as any other person. He has no duty to perform that is inconsistent with the character of purchaser. The law looks with jealousy upon contracts between an attorney and his client to the disadvantage of the latter, but here there was no contract with the client. *Miles v. Ervin*, 1 McC. Eq. 524 [16 Am. Dec. 623]. The complaint is not made by the client plaintiff, but by the defendant. The interests of defendants in general require that everybody may bid. If the plaintiff's attorney is forbidden to bid, the defendant is thereby injured by the decrease in competition. If an attorney complies with his bid, or procures another to do it by payment out of his own funds, on what grounds is it less a bona fide bid than if made by some other person? He stands in a position different from that of a party to the suit, and in a similar position to that of a third person purchasing, and ought to be subject to none of the perils of the former, but entitled to all the rights of the latter. *Freem. Judg.*, § 484.

It may be matter of regret that, when Mrs. Irwin was sued, she did not present her case to the court, or, having failed to do

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\*so, that she did not seek relief sooner. But it was delayed until after the legal title had been conveyed to Monckton, and the court is always reluctant to disturb vested rights, especially in summary proceedings by mere motion. *Orr v. Orr*, 7 S. C. 381.

The judgment of this court is, that so much of the judgment of the Circuit Court as set aside and ordered to be canceled the conveyance of the master, Seibles, to William H. Monckton, bearing date February 7th, 1883, be reversed.

19 S. C. 560

DUNSFORD v. BROWN.

(April Term, 1883.)

[1. *Guardian and Ward* ¶164.]

Action being brought by a ward, after his majority, against his guardian, simply for an account, ignoring a settlement had between them and making no allegation or proof of any misrepresentation, undue influence, imposition or fraud, the settlement and receipt are a bar to the action, and the complaint should be dismissed.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 546; Dec. Dig. ¶164.]

[2. *Account* ¶8.]

It was error in the Circuit judge, at the trial, to treat an action for an accounting (which was barred by an unassailed settlement



and receipt between the parties) as changed into a direct attack upon the settlement and receipt. [Ed. Note.—For other cases, see Account, Cent. Dig. § 22; Dec. Dig. ⚭8.]

[3. *Guardian and Ward* ⚭146.]

Amendments before trial may be allowed with great liberality to the end that the action may not be defeated for errors of form merely; but amendments at a later stage of the cause, "conforming the pleadings to the facts proved," should not be ordered where thereby the parties are surprised or misled, or the issues are wholly changed.

[Ed. Note.—Cited in *Hall v. Woodward*, 30 S. C. 575, 9 S. E. 684.

For other cases, see *Guardian and Ward*, Cent. Dig. § 493; Dec. Dig. ⚭146.]

[4. *Account* ⚭19.]

Where a receipt in full is pleaded in bar of the accounting demanded by the complaint, it is error to order the account stated until the plea in bar has been disposed of.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 100; Dec. Dig. ⚭19.]

[5. *Guardian and Ward* ⚭164.]

A settlement made between a guardian and ward on the day after the ward attained his majority, and a receipt in full then given by the one to the other, are conclusive upon the ward, if there was, on the part of the guardian, no concealment, misrepresentation, imposition, fraud or personal advantage secured.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 471, 545-555; Dec. Dig. ⚭164.]

Before Kershaw, J., Richland, November, 1882.

The opinion fully states the case.

[For subsequent opinion, see 23 S. C. 328.]

Messrs. John T. Sloan, Jr., and W. H. Lyles, for plaintiff.

Messrs. Abney & Abney, contra.

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\*July 31st, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action in the nature of a bill in equity by Francis W. Dunsford against Thomas R. Brown, his late guardian and his sureties on the guardianship bond, for an account of his guardianship. Brown, the defendant, the sureties concurring, pleaded in bar to the account asked for, that on May 21st, 1880, after the plaintiff had attained to the age of twenty-one years (the day after), the said guardian had a settlement with his ward, the plaintiff, in the Probate office for Richland county, before Andrew Crawford, Esq., then Probate judge, and with his concurrence, and upon that settlement the said Probate judge ascertained that the sum of \$1,496.78 was due to the said ward, the plaintiff, which was paid in full to the said plaintiff, who, being entirely satisfied with the settlement, received the money and gave his receipt in full, drawn by the said Probate judge, absolving him from all further responsibility in connection with the guardianship, and which is in the following terms:

"Received, Columbia, January 9th, 1880, of Col. Thomas Brown, guardian of Francis W. Dunsford, fourteen hundred and twenty-eight dollars due to said ward from the guardian aforesaid, to be retained by me as judge of Probate, until a final discharge shall be granted to said guardian.

"Andrew Crawford, J. P."

"Also this 10th April, 1880, four hundred and twenty-eight dollars, due on Mrs. A. G. Adams' bond.

"Andrew Crawford, J. P."

"Received, Columbia, May 21st, 1880, of Andrew Crawford, judge of Probate, fourteen hundred and ninety-six seventy-eight one hundredths dollars, in full and final settlement of all claims I have against my guardian, Thomas R. Brown, and I do in this manner absolve him from all responsibility in connection with the guardianship, as I am now twenty-one years of age. And I take this step after the judge of Probate has fully explained everything to me connected with my affairs.

"F. W. Dunsford."

"Witness, J. Meighan."

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\*The case was referred to Nathaniel B. Barnwell, Esq., the master, "to take the testimony upon all the matters of fact arising on the pleadings, to state the accounts and to report the same," &c. The master reported the facts to be substantially as follows:

In 1860, the plaintiff, Francis W. Dunsford, was left an orphan, being under two years of age, and was taken by his grandfather, R. J. Dunsford, a poor man, and supported and clothed by him for eleven years. It seems that at that time the child was entitled to a handsome estate in the hands of one Jesse Drafts, his first guardian, who died intestate in August, 1865. The administrators of Drafts, the guardian, refused to account for any of the estate of the ward which had been received by their intestate, the first guardian, claiming that it had been invested in Confederate bonds and lost. At that time, soon after the war, it was difficult to get any one to accept the appointment of guardian, in order to test the responsibility of Drafts, for the ward's estate; but, finally, a neighbor, William Weston, was prevailed upon to take the guardianship in August, 1870.

He found that neither Drafts nor, after his death, his representative, had rendered any assistance to the ward, who had been supported by his grandfather, R. J. Dunsford, as before stated; and, in doing so, the grandfather had contracted a debt to Weston of something over \$600. Weston, as guardian, employed counsel and instituted two suits against the representatives of Drafts. At first he was unsuccessful; but, finally, he succeeded in getting a compromise, by which he secured for the ward the sum of

\$4,205.38, which, without his efforts, might have been lost. Out of this money thus secured for the ward he paid an account to the grandfather, R. J. Dunsford, for the support and maintenance of the ward for eleven years, at the rate of \$100 per year, aggregating \$1,100, for which he returned a voucher; retaining out of that sum his debt against R. J. Dunsford.

On July 23d, 1873, upon his own application, Weston was discharged as guardian, and Thomas R. Brown, the defendant, was appointed his successor, the then judge of Probate, Sanders D. Swygert, Esq., passing the following order: "It is ordered that the letters of guardianship of the person-

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al estate of the \*said Francis W. Dunsford, heretofore issued to William Weston, be and are hereby revoked, and that the said William Weston be and he is hereby required to transfer to his successor, Thomas R. Brown, such portion of said estate of the said infant which has come into his hands, and has not been disbursed, and be discharged from further accountability in respect thereto." Thomas R. Brown received from his predecessors the portion of the estate which had not been disbursed, and continued guardian until the settlement with the ward and discharge before stated.

The object of the action was not only to have an accounting de novo from Brown, the last guardian, but, also, through him, to reach alleged errors in the accounting of Weston, and make Brown and his sureties liable therefor on the ground that he, as last guardian, should have held Weston, his predecessor, to a strict account of the ward's estate, and especially for the \$1,100 paid by Weston to the grandfather for the support and maintenance of the ward before he became guardian. The master, disclaiming any right to decide the legal question involved, except so far as was necessary in stating the accounts, restated, not only the account of Brown, disregarding his settlement with the ward and his discharge by the judge of Probate, but went back beyond Weston's discharge, and restated his accounts, disallowing \$500 of the money paid to the grandfather, and charging Brown with the same, and also with some small matters of counsel fees paid by Weston, &c.

Both parties excepted, and the case came on to be heard before Judge Kershaw, who held that the Probate Court, upon proper proceedings, could grant a final discharge to a guardian who had fully accounted in that court, which might be pleaded in bar of an accounting sought in another court: that a judgment of a court of competent jurisdiction is an estoppel between the parties in regard to all matters which might have been properly brought into consideration in the action; and that the judgment of the judge of Probate, in discharging Brown, could not

be collaterally attacked as proposed in this action.

"If the plaintiff, therefore, would have attacked this judgment, his very first step in the present action should have been to seek the judgment of the court to vacate it in

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order that he \*might reach the account concluded by that order. This, however, he has not done, but has come into court on a complaint for an accounting alone, which is the very matter in respect of which he is concluded. Ordinarily, this would be the end of plaintiff's case; but it has happened here that, notwithstanding the estoppel, he has been permitted to speak the truth. All the evidence and arguments upon the issue presented by the complaint and answers have been heard, which might have been heard had the proceedings been in the first place to set aside the order of discharge, and, also, for an accounting, which would undoubtedly have been the plaintiff's proper course of procedure. The question, therefore, presents itself. Shall the court proceed to give the judgment which, upon the evidence before it, justice demands, or shall it dismiss the complaint without prejudice to the right of the plaintiff to proceed de novo as indicated?"

The judge then, supposing that he had the power, under section 194 of the code, to amend the complaint before or after judgment in furtherance of justice, so as to conform it to the facts found, regarded the form of action as changed into a direct attack upon the settlement, receipt and discharge, and, in that view, pronounced judgment, setting aside not only the settlement and discharge of the Probate judge, but the receipt of the plaintiff himself, and ordering Brown to account de novo for his own transactions; but exonerating him from accountability on account of the alleged errors in the account of his predecessor, Weston.

From this decree both parties appealed to this court upon numerous exceptions, relating, for the most part, to different items of the account, but, from the view taken, it will not be necessary to set them out at length, or to consider any of them except the defendant's. 1. "That his Honor erred in refusing the motion of defendants to dismiss the complaint, the cause of action therein stated not being sustained." We think the first view of the Circuit judge was the correct one, viz., that the action being simply for an account against Brown and his sureties, ignoring the existence of the settlement and the receipt in full of the ward after he came of age, and the discharge of the guardian by the Probate

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judge, could not be maintained. \*and should have been dismissed. The judge of Probate has jurisdiction in relation to the duties imposed by law upon guardians, and the management and disposition of the estates of their wards, and certainly some considera-



tion is due to a settlement made by a Probate judge between a guardian and his ward, and his consequent discharge of the guardian.

As well stated by the Circuit judge, "the first point to be considered, was as to the effect of the settlement in the Probate court, and the receipt of the plaintiff to the defendant, Brown, as guardian, and the discharge of the latter by the order of the judge of Probate." These were, at least, *prima facie* good, and must remain in full force and effect until set aside in a direct proceeding instituted for that purpose. If, as alleged, they were informal or irregular, that could not be reached by a collateral proceeding. The scope of the plaintiff's action was for a simple account, collateral in its character, and under it the settlement and discharge could not be assailed; and it seems to us that, after trial on the issues joined, and without actual amendment, it was too late to consider the whole form and character of the action changed, and to pronounce judgment according to the new form given to it.

It is true that the provisions of the code are very liberal in allowing amendments, and we are thoroughly in accord with that spirit, in so far as it presents the requirements of form from degenerating into mere technicalities; yet it seems to us that it may be possible to fall into the opposite extreme, and in the effort to dispense with all form, to produce confusion, uncertainty and injustice. Section 194 of the code is in these words: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

This certainly gives a large discretion in the matter of amendments, but the provision

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itself shows that some limit was contemplated. The power is given to conform the pleadings to the facts proved only, "when the amendment does not change substantially the claim or defense." When does it do so? This is one of the questions under the code upon which there is great diversity of opinion. Several of the States have a provision identical with ours, but the decisions upon the subject are not in accord. Mr. Pomeroy, at section 566 of his work on "Remedial Rights," says: "In giving a practical interpretation to this clause of the codes, a conflict of decision has arisen among the tribunals of the different States which it is impossible to reconcile." This much, at least, may be considered certain, that there is a difference in the practice as to amendments before and after judgment. As to those before trial, we

think we can see a good reason for great liberality, as it is not desirable to defeat an action for error of form, merely, if there is merit in it. In such case the party proposing an amendment is put on terms as to costs, &c., and the defendant is entitled to notice and time to meet the case made. *Cleveland v. Cohrs*, 13 S. C. 400; *Coleman v. Heller*, Id. 494.

But it is not so clear what should limit the power of making amendments after trial, "conforming the pleadings to the facts proved." In the section from Pomeroy above cited, he goes on to say, that whilst a different rule is adopted in some States, "the rule is settled by one class of cases, and prevails in certain States, that in all the voluntary amendments which a party may make, as a matter of course, in his own pleadings, and in all amendments before trial, &c., he cannot under the form of an amendment change the nature and scope of his action; he cannot substitute a wholly different cause of action in place of the one which he attempted to set up in his original pleading. \* \* \*

In respect to the amendments made at the trial, or on appeal, or by the court upon its own motion, great freedom is used, provided the parties are not misled and surprised, and the issues to be decided are not wholly changed, &c. When evidence has been received without objections, making out a cause of action, &c., the utmost liberality is shown by the court in conforming the averments of the pleadings to the case as proved, if the ends of justice will be subserved thereby, &c."

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\*As we understand it, the fundamental principle of pleading is, that the matter upon which the judgment of the court is sought shall be clearly stated, and the party charged notified, that he may make his own answer to it. It is not mere form, but substance, that such party shall have an opportunity to be heard upon the very issue that is to be decided, for he is necessarily surprised if one issue is tried and another decided.

The Circuit judge was doubtless led to consider the cause of action as changed in form by the fact that the master had already taken the testimony on the accounting, and it seemed to him useless to dismiss the case only that it might be resumed in a different form. He says: "But it has happened here that, notwithstanding the estoppel, he has been permitted to speak the truth. All the evidence, and all the arguments upon the issues presented by the complaint and answer have been heard, which might have been heard had the proceedings been in the first place to set aside the order of discharge," &c. But who could say whether the defense would not have been different, and other testimony offered, if the action had been to vacate the proceedings, instead of for a simple account? At all events, the defendants never had an opportunity to meet the new issue.

Besides, under the issues joined, it was error to order the account stated until the matter pleaded had been disposed of. Until that was done, it was premature to state the account, and the testimony was inadmissible, except as taken to save time and subject to objection. We think it was error, after trial, to consider the whole cause of action changed by amendment and a new issue made. Wait's Anno. Code 324 and notes. As was said by the chief justice in *Fitzsimons v. Guanahani Company*, 16 S. C. 197: "We think it was error on the part of the judge thus, in the midst of the conflict, to change the whole character of the action from the cause upon which it was originally established to a new basis not appearing in the pleadings, and without opportunity on the part of the defendant to meet and resist it."

But if the action had been brought directly for the purpose of setting aside the settlement and discharge, we do not see the evidence to sustain that judgment. There can be no doubt that a settlement was made with

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the ward after he came of age, who \*received the money, gave his receipt in full, and the guardian was discharged by the Probate judge. We suppose that the settlement and discharge were not *prima facie* involved, and what evidence is there to impeach the transaction? The only circumstance tending in that direction is the fact that the settlement was made soon after (the day after) the ward came of age, but that alone was not sufficient to overthrow it, if there was on the part of the guardian, Brown, no concealment, misrepresentation, imposition or fraud.

There is a nice principle of law, that a settlement made by a guardian with his ward soon after he comes of age, is, on account of the relation of the parties, looked upon with great jealousy and scrutinized closely. Judge Story states the principle as follows: "But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand even when they have occurred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate in the highest sense of the terms the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian." 1 Story Eq. Jur., § 317.

Apply this test to the facts here, and it seems to us that they come up to the rule. It appears that in the settlement the guardian did not secure to himself any personal advantage, but that every dollar received by him and not disbursed, was paid over to the ward. This circumstance distinguishes the case from that of *Hylton v. Hylton*, 2 Ves. 549, and other cases of that class, where the ward made a donation to his late guardian. Over and above the claim that Brown should

account for the errors, if any, of his predecessor, Weston, which was unfounded, the whole extent of the complaint against him was, that he retained illegally a few dollars for his expenses in going to Columbia, and paid too much for counsel fees and commissions to the judge of Probate. He was instructed by his legal adviser to pay these demands, they were vouched by the Probate judge, and, whether the payments were prop-

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erly made or not, \*they did not touch in the remotest degree the question of his good faith.

It certainly does not appear that there was on the part of the guardian any concealment, misrepresentation or fraud. It seems to us that he acted with great frankness and fairness. The settlement was not made privately, but publicly, in the Probate office. The judge of Probate stated the accounts, and explained them to the ward. The accounts were not complicated or difficult to understand. The estate did not consist of securities, as to the value of which there was concealment, as in *Womack v. Austin*, 1 S. C. 421; but in cash then paid over. Mr. Crawford, the Probate judge, testified: "After having explained the matter as fully as I could with the lights before me. I drew up the receipt at the instance of all the parties. I also read it over to Dunsford carefully, after explaining to him the contents; the information I gave Dunsford being based upon the statement I had received from Colonel Brown and Captain Huguenin, Colonel Brown having assured me that the final return contained a full statement of all the estate of the ward he had received, which was otherwise shown upon the signing of the receipt; I paid over to Mr. Dunsford the money referred to in the receipt. Mr. Dunsford in no way questioned the proceedings; if he had, I would not have granted the final discharge; could see, as he drew it, was rather jubilant at getting the \$1,400." Brown testified: "We tried to see the judge of Probate on the day Dunsford was twenty-one years of age, but he was not at his office, and I and Dunsford remained here (Columbia) that night and the next day, that is, the day after he was twenty-one years old; we had the settlement in the judge of Probate's office, when he signed the receipt produced here. I should say that Dunsford had explained to him all the particulars of the estate, because Crawford explained them to him, and Crawford asked him if he was satisfied, and he said 'yes.' Nothing was concealed from him; that is a thing I would not do," &c.

We think that the guardian acted with perfect good faith, that he derived no personal bounty or advantage from the settlement to himself, and that the ward was informed so far at least as Brown's transactions were concerned.



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\*The judgment of this court is that the judgment of the Circuit Court be reversed and the complaint be dismissed.

A petition for rehearing was filed, upon which, December 4th, 1883, the following order was passed:

PER CURIAM. We have reread the brief in this case and carefully considered the grounds stated for a rehearing.

First. It is claimed to have been an oversight in the court to proceed upon the assumption that Thomas R. Brown was discharged as guardian by the Probate judge. The judgment of this court is not based upon that assumption. The evidence upon the subject was not overlooked, but was carefully examined before the judgment was pronounced. The Circuit judge considered the discharge proved, and it did appear in the settlement between Brown and his ward on May 21st, 1880; that there was an item of \$12 (charged with the knowledge of Dunsford) for "letters dismissory," and from the proof in the case it is clear that all the parties, the Probate judge, Brown and Dunsford, understood as a matter of fact that the Probate judge had discharged the guardian; yet as there was not in evidence any formal proof of an order of discharge, the judgment of this court was rested on the settlement between the parties pleaded in bar, which, under an action for simple account, ignoring entirely the existence of the settlement, was conclusive between the parties, there being neither allegation nor proof of any misrepresentation, undue influence, imposition or fraud in the said settlement. *McDow v. Brown*, 2 S. C. 95; *Murrel v. Murrel*, 2 Strobb. Eq. 148 [49 Am. Dec. 664].

Second. It is further suggested that the defendant had abandoned the defense of "settled account" in the office of the Probate judge. This matter also was considered before the judgment was pronounced. The cause had been referred to the master merely to take the testimony and state the account. In making his report he did make the statement that "this transaction was at first relied on by the defendants as a bar to the further accounting, but they subsequently abandoned their position." But it appears

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that the defendants excepted to this report upon the ground that "the master erred in striking out any of the vouchers presented by the defendant, Brown, his duty being to state the account as presented, with the testimony given in their presentation, leaving the decision of their admissibility to the court."

The difficulty was produced by the order "to state the account" before the plea in bar was disposed of. At first the defendant objected to going into the account at all until

the plea was disposed of, and that was the logical order of proceeding; but as the order of reference required the accounts to be taken, the defendants abandoned that position so far as to allow the evidence to be taken and the account stated, but still insisted that its admissibility should be left to the decision of the court. After this, Judge Kershaw considered the question, applying the evidence thus taken to the plea in bar, and deciding it adversely to the defendants; they appealed to this court, "Because his Honor held that the receipt given by the plaintiff is in no sense a bar to the accounting." In this court both parties argued this question. Under these circumstances, it was impossible to disregard a formal plea on the record, never withdrawn and still contested, for no other reason than a statement of the master that the defendants "had abandoned their position." Such statement of the master was not binding, and the whole conduct of the case shows that he misapprehended the position that was abandoned.

It is always matter of regret that any party should be misled; but, in the face of the facts, this court was bound to consider the plea of settlement, which was formally made and never formally withdrawn; but, on the contrary, was considered on the Circuit, made prominent in the appeal to this court, and argued here by the counsel on both sides, and which, in fact, constituted the defense; and, therefore, we cannot see how it can be properly said that the petitioner was misled.

Third. As to the claim of the petitioner to charge Brown with alleged errors in the accounts of Weston, the former guardian, this court simply concurred with Judge Kershaw that it could not be allowed.

The petition for a rehearing is refused.

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## \*BRAGG v. THOMPSON.

(April Term, 1883.)

[1. *Judgment* ⚡12.]

A judgment rendered against a party at that time deceased, is void, notwithstanding his sole executor was a defendant in the same action, but in his individual capacity.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 15-21, 56, 159; Dec. Dig. ⚡12.]

[2. *Sheriffs and Constables* ⚡98.]

But an execution, regular in form, issued upon such void judgment, was a mandate to the sheriff, which it was his duty to obey, whether it proceeded from a court of general or limited jurisdiction, and he will be protected in everything done in the due and proper execution of such process.

[Ed. Note.—Cited in *Goodgion v. Gilreath*, 32 S. C. 388, 391, 11 S. E. 207; *Rogers v. Marlboro County*, 32 S. C. 561, 11 S. E. 383; *State v. Black*, 34 S. C. 197, 13 S. E. 361.

For other cases, see *Sheriffs and Constables*, Cent. Dig. § 146; Dec. Dig. ⚡98.]

[3. *Execution* ⇨62.]

A transcript of a trial justice's judgment having been docketed and enrolled in the Court of Common Pleas, an execution issued thereon, signed by the trial justice, but tested by the clerk of the Circuit Court under his official seal on the margin, was in proper form and a legal execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 148; Dec. Dig. ⇨62.]

[4. *Execution* ⇨286.]

The purchaser, at a sale under such void judgment, may recover from the sheriff so much of the proceeds of the sale as had not been paid to the plaintiff in execution before notice had by the sheriff of any defect in the judgment.

[Ed. Note.—Cited in *Atlantic Coast Line R. Co. v. Schirmer*, 86 S. C. 309, 69 S. E. 439.

For other cases, see *Execution*, Cent. Dig. § 820; Dec. Dig. ⇨286.]

5. A new trial nisi granted by this court.

[This case is also cited in *Turner v. Malone*, 24 S. C. 406, and distinguished therefrom.]

Before Wallace, J., Spartanburg, October, 1882.

This was an action by Jonas B. Bragg against W. W. Thompson and Roddy Landford, executor, commenced September 10th, 1880. The opinion states the case.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, contra.

August 22d, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. In May, 1877, one R. M. Smith, as administrator, obtained a judgment before Trial Justice A. B. Woodruff, Esq., for \$74.47, against J. B. Landford, Roddy Landford and William Landford, defendants. A transcript of the judgment was filed in the clerk's office of the county, and execution issued thereon in the usual form, addressed to the sheriff of Spartanburg county, signed by the trial justice, but tested, "witness, F. M. Trimnier, clerk of the said

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court of \*Spartanburg, October 12th, 1877," with the official seal of the clerk attached. At that time the defendant, W. Wash. Thompson, was sheriff of Spartanburg county, and, by direction of Smith, the plaintiff, he levied the execution on a certain tract of land as the property of William Landford, one of the defendants in execution, and sold the same at sheriff's sale; and it was bid off by one L. Landford, for \$235, but he transferred his bid to the plaintiff Bragg, who paid the bid and received sheriff's titles.

From the proceeds of sale thus received, the sheriff paid Smith, the plaintiff, \$74.61, taking from him a refunding receipt for the amount paid to the trial justice, Woodruff, costs \$8.25; clerk's costs, \$3.75; advertising, \$2.80; his own costs, \$9.28, and \$25.00 to J. S. R. Thomson, on an order of Roddy Landford, executor, leaving in his hands the sum of \$111.31, as to which the sheriff received notice from Roddy Landford, as exec-

utor, not to pay it out to any one except to him, as the sole surviving executor of William Landford, deceased. The sheriff testified that until after the above payments were made, "he had no knowledge or suspicion as to any defects in the judgment, and said payments were made in good faith and without notice." Afterwards, upon some claim, the character of which did not appear, the said tract of land was recovered by one Elias Landford from the purchaser, Jonas B. Bragg, who thereupon commenced this action against W. Wash. Thompson, the sheriff, to recover back the purchase-money paid by him for the land so lost. The plaintiff was allowed to prove by parol that, at the time the suit was brought before the trial justice, two of the parties named as defendants were dead, viz., J. B. Landford and William Landford. It appeared that of the parties sued, only Roddy Landford was served, and that he was the sole surviving executor of William Landford.

The Circuit judge charged the jury that, if William Landford was dead, prior to the suit, the transcript judgment was absolutely void as to him, which rendered the sale of the land as his property also void, and the plaintiff had the right to recover the money, with interest, from the one who undertook to sell the land and received the money for

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the same; that in such sale the \*rule of caveat emptor did not apply; "that even if defendant paid out the money in good faith, and without knowledge of William Landford's death, he is still liable for the whole amount, and his only recourse was back upon those to whom he had paid the money; that there was a presumption in favor of the jurisdiction of the Court of Common Pleas, but no such presumption obtained in relation to trial justices' courts; that transcripts from such courts only had effect to authorize the sheriff to make such levy as the constable could not make; that the sheriff had no right, from what appears on this execution, to presume that such judgment and execution were regular and valid. When jurisdiction is wanting in a trial justice's court, the purchaser gets nothing, and is entitled to recover back the money paid. The presumption of all being right, does not apply to the execution in this case," &c. Under the charge of the judge, the jury found for the plaintiff \$269.06, the whole amount of the purchase-money, with interest, and the defendant, W. Wash. Thompson, appeals upon the following exceptions:

1. "In admitting testimony to show that William Landford was dead before the suit commenced against him.

2. "In ruling that such fact could be shown in a suit at law like the present.

3. "In charging that if William Landford was dead prior to said suit against him, the



judgment was absolutely void and not worth the paper it was written upon.

4. "In charging the jury that if they find no summons had been served on William Landford, and that they are obliged so to find, then, as a legal consequence, the judgment and sale are void, and the plaintiff has the right to recover the money from the one who undertook to sell, and who received the money on such sale.

5. "In charging that at such sale the rule of caveat emptor does not apply.

6. "In charging that plaintiff was further entitled, upon recovery, to interest from commencement of the action upon the amount paid defendant.

7. "In charging that even if defendant paid out the money in good faith and without

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knowledge of Wm. Landford's death, \*he is still liable for the whole amount, and his only recourse is to recover from those to whom he has paid.

8. "In charging that none of the parties to whom defendant, W. Wash. Thompson, has paid money, are proper or necessary parties to this action.

9. "In refusing to charge that, under the facts and testimony in this case, the jury cannot find a verdict against W. Wash. Thompson in this action.

10. "In refusing to charge the jury that, under the facts and testimony in this case, the jury cannot find against W. Wash Thompson a verdict for the money which in good faith and without notice he paid to R. M. Smith.

11. "In refusing to charge that it devolved upon Bragg to show that both himself and his assignor were ignorant of the facts, before Bragg can recover the \$235 in this action.

12. "In refusing to charge that the defendant, W. Wash. Thompson, can in no event be held liable in this action for that part of the money paid out in good faith to Dr. R. M. Smith, before any notice from plaintiff, and without knowledge of the defect in the judgment.

13. "In refusing to charge that R. M. Smith is a necessary party to this action.

14. "In charging that the sheriff has no right, from what appears on this execution, to presume that said judgment and execution were regular or valid, and that no such presumption obtained in relation to trial justices' courts, and that transcripts from such courts only had effect to authorize a sheriff to make such levy as the constable could not make."

We do not regard it necessary, in this case, to consider the difference between a judgment obtained in the Court of Common Pleas and one rendered before a trial justice in respect to the force of presumptions in the two cases respectively, for that distinction is only of consequence when the inquiry is whether the

judgment is merely voidable for irregularity, or is absolutely void on account of some jurisdictional defect. If the latter, testimony is admissible to show it either in collateral or direct proceedings, and the result must be the same, without reference to the character of the jurisdiction in which the judgment

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was \*obtained. As William Landford was dead before suit was brought against him, and his surviving executor, Roddy Landford (although one of the defendants), was not sued or served as the executor of William Landford, we must consider the judgment as to him absolutely void, without regard to the jurisdiction in which it was rendered.

But the important question is, whether the execution, as it went into the hands of the sheriff, was in form regular, or so irregular as fairly to put W. Wash. Thompson, as an officer, upon his guard, and make it his duty to go down to the office of the trial justice and look through the whole record to see if it was formal and legal before he ventured to obey the positive mandate it contained, requiring him to execute it. The sheriff is a ministerial officer. He is neither judge or lawyer. It is not his duty to supervise and correct judicial proceedings; but, being an officer of court, ministerial in character, he cannot impugn its authority nor inquire into the regularity of its proceedings. His duty is to obey. This principle applies alike to him, whether the execution issues from a court of general or limited jurisdiction. "It is too well settled to be questioned, that in an action against a ministerial officer, whether it issue from a court of general or of limited jurisdiction, if the process be regular upon its face—as to him it is a sufficient protection—he is not bound to look behind it. Nor is the protection of the judgment at all necessary." *Traylor v. McKeown*, 12 Rich. 251. And see *Hunter v. McElhany*, 2 Brev. 104; *McCool v. McCluny*, Harper 489; *Foster v. Gault*, 2 McMull. 336; *McWorter v. Reid*, 1 Hill 369.

This is the general law as is well stated in *Herm. Exec.*, § 151: "One of the effects or final process is the protection which it affords to the officer while acting according to its exigencies. Being the delegated agent of the court, if the court has jurisdiction to issue an execution, the officer to whom such writ is directed, and all his deputies under it, are protected. He is protected whether the execution issued from a court of general or limited jurisdiction, although such court has not, in fact, jurisdiction of the case or even of the debtor, provided it appears on the face of the writ that the court has jurisdiction of the

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\*subject-matter, and the process in other respects shows no want of authority, and whether it is regular or irregular is of no importance to the officer, except when he participates in the irregularity. The law affords

him this protection for the reason that he, being an officer of the court, cannot impugn its authority nor inquire into the regularity of its proceedings." &c. See *Freem. Exec.*, § 101; *Crock. Sher.*, §§ 283, 56.

Was the execution, under which the sheriff acted, issued by a court having jurisdiction of the subject-matter, and regular in form? The plaintiff insists that the execution was irregular and void upon its face, for the reason that, being based on a transcript judgment from a trial justice's court, it was not issued by the clerk of the Court of Common Pleas as the law directs. Section 87 of the code provides that, "A trial justice, upon the demand of a party in whose favor he shall have entered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the Circuit Court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket; and from that time the judgment shall be a judgment of the Circuit Court," &c. And subdivision 13 of section 88, concerning rules of procedure in trial justice courts, declares as follows: "If the judgment be docketed with the clerk of the Circuit Court, execution shall be issued by him to the sheriff of the county, and have the same effect and be executed in the same manner as other judgments and executions of the Circuit Court," &c.

In this case the transcript judgment was duly docketed and enrolled. The execution thereon was in the usual form, and after reciting that judgment had been rendered in the trial justice court against J. B. Landford, Roddy Landford and William Landford, as appears by the judgment-roll in the office of the clerk of Common Pleas for Spartanburg county, was signed by A. B. Woodruff, trial justice, but tested by F. M. Trimmier, clerk of the court, under his official seal. Can it be said that this process was not issued by the clerk? It was his signature and seal that stamped it an execution; and we do not

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\*see that they were less effective for that purpose by being on the margin of the paper which was signed by the trial justice. Under the old practice in this State, process was generally signed by the attorney and tested by the clerk by signing his name and affixing his seal in the margin. That was "issuing" the process. Worcester's definition of "issue" is "to deliver," "to send forth judicially." Under a provision similar to ours, it has been held in New York, that after a judgment rendered in the district court has been docketed in the Common Pleas, the execution thereon may be issued by the attorney for the judgment creditor. It is not necessary that the clerk should issue it. *Wait's Anno. Code* 91, and authorities.

The execution, regular in form, was at

least prima facie evidence that the trial justice had jurisdiction to render the judgment, and we think that the sheriff should be protected in everything he did in the due and proper execution of that process. Any other doctrine would paralyze the arms, and necessarily destroy the efficiency of ministerial officers. According to this view, it was error in the Circuit judge to charge that the plaintiff was entitled to recover the whole amount, "even if defendant paid out the money in good faith and without knowledge of William Landford's death, and his only recourse was to recover from those to whom he had paid." The sheriff only did what appeared to be his duty when he paid the plaintiff, Smith, the amount of his judgment, and the tax costs of the case, amounting to \$98.69, and, as to this amount, the plaintiff should not recover against him.

As to the remaining portion of the purchase-money, \$136.31, the verdict may be maintained. It is true that there was no warranty at the sheriff's sale, and it is also true that the plaintiff voluntarily paid the money; but after the facts of the case appeared, it is manifest that Roddy Landford, as executor of William Landford, deceased, is not entitled to receive it as defendant, the judgment and costs being paid. The sheriff holds it merely as stakeholder, and it may be regarded as having been paid by the plaintiff under a mistake of facts, to a person who has no grounds in conscience to retain it. *Glenn v. Shannon*, 12 S. C. 570; *Burns v. Ledbetter*, 56 Tex. 282.

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\*The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for a new trial, unless the plaintiff shall, within ten days after written notice of this judgment, remit on the record of the Circuit Court the sum of \$98.69, the amount of the judgment of Smith, and the tax costs of the case paid out by W. Wash. Thompson, as sheriff, in the performance of his office duty.

19 S. C. 579

# WOOD v. ATLANTA AND CHARLOTTE AIR-LINE RAILWAY COMPANY.

(April Term, 1883.)

## [1. Appeal and Error — 1177.]

Where a Circuit judge thought the evidence greatly preponderated against the verdict, and that under the old practice of the Court of Appeals, a new trial would be granted, but that under our present constitution less authority over this matter was vested in the Circuit Courts, he underrated his power as a Circuit judge, and committed error of law in refusing a new trial.

[Ed. Note.—Cited in *Altee v. South Carolina Ry. Co.*, 21 S. C. 559; *State v. Rhodes*, 44 S. C. 331, 21 S. E. 807, 22 S. E. 306; *State v. Johnson*, 45 S. C. 491, 23 S. E. 619; *Jones &*



Williams v. Fitzpatrick, 47 S. C. 58, 24 S. E. 1030; Varn v. Green, 50 S. C. 405, 27 S. E. 862; Reed v. Southern Railway, 75 S. C. 172, 55 S. E. 218; Mills v. Atlantic Coast Line R. Co., 69 S. E. 96.

For other cases, see Appeal and Error, Cent. Dig. § 4604; Dec. Dig. ⚡1177.]

[2. Trial ⚡183.]

[Cited in Norris v. Clinkscales, 47 S. C. 512, 25 S. E. 797, to the point that Const. S. C. art. 14, § 26, was intended to exclude the influence of the judge in molding verdicts.]

[Ed. Note.—For other cases, see Trial, Dec. Dig. ⚡183.]

Before Pressley, J., Spartanburg, March, 1882.

The opinion fully states the case.

Messrs. W. E. Earle, Duncan & Sanders, for appellant.

Messrs. J. S. R. Thomson, Bobo & Carlisle, contra.

August 22d, 1883. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action to recover damages for burning nine bales of cotton, alleged to have been caused by the negligence of the defendant company, at Gaffney City, in Spartanburg county. This cotton was deposited near the railroad track, on a platform built by the town authorities, but had not been receipted for by the agent of the company when it was destroyed by fire. Much testimony was offered, and the judge was requested to charge several points of law, which he did, rather favorably for the defendant corporation, but the jury found for the plaintiff the value of the cotton, \$450.

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\*Whereupon the defendant moved for a new trial, which the judge refused upon the following grounds: "In this case a motion is made for a new trial, on the ground that the preponderance of testimony was greatly on its side. That is my opinion, and under the practice of the Court of Appeals, under our old constitution, this must be regarded as a case in which that court would have granted a new trial. But I think the spirit of section 26, article IV., of the new constitution, restricts the powers of the present judges in matters of fact, and that a new trial now should not be granted, unless the testimony be very clearly against the verdict of the jury. The motion is therefore refused."

The defendant appealed to this court upon numerous exceptions, alleging errors to the charge, and in refusing to charge various points of law; but, from the view taken, it will be unnecessary to consider any of them, except the last four, which are as follows: 10. "Because his Honor, the presiding judge, erred in holding that section 26, article IV., of the constitution, restricts the powers of Circuit judges in granting new trials, when the verdict is against the preponderance of the testimony. 11. Because his Honor, the

presiding judge, erred in holding that he had no right, under the constitution, to grant a new trial, notwithstanding the verdict was against the preponderance of the testimony. 12. Because his Honor, the presiding judge, erred in holding that he had no power to grant a new trial, notwithstanding this was a case in which the old Court of Appeals must have granted one. 13. Because his Honor, the presiding judge, erred in not granting a new trial."

If the Circuit judge had exercised his untrammelled judgment in refusing to grant the new trial moved for upon the ground of the preponderance of testimony, that judgment could not have been reviewed by this court. It would have been the final judgment of the officer appointed by the law as the appellate tribunal in such cases. Steele v. Railroad Company, 11 S. C. 591. But we think it was quite a different thing for the Circuit judge to refrain from exercising such judgment, in the view that he was restricted by the con-

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stitution from granting a \*new trial for reasons for which new trials have usually been granted in the courts of law of this State.

Certain machinery has been adopted for the administration of justice, and although the single purpose is to secure to the citizen the protection of the law according to the very truth of the case, yet it consists of several separate and distinct parts, and to secure the purpose in view it is necessary that these parts should all act in harmony, each performing independently the functions assigned to it. A judgment is the compound result of law and facts, and if either element is wrong the result must be wrong. In cases tried by a jury, it is made the duty of the judge to announce the law; but it has been thought best that a jury of the vicinage, after hearing the law announced, should determine the facts, and in most cases render a general verdict, subject always to correction, in case of error of law, by appeal to this court, and in case of error of fact by the Circuit judge ordering a new trial.

Our present constitution, proceeding on the view that it is important in the trial of a jury case to keep the law and the facts distinct, does provide that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Article IV, section 26. This provision has received construction in several of our cases, and it has been held that "the real object of this clause is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expression of opinion by the judge, whose position would naturally add great weight to any opinion he might express upon any question of fact arising in a case. The judge should carefully avoid expressing any opinion he may have formed from the facts, leaving it for the jury to draw their own conclusions unbiased by

any impression which the testimony may have made upon the mind of the judge." *State v. White*, 15 S. C. 392.

But we do not regard this provision of the constitution, which relates merely to the occasion of the trial, and was intended to exclude the influence of the judge in moulding verdicts, as indicating a spirit which should restrict the powers of the judge in respect to the very important and independent duty intrusted to him of granting new trials in jury

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cases. Upon this latter subject, there is certainly no express inhibition in the constitution as to the sufficiency or insufficiency of evidence, and the legislature has expressly declared that: "The Circuit Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law of this State." *Gen. Stat.* (1882) § 2113. And section 286 of the code also provides that, "the judge who heard the cause may, in his discretion, entertain a motion to be made on his minutes to set aside the verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages," &c.

There is no part of the whole machinery used in administering the law more important than this power to grant new trials in cases tried by a jury. When we consider the inexperience of juries, and their great power, not only to find what the facts are, but to apply them to the law, which is involved in the right to give a general verdict, we see at once that occasional mistakes may be made, and, in the interest of justice, it is absolutely necessary that there should be lodged somewhere the unrestricted power, not to mould verdicts by particular views of the facts, but simply to give the parties the right to be heard again before another jury. Without such power there can be no certainty or consistency in the administration of the law. As we understand it, this power exists in our system in full force and without restriction.

The inhibition in the constitution against the judge expressing his opinion of the facts to the jury on the trial, should have no effect whatever in restraining the exercise of the power to grant new trials, which is entirely independent of the restriction as to charging juries on the facts, and is possibly only the more necessary on account of that restriction which leave juries very much "a law unto themselves." This power, without restriction, has been lodged by the law in the Circuit judge, and this court has declared that it is error of law in him to decline to exercise it on the ground that he has not the right to do so. *Steele v. Railroad Company*, supra. It is not only the right of the Circuit judge, but his exclusive right. Neither the Supreme Court nor any other tribunal in the State possesses the power, and if he refuses to exercise it promptly on all proper occa-

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sions, this very important means of securing justice will be entirely lost. The law expressly makes it the duty of the Circuit judge to grant new trials "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law of this State."

In this case the Circuit judge informs us "that in his opinion the evidence for the defendant greatly preponderated, and according to the practice of the old Court of Appeals in this State, that court would have granted a new trial." Under these circumstances we think that he underrated his power as Circuit judge, and committed error of law in refusing the motion of the defendant company for a new trial. *State v. David*, 14 S. C. 430.

The judgment of this court is, that the judgment of the Circuit Court be set aside and the case remanded for such further proceedings as may be deemed proper according to the conclusions herein announced.

19 S. C. 583

THORNTON v. DEAN.

(April Term, 1883.)

[1. *Penalties* ⌘20; *Usury* ⌘135.]

A penalty, under the laws of North Carolina, of double the amount of interest paid on a usurious contract, cannot be enforced by the courts of this State.

[Ed. Note.—For other cases, see *Penalties*, Cent. Dig. § 19; Dec. Dig. ⌘20; *Usury*, Cent. Dig. § 418; Dec. Dig. ⌘135.]

[2. *Executors and Administrators* ⌘524.]

An executrix may sue in the courts of this State, letters testamentary having been here issued to her on the proof of a will under an exemplification of the proceedings from the proper office in North Carolina, where the original will was duly admitted to probate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2334; Dec. Dig. ⌘524.]

[3. *Usury* ⌘2.]

A note given in South Carolina, payable in North Carolina, secured by a mortgage of lands in this State, with a stipulated rate of interest which was usurious by the laws of North Carolina, but not usurious in South Carolina under the then existing law, may be enforced in the courts of this State according to the terms of the contract.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 11; Dec. Dig. ⌘2.]

[4. *Bills and Notes* ⌘117.]

The mere fact that payment was stipulated to be made in North Carolina, does not raise a conclusive presumption that the contract was made with reference to the laws of that State.

[Ed. Note.—Cited in *Galletley v. Strickland*, 74 S. C. 399, 54 S. E. 576.

For other cases, see *Bills and Notes*, Cent. Dig. § 249; Dec. Dig. ⌘117.]

[5. *Interest* ⌘28.]

If a contract be entered into in one place to be performed in another, the parties may stipulate for the rate of interest of either coun-



try: if the contract stipulate generally for interest without fixing the rate, it should be the rate of interest at the place of payment; if no interest be stipulated, and payment be not made, interest by way of damages is according to the law of the place of payment. *Peck v. Mayo*, 14 Vt. 33, approved.

[Ed. Note.—Cited in *British American Mortgage Co. v. Bates*, 58 S. C. 553, 36 S. E. 917.

For other cases, see Interest, Cent. Dig. §§ 55, 56-59; Dec. Dig. ⚭28.]

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[6. *Mortgages* ⚭512.]

\*In selling land for foreclosure, only so much should be sold as is necessary to pay the debt and costs, and it should be sold in such parcels as will secure the best price.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1515; Dec. Dig. ⚭512.]

[7. *Contracts* ⚭144.]

[Cited in *Rosemand v. Southern Ry.*, 66 S. C. 96, 44 S. E. 574; *Equitable B. & L. Ass'n v. Corley*, 72 S. C. 407, 52 S. E. 48, 110 Am. St. Rep. 615, to the point that the *lex loci contractus* governs the interpretation of a contract and its obligations.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 724-727; Dec. Dig. ⚭144.]

[Cited in *Carpenter v. Lewis*, 60 S. C. 40, 38 S. E. 244; *Rosemand v. Southern Ry.*, 66 S. E. 96, 44 S. E. 574; *Exchange Bank v. McMillan*, 76 S. C. 572, 57 S. E. 630, to the point that matters relating to remedies are governed by the *lex fori*.]

Before Cothran, J., Spartanburg, June, 1882.

The opinion fully states the case.

Mr. J. S. R. Thomson, for appellant.

Messrs. R. K. Carson, Bobo & Carlisle, contra.

August 29th, 1883. The opinion of the court was delivered by

Mr. Justice McGOWAN. Mrs. Dean, the defendant, of Spartanburg county, South Carolina, being pressed by debt, solicited a loan of money from John Rutherford, of Bridgewater, North Carolina. The arrangement was made at Spartanburg, South Carolina, by which Mrs. Dean gave her note to Rutherford for \$7,000, as follows:

"\$7,000.00. Three years after date, I promise to pay to John Rutherford, or order, at Bridgewater, N. C., seven thousand dollars, with interest from maturity, at the rate of ten per cent. per annum, for value received.

"Witness my hand and seal, this 3d day of June, 1874.

"Mary Owen Dean, [L. S.]

"Attest: S. Bobo."

The interest to be due before maturity, was secured as follows: \$350 for the first half year was paid in cash or deducted from the amount loaned, leaving the money actually received, the sum of \$6,650, and for the remaining two years and a half, five notes for the same amount, being the interest for six months, were given, payable, respectively, in twelve, eighteen, twenty-four, thirty and thirty-six months. These notes were

also made payable at Bridgewater, North Carolina. These notes were all secured by a mortgage of a lot of land in the city of Spartanburg, South Carolina, where all the papers were executed, and the money

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changed \*hands. Mrs. Dean was allowed permission to sell a part of the lands mortgaged, the proceeds of sale to go to the mortgage debt, and on June 19th, 1880, she paid to Simpson Bobo, Esq., the plaintiff's agent at Spartanburg, the sum of \$3,500, which, in the absence of any direction from defendant, was applied to the five notes given for interest, and on November 1st, 1880, she paid the further sum of \$1,100, which extinguished the five interest notes, and left a balance over to be credited on the large note.

Subsequently to the loan of the money, John Rutherford died, leaving a will, of which his widow, Elizabeth C. Thornton, was appointed executrix, and which was admitted to probate in Burke county, North Carolina, by D. C. Pearson, judge of Probate of that county, March 27th, 1880. The proceedings were exemplified to the judge of Probate for Spartanburg county, in this State, who admitted the same to probate, and issued letters testamentary in this State to the plaintiff, Elizabeth C. Thornton, who, as such executrix, instituted this proceeding in Spartanburg county, South Carolina, to foreclose the mortgage for the balance of the debt unpaid, upon the remainder of the mortgaged premises, which had not been sold. The principal defense was, that the fact appearing from the face of the notes, that they were payable at Bridgewater, North Carolina, the whole transaction was a North Carolina contract, and to be interpreted exclusively with reference to the laws of that State, which should be applied to the case, and which at that time prohibited the lending of money at a higher rate of interest than eight per cent. per annum, under forfeiture of all interest and costs.

The case came on to be heard by Judge Cothran, who held from the testimony: (1.) "That the contract between the parties was made in South Carolina; (2.) That the parties in making it had reference to the laws of this State in all of its material parts; (3.) That there was no intention to evade the usury laws of North Carolina, but, on the contrary, that the plaintiff was moved by a desire to relieve the embarrassment of the defendant, who was at the time under obligation to others to pay a higher rate of interest; (4.) That the place named for the payment of the note was for the convenience

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of the parties, and without any intention \*of establishing such as the place of performance; (5.) That the premises mortgaged are situated in this State, where alone foreclosure could be had; (6.) That both parties recognized and affirmed this as the place of

performance, by making and receiving payments of money upon the contract in Spartanburg." &c. The judge ordered a decree of foreclosure for the whole amount of the debt, with interest according to the terms of the contract, as that was allowable by the South Carolina law at the time of the contract.

From this decree the defendant appeals to this court upon exceptions, alleging that his Honor had erred as follows:

1. "In not at least ordering that the premises be subdivided into small lots, and only so many thereof be sold as might be necessary to pay the judgment.

2. "In not at least crediting the note sued on with the sum of \$3,500 paid in June, 1880.

3. "In not at least crediting the note sued on with the further sum of \$1,100 paid in November, 1880.

4. "In not finding as a matter of fact that the payments upon said note were made in North Carolina.

5. "In not finding that the plaintiff, Elizabeth C. Thornton, was not the regularly appointed and qualified executrix in this state of the will of John Rutherford, deceased.

6. "In finding that the defendant and John Rutherford, in making their contract, had reference to the laws of this State in all of its material points.

7. "In finding that Rutherford, in making the contract, was moved by a desire to remove the embarrassment of the defendant.

8. "In finding that the place named for the payment of the note was for the convenience of the parties, and without any intention of establishing such as the place of performance.

9. "In finding that both parties recognized and affirmed this as the place of performance by making and receiving payments upon the contract at Spartanburg.

10. "In not finding that the place of performance of said contract was at Bridgewater, North Carolina.

11. "In not holding that the usury laws of North Carolina operated upon said contract.

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\*12. "In not finding at least that no more than eight per cent. interest could in any event be collected upon the note sued on.

13. "In not holding at least that the only amount recoverable in this action was the amount of money actually loaned, less the \$4,600 paid thereon.

14. "In not holding that if the amount paid was applied to the payment of interest, then the defendant had a good and valid counterclaim for double the amount thereof."

The last exception was very properly abandoned. In no view of the case can our court enforce the penal laws of North Carolina.

It was in proof that the will of John Rutherford had been admitted to probate, both in Burke county, North Carolina, and in Spartanburg county, South Carolina; and the

plaintiff qualified as sole executrix in both States. Gen. Stat., 1882, § 1875.

The laws of a State are limited to its territory. As a rule, it administers only its own laws. But it sometimes happens that the judiciary of one State is called upon to administer the laws of another. Certain rules of "comity" have been adopted by common consent and are generally followed. For example, a case may arise in our courts upon a contract made in another State, and then the question arises, whether the law of the State where the contract is to be interpreted or that of the State where it was made, shall govern. As to all matters relating to remedies, each State insists upon enforcing its own laws—the *lex fori*; but in the interpretation of a contract it has been established by usage that the *lex loci contractus* must govern. The rule is clearly stated by Chancellor Kent with its qualifications: "Then it may be laid down as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation and obligatory force in any other country which they have in the country where they are made. \* \* \* It is, however, a necessary exception to the universality of the rule, that no people are bound or ought to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law," &c. 2 Kent \*458.

Taking this as the rule, the defense in this

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case could not stand, for, confessedly, the contract was made in South Carolina, whose public law upon the subject of interest at that time was: "That in all cases for the hiring or lending, or use of money, wherein, by the terms of the original contract, no specific rate of interest shall have been agreed upon in writing, signed by the party to be charged therewith, the legal interest shall be and remain at the rate of seven per cent. per annum." 13 Stat. 318. This provision has been construed to allow transactions where such specific rate of interest was agreed upon in writing, &c. *Maner v. Wilson*, 16 S. C. 469. The terms of the agreement in this case were in precise conformity to the requirements of this South Carolina law, and it seems to us were adopted with direct reference to that law, for, by the original contract, ten per cent. was "agreed upon in writing, signed by the party to be charged," &c. As a matter of fact, we suppose that there can be no doubt that the parties contracted with reference to the South Carolina law.

It is urged, however, that this rule of the *lex loci* is not universal; that it is changed in cases where the parties themselves contract with reference to the laws of some particular State other than that in which the contract was made. That it true. The general purpose of courts is to enforce con-



tracts according to the intent of the parties; and if they make a contract in South Carolina, expressly or clearly with reference to North Carolina law, I know no reason why our courts, in carrying out the doctrine of "comity," would not apply the North Carolina law to it, except in the excepted cases stated by Chancellor Kent. But we do not think it follows that the single fact of the note being payable in North Carolina affords conclusive proof that they did so contract. It is true that indicating a place for payment affords a presumption, and is generally taken as sufficient proof of the fact. We do not, however, understand that this is a conclusive presumption of law, but is rather one of fact which may be rebutted. Suppose the parties had expressly declared in the note that this money, for convenience, was to be returned at Bridgewater, North Carolina, but the contract was made with direct reference to the South Carolina law, would any court enforce a contract which they did not make? It is

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like the \*presumption which arises, when no other place is named, that the parties contracted with reference to the laws of the country where the contract is made, which can be overthrown by showing that they actually contracted with reference to the laws of some other State, as is attempted here.

But be this as it may, if the isolated fact that the note was made "payable at Bridgewater, North Carolina" must, without regard to the actual intention of the parties, be regarded as conclusive evidence that the parties contracted with reference to the North Carolina law, we think there was no error of law in the decree of the Circuit judge. There has been some confusion and conflicting opinions on the subject, but we think it now settled by authority and sustained by reason, that in such cases there is an exception as to the interest on a debt when it is expressly stipulated in the contract. Without incumbering this opinion with a review of the authorities upon the subject, we are content to take the doctrine as laid down in the case of *Peck v. Mayo*, 14 Vt. 33, and cited in a note in *Kent*, supra, where, after full discussion, it was decided as follows: (1.) "If a contract be entered into in one place to be performed in another, the parties may stipulate for the rate of interest of either country. (2.) If the contract stipulate generally for interest without fixing the rate, it shall be the rate of interest at the place of payment. (3.) If no interest be stipulated, and payment be not made, interest by way of damages is according to the law of the place of payment," &c.

In commenting on this case it is said in a note to *Kent*, supra: "The principle now established in Louisiana and New York is, that the place where the contract was made determines its validity as to interest, though made payable in another State or country, where the rate of interest is lower. This principle has

much to recommend it for reasonableness, convenience and certainty, except in cases where the whole arrangement was evidently and fraudulently intended as a mere cover for usury." No allegation even of such fraudulent intent is made here. Indeed, the judge finds as a matter of fact, and we concur with him, "that there was no intention to evade the usury laws of North Carolina, but, on the contrary, that the plaintiff was

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moved by a desire \*to relieve the embarrassment of the defendant, who was at the time under obligation to others to pay a higher rate of interest."

The same doctrine has been announced by the Supreme Court of the United States. In the case of *Miller v. Tiffany*, 1 Wall. 310, [17 L. Ed. 540], it is said: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. *Andrews v. Pond*, 13 Pet. 77 [10 L. Ed. 61]; *Curtis v. Smith*, 15 N. Y. 92. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate," citing *Depeau v. Humphrey*, 20 Mart.; *Chapman v. Robinson*, 6 Paige 634; and see, also, *Dan. Neg. Inst.* (2d edit.), § 922, and many authorities.

The forfeitures under the North Carolina usury law are somewhat in the nature of penalties, very different from our own law of force at the time of the contract, and to make it proper for the courts of this State to enforce them in the very face of our own law, would require the clearest evidence that the parties contracted alone with reference to the law of North Carolina, and in doing so had violated the usury law of that State. One of the established rules in respect to the doctrine of comity is, that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. 2 *Kent* 461. In this case the contract was made in South Carolina, secured by a mortgage on land in South Carolina, and is now being enforced in South Carolina; and we have not been referred to any case where the *lex loci* and the *lex fori* were the same, in which the plea of the usury law of another State, although the State of the *lex solutionis*, was enforced upon the principle of "comity."

It is proper that only so much of the land should be sold as is necessary to pay the debt

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and costs, and that it should be \*sold in such

parcels as will secure the best price. If the point had been made below, we have no doubt the decree of foreclosure would have provided for it. We think that it was stated at the bar that no objection would be made to such course. If the parties cannot agree as to the parcels, let the officer to whom it was referred to estimate the amount due, make such recommendation on the subject as he may deem proper.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## 19 S. C. 591

## KENNEDY v. BADGETT.

(April Term, 1883.)

[1. *Compromise and Settlement* ⚡6; *Descent and Distribution* ⚡82; *Trusts* ⚡162.]

Where a mother and five adult children make a division in severalty of an estate, held in trust for them, of which the children have each one-sixth absolutely and the remaining one-sixth in remainder after the death of their mother, who is entitled to it during her lifetime, and to the division the mother also contributes property in which she has an absolute estate, such settlement is based upon a valuable consideration, and, moreover, will be sustained as a family arrangement; and by such settlement the trust is discharged.

[Ed. Note.—Cited in *Smith v. Tanner*, 32 S. C. 263, 10 S. E. 1008.]

For other cases, see *Compromise and Settlement*, Cent. Dig. § 35; Dec. Dig. ⚡6; *Descent and Distribution*, Cent. Dig. § 319; Dec. Dig. § 82; *Trusts*, Cent. Dig. § 212; Dec. Dig. ⚡162.]

[2. *Executors and Administrators* ⚡294.]

Debts due to an estate by the husbands of devisees cannot be set off against the shares of their wives.

[Ed. Note.—Cited in *Turbeville v. Flowers*, 27 S. C. 337, 3 S. E. 542.]

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1169-1184; Dec. Dig. ⚡294.]

[3. *Contracts* ⚡77; *Husband and Wife* ⚡13.]

A contract made between son and sons-in-law for the support of the mother is binding, and for her board by one of them the others are liable to contribution.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 287; Dec. Dig. ⚡77; *Husband and Wife*, Cent. Dig. § 26; Dec. Dig. ⚡13.]

Before Wallace, J., Laurens, September, 1882.

In this case, the Honorable James S. Cothran, of the Eighth Circuit, sat in the place of the chief justice, who had been of counsel in the cause.

This was an action by Nathaniel O. Kennedy, as executor of Leannah Kennedy, against all the other children of Leannah, and their husbands, and the wife and children of the plaintiff, for a settlement of the estate of the said Leannah. It is unneces-

sary to add anything to the statement contained in the opinion of this court.

[For subsequent opinion, see 26 S. C. 591, 2 S. E. 574.]

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\*Messrs. Holmes & Simpson, for appellant.

Messrs. B. W. Ball and Ferguson & Young, contra.

September 13th, 1883. The opinion of the court was delivered by

Mr. Justice COTHIRAN. This matter has been much complicated by an attempt to bring into the settlement of Leannah Kennedy's estate that of Roda Kennedy, also deceased. If the latter can be eliminated from the case, and we think it can and should be, the matter will be greatly simplified, and the application of the familiar rules of accounting will work out their just and legitimate results.

Many years ago, as far back as the year 1825, Roda Kennedy executed certain deeds of trust, by which his estate, both real and personal, was conveyed to Allen Barksdale, in trust, for the benefit of himself during his life, the same to be equally divided at his death between his wife, Leannah, and her children by him—the share thus given to Leannah to go to their children at her death, "share and share alike." Roda Kennedy and two of the children departed this life prior to the year 1848, at which time the whole estate (the title to which was in the said trustee, but itself in the possession of the family of Roda Kennedy,) was divided into six equal parts and assigned in severalty to Leannah Kennedy, N. O. Kennedy, James Kennedy, Susan Kennedy (now Badgett), Ellen Kennedy (now Bolt), and Nancy Kennedy (now Franks), who entered into the following covenant:

"We do hereby acknowledge that the above settlement, embracing the estate of Roda Kennedy, deceased, including the property embraced in deeds of trust made to Allen Barksdale, and also the estates of Maria, Samuel B. and John Kennedy, children of Roda Kennedy, who have died intestate since his death, was this day made by and between us, and that we have received the lands, negroes, notes and moneys set forth and specified in said settlement, to the extent of our interest in said estate; and we do hereby bind ourselves, jointly and severally, and our respective heirs, executors, administrators and assigns, to abide by, perform and fulfill the aforesaid settlement in every respect, and to indemnify and save

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harmless Allen Barksdale, \*the trustee, and each other for any damages, cost and charges that may arise by reason of and on account of said settlement. Witness our hands



and seals this fifth day of January, one thousand eight hundred and forty-eight.

(Signed,)	Leannah Kennedy,	[L. S.]
	N. O. Kennedy,	[L. S.]
	Jas. P. Kennedy,	[L. S.]
	J. M. Franks,	[L. S.]
	N. C. Franks,	[L. S.]
	S. Kennedy,	[L. S.]
	E. Kennedy,	[L. S.]

"Test: Samuel Barksdale, H. C. Young."

It appears that this arrangement was entered into more than twenty-one years after the date of the trust deeds of Roda Kennedy to Allen Barksdale, and it is safe to assume that the parties to it were all of full age. Into the pool Leannah cast her distributive shares as an heir-at-law in the vested remainders of her children who had died in the meantime, unmarried and intestate, and in these shares, as well as in the slave Hamah and her increase, given to her by the deed of Roda Kennedy, she had an absolute estate. Whether it was from a feeling of impatience on the part of the children to be let into the inheritance, so long delayed, or from whatsoever motive the arrangement was thus solemnly entered into by them, it is needless now to inquire; the act finds just and sufficient support, as well in the valuable contributions made to the pool by Leannah as in the fact of a family settlement amongst themselves, into the precise terms of which, and the motives that induced it, in the absence of fraud, imposition or overreaching, courts of justice are not swift to inquire. \* \* \* But when required to do so, and the same are found fair and reasonable, to save, it may be, family disputes, or for other good cause, "they are upheld with a strong hand, and are binding when in cases between mere strangers the like agreements would not be enforced." Story Eq. Jur., § 132. And it was said by Lord Eldon that, "in family arrangements an equity is administered in equity which is not applied to agreements generally." 1 Ves. & B. 30. The arrangement of January 5th, 1848, comes within the operation of these

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wholesome \*rules, and by means of it Allen Barksdale was discharged from the duties of his trust, and the estate of Roda Kennedy lost forever its identity.

As Leannah advanced in years and incompetency, and her children grew in strength and capacity, she gave to them of her personal property from time to time, until finally she gave away all excepting some choses in action against her son, N. O., and her sons-in-law, stipulating only for a maintenance. The property thus given was taken by the children at a valuation agreed upon, and upon condition that in the final disposition of her estate, consisting of a tract of land and the choses in action aforesaid, these gifts should be accounted for with a view to equality.

In 1866, Leannah executed her will by

which she gave her entire estate, in equal shares, to her three daughters, Mrs. Franks, Mrs. Badgett and Mrs. Bolt, and to her son, N. O. Kennedy, in trust, for the use of his wife and children. Her son, N. O., and her sons-in-law, were all indebted to her; the first-named in excess of the others. Touching the claims held against N. O., she directed her executor, by the third clause of her will, "to take into the account only so much of those claims as will amount to the principal and interest of the note I hold on my son-in-law, J. M. Franks; the balance of the said claim, I give to my said son, in trust for the benefit of his wife and children, as mentioned in the second clause of my will."

The several claims against her sons-in-law, Franks, Badgett and Bolt, cannot be set-off, as is contended for, against the shares of their wives. *Roberts v. Adams*, 2 S. C. 337; *Farrow v. Farrow*, 12 Id. 168. These are assets, whatever may be their value, in the hands of the executor; and so, also, as to the claims against N. O. Kennedy, to an amount equal to the sum due by J. M. Franks upon his note to the testatrix.

Soon after the death of Leannah, which occurred on March 10th, 1876, suit was begun in the Court of Common pleas, by Susan Badgett and Thomas L., her husband, against N. O. Kennedy, as executor of the will of Leannah, and individually, and all the other defendants here, excepting the children of N. O. Kennedy. The object of that suit was for an accounting amongst the parties for

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the amounts received by them of the \*estate of Roda Kennedy. It ignored the settlement of January 5th, 1848, and sought to go behind it for the purpose of separating the estate which Leannah held absolutely, from that which, under the deeds of Roda Kennedy, she held only for life, and for a sale and division of the same. The case was heard on exceptions to the referee's report, fall term, 1880, by Judge Kershaw, who, in a well-considered decree, announced amongst other things, as his conclusion, that the settlement of January 5th, 1848, excluded the parties from claiming the property then (as now) in controversy, otherwise than as of the estate of Leannah. There was no appeal from his decree. The children of N. O. Kennedy were not parties to that suit.

The points made and most strenuously urged upon the hearing before us are: 1. The matter of *res adjudicata*. 2. The matter of necessary parties; both arising under Judge Kershaw's decree in the case just referred to. In the view which we have taken, the question of *res adjudicata* is not material to the decision of the case, nor is it necessarily involved in its determination. Indeed, technically, one of the unities necessary to support the plea of *res adjudicata* is wanting here, to wit, identity of parties. *Mauldin v. Gossett*, 15 S. C. 565.

But we concur in the conclusions announce-

ed by Judge Kershaw, not upon the ground of *res adjudicata*, but because in our judgment they are correct. Nor does the question as to who were necessary parties to that suit arise, and we are relieved, by finding that there was no subsisting trust after the settlement of January 5th, 1848, from considering the nice distinction between an action brought in opposition to the trust, and one brought in furtherance of it, to enforce its provisions; the former requiring the presence of the beneficiaries, the latter not.

The master, adopting the referee's report in the former case, has found that, in the various gifts of property made by Leannah to her children, in the years 1848, 1856 and 1860, inequalities exist. In other words, assuming \$6,621.17 to be the amount of a share, not of "the trust estate," as it is styled by the referee, but of the whole estate as found in the hands of Leannah at the settlement of January 5th, 1848, Mrs. Badgett, Mrs. Franks and Mrs. Bolt each received less than

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said sum, and that N. O. Ken\*nedy received more. These deficiencies are not debts due to the daughters, but, after the debts of Leannah shall have been paid, these amounts must be taken into account in the final dis-

tribution of her estate for the purpose of equalizing the shares of the parties interested.

As the case must go back to the master, it will be proper to recur, in revising the accounting, to the item of \$280 disallowed to J. M. Franks for the board of Leannah. There is no legal obligation upon children to support their parents, but it has always been considered a high moral duty; and in this case it was the subject of contract, supported by the final division of the mother's property amongst the children. As such, the matter referred to is a proper charge, and if no others of the same kind exist, contribution should be made to J. M. Franks by the other children, under the agreement made between them to maintain Leannah. If it should be found that others of them have also borne the burden of her support, compensation to them in like manner should be made on proper proof.

The report of the master was confirmed by Judge Wallace; and it is the judgment of this court that his order confirming said report be modified as herein indicated, and that the case be remanded to the Circuit Court for such orders as are necessary to carry out the conclusions herein stated.



# NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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\*No. 1361. PUCKETT v. WOOD. November Term, 1882.

[*Evidence* ⇨178.]

A return appearing in the proper book of the commissioner in equity, and in his handwriting, purporting to have been made by the administrator of a deceased guardian (although without signature), was held by the Circuit judge (Pressley) to be competent evidence against the guardian in action brought by the ward, an unsuccessful search for the original return having been made. *Held*, on appeal, that this ruling was correct; that such copy was not only competent, but *prima facie* evidence.

[*Ed. Note.*—For other cases, see *Evidence*, Cent. Dig. § 585; Dec. Dig. ⇨178.]

Opinion by Mr. Justice McIVER, March 14th, 1883. J. W. Ferguson, for appellant.

No. 1362. STATE v. ATTERBERRY. November Term, 1882.

[*Criminal Law* ⇨763, 764.]

The defendants being on trial for riot, the Circuit judge (Aldrich) charged the jury as follows:

"The prosecutor, Mr. W. A. Bradley, is a gentleman well and favorably known to the court, and, no doubt, to many of the jury. If you believe the witnesses for the State, the conduct on board of that train that night was outrageous. The witnesses for the State have identified these defendants as being among the number, but it is, after all, for you to say, gentlemen, whether or not a riot was committed, and whether these defendants were among the number. Take the record."

The defendants were convicted and appealed. *Held*, that Bradley, being corroborated by two other witnesses, none of whom were impeached, the charge, though somewhat irregular, was not in this, nor in any particular, an invasion of the province of the jury, nor a violation of the constitution, Art. IV., § 26.

[*Ed. Note.*—Cited in *Norris v. Clinkscales*, 47 S. C. 513, 25 S. E. 797.

For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. ⇨763, 764.]

Opinion by Mr. Chief Justice SIMPSON, March 15th, 1883. J. E. Davis, for appellant. F. H. Gantt, solicitor, contra.

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\*No. 1377. HARBIN v. PARKER. November Term, 1882.

In this case, which was an action to recover money due on account of certain partnership transactions, this court, accepting the understanding of counsel, treated it as a case in chancery, and ruled the following points:

[1. *Appeal and Error* ⇨273.]

Exceptions to a Circuit decree should not be taken by a mere reference back to such exceptions to the master's report as were sustained or overruled.

[*Ed. Note.*—Cited in *Levi v. Blackwell*, 35 S. C. 514, 15 S. E. 243.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. ⇨273.]

[2. *Appeal and Error* ⇨1022.]

Concurrent findings of fact by master and Circuit judge in a chancery case confirmed, the testimony being conflicting.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. § 4016; Dec. Dig. ⇨1022.]

[3. *Reference* ⇨101.]

There being in the master's report no statement of the accounts upon one branch of the case, but a recommendation for a recommitment as to that matter, and the Circuit judge not having himself made a statement of such accounts, he erred in not directing a recommitment.

[*Ed. Note.*—For other cases, see *Reference*, Cent. Dig. §§ 169-180; Dec. Dig. ⇨101.]

[4. *Costs* ⇨223.]

The Circuit judge having made no order for costs, this court declined to direct each party to pay their own costs.

[*Ed. Note.*—For other cases, see *Costs*, Cent. Dig. §§ 835-837; Dec. Dig. ⇨223.]

Circuit decree of Aldrich, J., modified.

Opinion by Mr. Justice McGOWAN, March 31st, 1883. Keith & Verner, J. J. Norton, for appellant. Wells & Orr, contra.

No. 1381. BRANCH & SMITH v. KNEPTON. November Term, 1882.

This was an action by the plaintiffs against the defendant on a sealed instrument in words following:

"This agreement, made February 9th, 1875, between Branch & Smith, of the first part, and J. W. Knepton, of Beldoe, S. C., of the second part, provides that we agree to sell

for Branch & Smith fertilizers on the following terms: \* \* \* The party of the second part to endorse all notes given for fertilizers, and make a settlement with Branch & Smith on the first of May, and to guarantee all sales made. In consideration of this the party of the first part agree to pay a commission of five dollars per ton to the party of the second part. Settlement of commission on time sales to be made first of November next."

The complaint alleged sales by the defendant under this covenant to the amount of \$1,547.11, and that only \$20 had been paid by the defendant. The answer made a general denial, and, for a second defense, admitted the agreement to sell, to endorse the purchasers' notes and to guarantee the solvency of the purchasers; that defendant did sell,

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and did endorse the \*notes of the purchasers and deliver them to the plaintiffs; that the commercial fertilizers proved to be worthless and a damage to those who used them, and that therefore it was that the plaintiffs had sued this defendant instead of the makers of the notes, and denied indebtedness. Plaintiffs moved before the Circuit judge (Hudson) to strike out the first defense as sham and the second as frivolous. This motion was refused. At the trial the agreement was proved and the notes for the fertilizers made by the purchasers to the defendant, and by him endorsed. A non-suit was then ordered "because of failure to show any exercise of diligence on the part of the plaintiffs in collecting these notes, guaranteed or endorsed—no demand and refusal and no notice of such refusal." Plaintiffs appealed. *Held*—

[1. *Pleading* ⚡353, 354.]

The motion to strike out was addressed to the judicial discretion of the Circuit judge, and that discretion was not abused. Defenses may not be stricken out on the specific ground of inconsistency. *Ransom v. Anderson*, 9 S. C. 440, approved.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1092–1095; Dec. Dig. ⚡353, 354.]

[2. *Guaranty* ⚡6.]

The covenant required the defendant to sell the fertilizers and endorse the notes over to the plaintiffs, and to guarantee the solvency of the purchasers; and he having done this there was no breach of the agreement.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 8; Dec. Dig. ⚡6.]

[3. *Guaranty* ⚡44.]

But if an original guaranty in advance of all notes that might be taken, it was not a purchase by the defendant nor an unqualified promise by the defendant to pay the notes taken by him, and the diligence, demand and notice which the law requires in such cases, were not dispensed with.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 54; Dec. Dig. ⚡44.]

[4. *Guaranty* ⚡45.]

The defendant having performed his covenant, the plaintiffs could proceed to enforce their demands only through the notes.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 55; Dec. Dig. ⚡45.]

Judgment affirmed. Opinion by Mr. Justice McGOWAN, April 5th, 1883. J. C. Davant, for appellant. Rob't Aldrich, contra.

No. 1382. THE STATE, ex relatione NOLLEN, v. THOMSON, Mayor, et al.

November Term, 1882.

In response to a petition duly presented to the city council of Spartanburg by the requisite number of voters, (Gen. Stat., § 1746,) an election upon the question of "License" or "No License" was held on November 28th, 1882, and the election resulted in a majority for "No License." On December 21st, 1882,

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the city council \*passed an ordinance forbidding the sale of liquors within the limits of the city of Spartanburg. At such election, there was no registration of voters, the ordinance providing for the election declaring that "all persons qualified are permitted to vote irrespective of registration." On December 30th, certain citizens of Spartanburg, including one only of the signers to the petition aforesaid, made application to the city council for another election, upon the ground that for want of registration there had been no valid election under the petition above mentioned, and, this being refused, they applied in January, 1883, to this court for a writ of mandamus to compel the said city council to order an election. The pleadings here were the petition, return, reply and demurrer to the reply. *Held*—

[1. *Mandamus* ⚡74.]

That a writ of mandamus will not issue where only one out of 290 who demanded the election, complain of the manner in which it was conducted.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 150–157; Dec. Dig. ⚡74.]

[2. *Mandamus* ⚡74.]

That the application came too late, especially so as the relators took part in the election and made no protest at the time.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 150–157; Dec. Dig. ⚡74.]

[3. *Mandamus* ⚡74.]

That mandamus could not issue to the mayor and aldermen, who ordered the election to be held, even if they erred in their construction of the law, and went beyond their duty in prescribing how it should be conducted, which was a matter regulated by statute.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 150–157; Dec. Dig. ⚡74.]



[4. *Mandamus* ⇨10.]

It being doubtful whether registration was required for such an election, and whether registration can be made a qualification of an elector, or be more than the requisite legal evidence that the person offering to vote is qualified—mandamus will not issue.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. ⇨10.]

Petition refused with costs. Opinion by Mr. Justice McIVER, April 9th, 1883. Stanyarpe Wilson, L. F. Youmans, for relators. J. S. R. Thomson, C. P. Wofford, contra.

## No. 1383. CAULFIELD v. COUNTY OF CHARLESTON. November Term, 1882.

The following points were ruled in this case:

[1. *Appeal and Error* ⇨87.]

After the master had fully reported and the case was being heard on that report, the judge could not receive additional testimony. If a motion to recommit was formally made, it was addressed to the judicial discretion of the Circuit judge, and its refusal was not appealable.

[Ed. Note.—Cited in *Hubbard v. Camperdown Mills*, 26 S. C. 588, 2 S. E. 576; *Halk v. Stoddard*, 62 S. C. 571, 40 S. E. 957.

For other cases, see *Appeal and Error*, Cent. Dig. § 587; Dec. Dig. ⇨87.]

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[2. *Appeal and Error* ⇨1017.]

\*The report of a master in a case at law, if erroneous, can only be corrected by the Circuit judge as upon a motion for a new trial. This court cannot, in such case, review the facts found below.

[Ed. Note.—Cited in *Meetze v. Charlotte, C. & A. R. Co.*, 23 S. C. 16.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. ⇨1017.]

[3. *Evidence* ⇨162.]

The books of a trial justice kept by him under the requirement of the law, are the highest and best evidence of proceedings had before him, especially in action by him for unpaid costs in criminal cases claimed to have been tried by himself. *Cherry v. McCants*, 7 S. C. 224, recognized and followed.

[Ed. Note.—Cited in *State v. Rice*, 49 S. C. 420, 27 S. E. 452, 61 Am. St. Rep. 816.

For other cases, see *Evidence*, Cent. Dig. §§ 536-542; Dec. Dig. ⇨162.]

[4. *Appeal and Error* ⇨842.]

Whether there has been sufficient proof of the loss of original evidence to justify the admissibility of secondary evidence, must, to a great extent, be left to the discretion of the Circuit judge.

[Ed. Note.—Cited in *Norris v. Clinkscales*, 47 S. C. 497, 25 S. E. 797.

For other cases, see *Appeal and Error*, Cent. Dig. § 3326; Dec. Dig. ⇨842.]

Mere proof of the loss of a trial justice's papers does not dispense with the necessity of proving the correctness of the items of an account for services rendered, the books not being lost, and such papers as were produced being grossly irregular and defective.

Judgment of the Circuit Court (Hudson, J.), affirmed. Opinion by Mr. Justice McGOWAN, April 10th, 1883. W. M. Thomas, for appellant. J. E. Burke, contra.

## No. 1403. STATE v. LUNDY. April Term, 1883.

[*Habeas Corpus* ⇨4.]

The defendant being in the penitentiary, under a life sentence, on a conviction for manslaughter, applied to this court for a discharge under a writ of habeas corpus. *Held*, that the court below having had jurisdiction of the person of the prisoner and the subject-matter, the sentence was not void, but voidable by appeal.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 4; Dec. Dig. ⇨4.]

Motion refused PER CURIAM, April 27th, 1883. W. S. Monteith, for petitioner.

## No. 1404. DUNBAR, CLARK &amp; CO. v. PORT ROYAL AND AUGUSTA RAILWAY COMPANY. November Term, 1882.

[*Carriers* ⇨131.]

This was an action by plaintiffs for the recovery of eighty-six barrels of commercial fertilizers, shipped over defendants' road, but not delivered. The complaint set out the shipment of two invoices, aggregating 240 barrels chemicals, on February 4th and 13th, 1879, from Port Royal to Allendale, and seven invoices at stated dates in February to May, 1879, of 256 barrels of dissolved bone from Augusta to Allendale, out of which shipments, twenty barrels of chemicals and

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sixty-six barrels of dissolved \*bone had not been delivered to the consignee, but that plaintiffs "do not know on what day or days the eighty-six barrels of fertilizers alleged to have been lost, were received by the defendants for shipment." Motion was made by defendant, before Judge Wallace, to require the plaintiff to make his complaint more definite and certain, by stating "on what day or days the fertilizers alleged to have been lost, were received." This motion was refused, and on appeal, submitted without argument, the order below was affirmed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 569, 570; Dec. Dig. ⇨131.]

Opinion by Mr. Justice McIVER, May 5th, 1883.

No. 1406. ALLEN v. STOKES. April Term, 1883.

[*Appeal and Error* ⇨425.]

Appeal dismissed on motion of respondent, because notice of appeal had not been served within ten days after the rising of the court, at which the cause was heard and determined. Respondent having, by affidavit, denied such service, it was incumbent upon the appellant to show a compliance with the requirements of the law, and this he failed to do.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2155; Dec. Dig. ⇨425.]

Opinion PER CURIAM, May 30th, 1883. D. P. Verner, for the motion. E. F. Stokes, contra.

No. 1408. CARDWELL v. BREWER. April Term, 1883.

Action for foreclosure of mortgage, the contest being as to the balance due. *Held*—

[1. *Reference* ⇨65.]

The court cannot hold testimony incompetent, unless the objector can show affirmatively that it was objected to and exception taken, when offered at the reference.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 98; Dec. Dig. ⇨65.]

[2. *Reference* ⇨65.]

Under a reference to the master to take the testimony, and to report the law and the facts, objection to the competency of testimony offered at the reference, cannot be raised for the first time in the Circuit Court. *Quere*. Could it have been first raised on Circuit, if the reference had been simply to take testimony?

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 97, 98; Dec. Dig. ⇨65.]

[3. *Appeal and Error* ⇨1022.]

Concurrent findings of fact by master and Circuit judge, sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇨1022.]

[4. *Mortgages* ⇨415.]

Charges for traveling expenses, attorney's fees, &c., not being set up in the complaint, nor covered by the mortgage, could not be used as offsets to payments made by the mortgagor on the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1210-1224; Dec. Dig. ⇨415.]

[5. *Pleading* ⇨377.]

A claim for repairs set up in the answer as payment, and not as counter-claim, must

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be proved; it is not established by \*plaintiff's failure to reply.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1228-1231; Dec. Dig. ⇨377.]

Circuit Decree of Witherspoon, J., affirmed. Opinion by Mr. Justice McIVER, June 27th, 1883. J. T. Hay, for plaintiff. W. D. Trantham, for defendant.

No. 1413. STATE v. GILREATH. April Term, 1883.

This case involved the same points as to the irregularity of the writs of venire, as were raised in *State v. Hill*, ante p. 435, and the two cases were heard together. Appeal dismissed for the reasons stated in *State v. Hill*, the opinion in this case simply referring to that.

[Ed. Note.—Cited in *Information against Oliver*, 21 S. C. 323, 53 Am. Rep. 681.]

Opinion by Mr. Justice McIVER, June 29th, 1883.

No. 1420. ALSTON v. FRANZ. April Term, 1883.

[*Depositories* ⇨11.]

The captain of an outward bound brig from the port of Beaufort, denying the right of plaintiff, as pilot, to his pilotage fees, paid the amount into defendant's hands to be paid to the plaintiff, if the board of pilot commissioners (of which defendant was chairman) should decide that plaintiff was entitled to be paid. Plaintiff was summoned before the board, that the matter might be determined, but he failed to attend, and then brought this action to recover this money. Under the charge of Judge Aldrich, the jury found a verdict for the plaintiff, and defendant appealed. *Held*, that whether plaintiff was entitled to his pilotage fees or not, he could not recover this money from the defendant, as it did not belong to the plaintiff, nor was there any evidence that the defendant had contracted either expressly or impliedly to be responsible to the plaintiff, for the fees claimed, except upon certain conditions, which had been ignored, if not repudiated by the plaintiff.

[Ed. Note.—For other cases, see *Depositories*, Cent. Dig. ⇨14-19; Dec. Dig. ⇨11.]

Judgment reversed. Opinion by Mr. Chief Justice SIMPSON, July 4th, 1883. W. J. Verdier, for appellant. W. J. Whipper, contra.

No. 1429. WARD v. PARKER. April Term, 1883.

[*Executors and Administrators* ⇨513.]

Where an executor applies to the Probate Court for a final discharge and letters dismisory, and the parties in interest appear in that court in person or by attorney, and resist the application, the decree of the Probate Court, granting a final discharge, is bind-



ing upon the parties so appearing, and cannot be assailed, in whole or in its particulars, in action for accounting afterwards brought by them against the executor in the Court of

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Com\*mon Pleas.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2277; Dec. Dig. ☞513.]

Judgment of the Circuit Court (Witherspoon, J.) affirmed. Opinion by Mr. Chief Justice SIMPSON, July 5th, 1883. J. D. Kennedy, for appellant. J. T. Hay, contra.

No. 1433. Ex parte REED. April Term, 1883.

An action was instituted in the Court of Common Pleas for Beaufort county by one Mrs. Reed, against her husband, for separation, custody of their four infant children, alimony and general relief. A motion was made by defendant to have the service of the summons set aside, which motion was refused, and an appeal was taken to this court from the order of refusal. (See Reed v. Reed, ante 548.) The cause being thus delayed, Mrs. Reed filed her petition for writ of habeas corpus, renewing the statements of her complaint, and sought, under this proceeding, to obtain the custody and control of her children, who were then with the father, their ages being eleven, ten, six and four years, respectively. On hearing the petition and the affidavits submitted on both sides, the Circuit Judge (Aldrich) found as matters of fact that the husband had been openly incontinent even in the house with his wife and daughters, and cruel to his wife, subjecting her to personal violence of a brutal character, and to humiliation in the presence of her servants, and that, therefore, he was not a proper person to have the nurture and moral training of young children, but that the mother, notwithstanding alleged errors committed before marriage, was; and, as the mother asserted her willingness and ability to support the children, the order was that she should have their custody, they not to be removed beyond the limits of this State, and the father to have reasonable access to them. From this order Mr. Reed appealed to this court. *Held*—

[1. *Abatement and Revival* ☞8.]

That this proceeding was in its nature pendente lite, and not independent of the original action, nor superseding by substitution so much of the original action as relates to the permanent custody and support of the children. It could not, therefore, be resisted under the plea of another action pending; but the order must be regarded as provisional only, and cannot extend beyond the rendi-

tion of the final judgment in the original cause.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-56, 58-63, 68-72; Dec. Dig. ☞8.]

[2. *Habeas Corpus* ☞113.]

The application for the possession of children under a writ of habeas corpus is a pro-

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ceeding on the law side of the court, \*and the findings of fact by the Circuit judge in such case are decisive.

[Ed. Note.—Cited in *Re Solomon's Estate*, 74 S. C. 191, 54 S. E. 207; *Ex parte Cannon*, 75 S. C. 219, 55 S. E. 325; *Brown v. Robertson*, 76 S. C. 152, 56 S. E. 786, 9 L. R. A. (N. S.) 1173; *Ex parte Canova*, 84 S. C. 476, 65 S. E. 625; 67 S. E. 476.

For other cases, see *Habeas Corpus*, Cent. Dig. §§ 102-115; Dec. Dig. ☞113.]

[3. *Habeas Corpus* ☞99.]

Other things being equal, the claims of the father to the custody and control of his children are superior to those of the mother, but it is discretionary with the court to which one of the parents the children shall be committed, and where they are under the age of choice (as in this case) the court will exercise that discretion, looking solely to the welfare and happiness of the children. *Ex parte Schumpert*, 6 Rich. 344, approved.

[Ed. Note.—Cited in *Ex parte Reynolds*, 73 S. C. 305, 53 S. E. 490, 114 Am. St. Rep. 86.

For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. ☞99.]

[4. *Habeas Corpus* ☞99.]

Under the facts of this case, the discretion of the Circuit judge was properly exercised in the interest of the children.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. ☞99.]

[This case is also cited in *Ex parte Tillman*, 84 S. C. 562, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, as to habeas corpus to determine proper custody of children.]

Order of the Circuit Court affirmed to continue in force until the final hearing of the cause. Opinion by Mr. Justice McGOWAN, July 31st, 1883. Simonton & Barker, William Elliott, for appellant. A. G. Magrath, contra.

No. 1435. WARREN v. RAYMOND. April Term, 1883.

[*Bankruptcy* ☞20.]

In ordering that any money in this case (see 12 S. C. 9; 17 Id. 163,) applicable to the claim of W. M. Thomas, (who had been adjudged a bankrupt in February, 1871,) should "be paid into the registry of the United States District Court, without prejudice, where all the questions between the bankrupt and his assignee can be adjudicated and finally settled," the Circuit judge (Aldrich) properly left it to the District Court to determine whether the question of owner-

ship between the bankrupt and his assignee was res adjudicata. But if the assignee, by voluntarily submitting himself to the State courts, would be estopped from raising in the District Court a question which has been here determined, it is then proper for this court to consider whether the ownership of this claim has been adjudicated; and, so considering it, this court finds nothing in the records of the case determining to whom belongs the money applicable to the Thomas claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 23, 234; Dec. Dig. ☞20.]

Judgment affirmed. Opinion by Mr. Justice McIVER, July 25th, 1883. W. M. Thomas, for appellant. W. E. Earle, contra.

No. 1438. *Ex parte BRADY*. April Term, 1883.

This was an appeal from a decree of Cothran, J., confirming a decree of the Probate Court of Spartanburg. The following points were ruled:

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[1. *Process* ☞111.]

\*Persons living outside of the State, made parties defendant by publication, have the right to appear and defend before judgment rendered.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 138, 139; Dec. Dig. ☞111.]

[2. *Appeal and Error* ☞1008.]

Findings of fact by Probate judge and Circuit judge approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ☞1008.]

[3. *Executors and Administrators* ☞456.]

There was no error in requiring the petitioner, who was administratrix, to pay the costs of the proceedings, she not having litigated in good faith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1967; Dec. Dig. ☞456.]

Opinion by Mr. Justice McGOWAN, July 31st, 1883. J. Winsmith, for appellant. Evins, Bomar & Simpson, contra.

No. 1449. *ALLSTON v. PICKETT*. April Term, 1883.

Action for damages for assault and battery, and a verdict for plaintiff. Defendant appealed, upon the ground that the Circuit judge (Pressley) had erred in charging the jury upon a conjectural state of facts. Appeal dismissed, this court holding that the state of facts submitted to the jury was not conjectural, but was supported by evidence,

both circumstantial and direct, the truth of which was left by the charge to the jury.

Opinion by Mr. Justice McIVER, September 24th, 1883. Simonton & Barker, for appellant. S. Lord, Jr., contra.

No. 1450. *DAWSON v. NIVER*. April Term, 1883.

[*Appeal and Error* ☞1011.]

This was an action to set aside a deed of conveyance, upon the grounds of misrepresentation, fraud, and gross inadequacy of consideration. The Circuit judge (Aldrich), from the written testimony submitted to him, found, as facts, that it was a "wicked attempt to cheat this poor, illiterate negro out of her patrimony," and that "the price was grossly inadequate;" that the interest for which defendant paid \$10 was then worth at least \$56, and probably a great deal more; and he declared the deed to be void, and ordered it to be delivered up and canceled. From this decree defendant appealed, but the judgment below was here affirmed. This court, in its opinion, reiterates the rule laid down in *Gary v. Burnett*, 16 S. C. 632, as to the weight of the Circuit decree on issues of fact, where the testimony is submitted to the Circuit judge in writing, and, upon this same subject, uses the following language: "Indeed, the case depended largely upon the credibility of the witnesses, and, where that is the case, and

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there is \*a conflict of testimony, as there was in this case, this court would rarely, if ever, disturb the findings of fact in the court below."

The court further held, that, while mere inadequacy of price is not sufficient to set aside a deed, yet, where the inadequacy is so gross as to warrant an inference of fraud, it may furnish the ground, or rather, the evidence of fraud.

[Ed. Note.—Cited in *Lebby v. Ahrens*, 26 S. C. 282, 2 S. E. 387.

For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. ☞1011.]

Opinion by Mr. Justice McIVER, September 24th, 1883. W. J. Verdier, for appellants. Elliott & Fowles, contra.

No. 1457. *SMITH v. McFALL*. April Term, 1883.

[*Associations* ☞10.]

This was an action by the president of an unincorporated society against the treasurer for the recovery of a tin box containing \$13.25 belonging to the society, the plaintiff alleging that the defendant had been expelled from membership for her refusal to pay a fine imposed upon her for "disrespect to the



chair," and her refusal to deliver up the tin box and its contents. Judgment was rendered for the plaintiff by the trial justice, but on appeal to the Circuit Court, Judge Pressley held that the action was improperly brought by the president, and dismissed the complaint. On appeal to this court, this judgment was affirmed it not appearing that an expulsion of the defendant was justified by any of the rules of the society, and that being still the treasurer she was entitled to the tin box and its contents.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 10-12; Dec. Dig. ⚡10.]

Opinion by Mr. Justice McGOWAN, October 2d, 1883. J. W. Polite, for appellant. Theo. D. Jervey, Jr., contra.

No. 1460. LEE v. FOWLER. April Term, 1883.

This was an action, in effect, upon two sealed notes in the usual form. The answer alleged that these notes were intended merely as memoranda upon which to base, at some future time, a settlement of a partnership between the parties. The case was referred to the master, who, against objection, permitted parol proof to sustain the allegations of the answer. On exceptions to this report, Judge Fraser ruled that the defendant was bound by the notes, unless he could show that the consideration had failed in whole or in part, or was illegal, &c.; but that matters arising subsequent to the execution of the notes, might be inquired into, under the defendant's plea of counter-claim, and he re-committed the cause. To this decree, no ex-

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ceptions were taken. The \*master restated the account under these directions, and Judge Cothran confirmed his report. The cause was then brought to this court on appeal. *Held*—

[1. *Appeal and Error* ⚡872.]

"It would have been more in accordance with safe practice if the defendant had at least excepted to the decree of Judge Fraser, which set aside the first report and re-committed the case; but we will consider the appeal from the order of Judge Cothran as giving this court the power to review the decree of Judge Fraser as one intermediate and affecting the final order." *Hyatt v. McBurney*, 17 S. C. 150.

[Ed. Note.—Cited in *Thatcher & Co. v. Massey*, 20 S. C. 547; *McCrary v. Jones*, 36 S. C. 175, 176, 15 S. E. 430.

For other cases, see *Appeal and Error*, Cent. Dig. § 3516; Dec. Dig. ⚡872.]

[2. *Evidence* ⚡441.]

Contemporaneous parol declarations are inadmissible to vary the terms of a written agreement.

[Ed. Note.—Cited in *Rapley v. Klugh*, 40 S. C. 146, 18 S. E. 680.

For other cases, see *Evidence*, Cent. Dig. § 1756; Dec. Dig. ⚡441.]

[3. *Contracts* ⚡90; *Evidence* ⚡419.]

The line is not always very distinct and well-marked that separates causes in which the defendant may inquire into the consideration, from those in which the colloquium shall be considered as merged in the written contract; but, when allowed, the defense of failure of consideration must be made out clearly and distinctly.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 410; Dec. Dig. ⚡90; *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. ⚡419.]

[4. *Evidence* ⚡441.]

A verbal guaranty that two horses (for which in part the notes were given) would sell for \$125 each, cannot be proven.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. ⚡441.]

Judgment affirmed. Opinion by Mr. Justice McGOWAN, October 9th, 1883. F. C. Whitner, for appellant. J. N. Brown, contra.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

















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